MULLA

THE TRANSFER OF PROPERTY ACT

Sir Dinshaw Fardunji Mulla

13th Edition

Dr Poonam Pradhan Saxena

Vice Chancellor, NLU, Jodhpur
Former Professor, Faculty of Law, University of Delhi
Senior Fulbright Fellow
Shastri Indo-Canadian Fellow

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Preface to the Thirteenth edition

Revising an acclaimed celebrated treatise is in itself an honour for any academician, but remains a daunting task accompanied with awe virtually becoming a challenge. An elaboration of the practical importance of transfer of Property, its accompanied rules and regulations becomes unnecessary in today's scenario. Besides the essentiality of having a roof over one's head; usage of landed property for avocation including cultivation makes it one of the indispensable requisite for the society. In addition, in today's materialistic world, tendency of human beings to accumulate wealth and acquisition of real estate visualised as a coveted option for monetary amass and financial security has increased multifold dealings in landed property. For many, real estate; its acquisition facilitating its transfer for personal gains and as a business is the their primary livelihood. Increased demand also augments the probability of enormous squabble. Coupled with increased awareness of legal rules, rights and remedies, notions of entitlements and their perceived denials make people rush to courts for a favourable enforcement adding to already burgeoning case law on this subject. It is therefore not surprising that the last four years have seen a bulk of litigation and rendering of important judicial pronouncements in the arena of transfer of property.

The absence of legislative modifications notwithstanding, these deliberations on several aspects of transfer of property led to clarity in many areas. While an express legislative prohibition on transfer of the suit property by any party to the suit exists, the categorical judicial adjudication pronouncing such transfers as void as against the successful plaintiffs was timely. The inability of such transferees to deprive the successful plaintiff of the fruits of the decree if he purchased the property *pendente lite* was re-affirmed, as they were held bound by the decree just as much as they were parties to the suit. Courts also observed that a litigating party was exempted from taking notice of a title acquired during the pendency of the litigation even if he was not aware of the status quo. Thus, buyers purchasing suit properties voluntarily, in violation of statutory provisions should not hope for desired relief from the courts as these are exactly the kind of situations section 52 was enacted to prevent. Further, legislative mandate of registration of an agreement to sell, for availing the protection under doctrine of part performance was promulgated seventeen years back, yet in a large number of cases, possession was unsuccessfully sought to be protected under either an oral or an unregistered agreement to sell by the parties. Judicial concern over practical dispossession of a transferee taking possession under a partly performed contract was evident as they permitted a situational specific transferee to be in the shoes of the plaintiff, diluting to some extent the perception of doctrine of part performance as a "shield and not as a sword".

The area of conditions restraining alienation, settlement of property in favour of unborn persons and their conflict with rule against perpetuity, doctrine of feeding the grant by *estopple*, of *lis pendens*, sale, mortgage, lease and gifts also involved considerable case law. Distinction between transactions executed by owners and power of attorney holders, claims and counter claims over the nature of mortgage, differentiation between a mortgage by conditional sale or an outright sale without a right of redemption saw further clarification by the judiciary, but a sizeable number of cases related to the transactions under lease agreements.

The differential rules under Muslim personal law relating to procedural formalities in case of gifts and the one statutorily mandated under the Transfer of Property Act, led to adjudication of some interesting issues.

An attempt has been made to maintain the original style of presentation, clarity and critical analysis of both legal provisions and judicial pronouncements in the present edition as well. I cherish a modest hope of its receptivity by the readers.

14 May 2018

Prof Poonam Saxena
Sr Fulbright Fellow; Shastri Indo Canadian Fellow
Vice Chancellor
National Law University, Jodhpur

Preface to the Twelfth Edition

"Property is the condition of good life," says Aristotle. He regards it as an extension of human personality and his view is that property is essential for the satisfaction of a natural instinct of possession and an equally natural impulse of generosity. Even after generations, this view is gaining acceptance. Right to Property is an incentive to effort and induces men to industry and prudence. It should meet the demand of natural justice that man should be entitled to the reward of his labour, and also promote economic growth. The Transfer of Property Act, 1882, evolves on this concept.

The Transfer of Property Act has withstood the test of time for 132 years. In fact after the publication of the 11th edition, there has been no legislative amendment thereto at the central level. In 2013, Registration (Amendment) Bill (Bill No. XLVII of 2013) bringing in changes which would indirectly affect transfer of properties was introduced in the Rajya Sabha, but it has not yet been passed and brought into the statute book. All the same, most of the provisions contemplated therein have been brought into effect in the state of Kerala through the Registration (Kerala Amendment) Act, 2012 (Act 31 of 2013).

That very few amendments were required to the statute over a century indicates the quality of the work that had gone into it. Not that there was no substantial change in the outlook towards property rights. To begin with, right to acquire and hold property was one of the fundamental rights guaranteed by the Constitution. The decision in *A.K. Gopalan* shook it, leading to a Constitutional amendment. Land reforms legislations in different States also changed the outlook towards holding of property and the rights of lessors and mortgagors and eroded the original provisions in the Transfer of Property Act very fast.

Difficulties of Financial Institutions to recover the dues through enforcement of securities led to the passing of the SARFAESI Act. The coming into force of the IT Act and changes to the Registration Act and Rules also made inroads to the traditional outlook. The application of the provisions in the Transfer of Property Act had to be compromised in view of these modern legislations. The number of decisions rendered by the Supreme Court and High Courts bringing in substantial changes to law of properties after the last edition of the Book were not many. Efforts have been taken to ensure that none of these pronouncements delivered during the interregnum are left out. It is hoped that authenticity of the book will in no way be hampered, if not further improved through this edition.

The project was proposed by Advocate M.A. Rashid to whom I am thankful. In bringing out this book, I was ably assisted by Advocate Boris Paul, an upcoming lawyer of the Kollam Bar, and his effective assistance is appreciated.

19 November 2014
Thiruvananthapuram

M R Hariharan Nair

Preface to the Eleventh Edition

I have great pleasure in presenting the eleventh edition of Mulla's well known work on the Transfer of Property Act. I must make the frank admission, however, that it has been an extremely daunting task going through an authoritative volume that has already been scrutinized by a number of intelligent brains and sharp eyes. I have remained conscious of this background and have made every effort to remain faithful to the original style and authenticity of the publication while making revisions in the substantive content, and also additions and deletions. The original author's name is potent enough to command respect to such an extent that the work is referable not merely as a book, but as a classic. An association with or a chance to be a part of this volume as a contributor in itself is an honour and at the same time an enormous challenge for the present revising author.

Real estate is an important arena of public life owing to multifarious reasons ranging from high commercial returns and imperative necessity of securing a dwelling house or raising cash on the strength of immovable assets. Similarly, extensive transactions that are totally or partly gratuitous in nature including not merely donations, but akin to relinquishment are also fairly common. Adherence and observance of appropriate legal provisions and principles become inherently necessary to the validity of any such transfer. Property matters are very important in the practical scenario as well, and a tough test for relations and friends, as lust for property, leading to dubious transactions with a view to grabbing the property of innocent and simple people, turns friends into foes and relatives into bitter enemies at times with unfortunate and gruesome consequences. In such a scenario, the settlement of disputes through judicial mechanisms becomes imperative that is evident from a large number of cases making their way to the courts every year. Needless to say that a huge accumulation of judicial pronouncements spreading over six years becomes an added justification for the new edition notwithstanding the immense popularity of the book amongst the legal practitioners, academicians as also the judiciary.

Judicial pronouncements in the last few years have covered the entire enactment, but the highlights were decisions relating to ss. 6(a), 52, 53, 58, 116 and 129. The apex court applied the rules of equity, justice and good conscience and the rules of estoppel even in cases of voluntary and deliberate sale of *spes successionis* under Muslim law, which as per the literal interpretation of the legislation and the earlier judicial pronouncement was held as un-transferable. It aptly thwarted the attempts of people, who sell *spes successionis* for considerations analogous to a barter, utilize the consideration and then when the time comes for them to perform their own part of the bargain, resile from doing so, taking the plea under s. 6(a) claiming themselves their inability and incapability to have transferred the *spes successionis* in the initial place. This evasion of the responsibility under the contract and attempted exploitation of legal provisions amounting to an actual misuse has been noticed and tackled effectively and carefully by the apex court. The impleadment of a transferee *pendente lite*, where the transfer was affected without taking leave from the court and rather against their order, was refused by the court in light of s. 52. Similarly, despite provisions for mandatory registration, and its requirement in cases of even an agreement to sell under s. 53A as per the 2001 amendment, a contrary but reasoned judgment of the Punjab and Haryana High Court complicates the position. The rules with respect to computation of the limitation period more specifically in cases of usufructary mortgages were reiterated by the apex court in consonance with the legislative provision. The court

also clarified the apparent conflict that had developed in the past years over the requirement of registration of a gift deed executed by a Muslim. On one hand the provisions of classical Muslim law permit an individual to gift the property even orally without complying with the formalities of writing, attestation and registration, and on the other hand some high courts had in the past held that where the gift is reduced to writing , then it would have to comply with the requirements under the TP Act, for its validity despite the fact that the law makes it clear that the chapter under the TP Act does not apply to Muslims in so far as it contradicts any provision of classical Muslim law, which clearly means that in cases of conflict, it is the principles of Muslim law that would prevail. The apex court set at rest this conflict by holding that if the gift satisfies the essential requirements of its validity under the classical Muslim law, then the mere fact that it is reduced to writing does not mean that it would have to satisfy the mandatory requirement under the TP Act of registration. Other areas that dominated the five years though without any spectacular development on the judicial side, were ss. 58, 60 and 105-116.

My gratitude and thanks are due to my ever inspiring parents, siblings, my husband Ravinder Saxena and our children Neha and Nipun, without whose encouragement, support and enormous patience, the completion of this work would have remained an impossibility. I sincerely hope that the present edition will find a befitting receptivity and would demonstrate its usefulness as an authority for the judiciary, legal practitioners, academicians, legal researchers and the students.

New Delhi
October 2012

Poonam Pradhan Saxena

Preface to the Tenth Edition

The principles statutorily recognised in the Transfer of Property Act are essentially principles of justice, equity and good conscience. These principles underlying the various provisions of the Act particularly relating to mortgage and lease have been applied in areas where otherwise the Act has not been made applicable. The widespread application and effect of the Act and the underlying principles necessitates that the law of transfer of property as declared by the Supreme Court of India under article 141 of the Constitution of India be placed appropriately in a commentary.

In the present edition, law has been updated on the subject since the previous edition. More importantly, an attempt has been made to incorporate and update the Supreme Court decisions. English law and decisions have been suitably placed for tracing the sources of the legal principles which have been statutorily embodied in the Act with appropriate variations, keeping in mind the domesitc need and prevailing customs and practice.

In India, now with the volume of Supreme Court judgments on almost on all the facets of litigation in this area, the law of transfer of property has to a great extent settled and crystalized. With the proper understanding of the law declared by the Supreme Court and the respective high courts and its proper application to the fact situation of a particular case, the adjudicatory process can be made speedy and effective.

The amending Act of 2001 introduced far-reaching changes in section 53A of the Transfer of Property Act and the Registration Act 1908. Now, a registered document signifying transfer of property is a must for the purposes of section 53A. The amending Act of 2002 has substituted section 106. Both the amendments have been duly incorporated.

Most of the cases in the last five years have stemmed out of the provisions relating to lis pendens (s 52), specific performance (s 53A), sale (s 54) mortgage, (ss 58 & 60), lease (ss 105, 106, 108 & 111) and gift (s 122). More than 500 reported cases are available since the previous edition. Important judgments have been delivered by the Supreme Court in the areas of lease, gift. etc. For instance, in *K Balakrishnan v K Kamalam* the Supreme Court has held that it is open to the donor to transfer by gift, title and ownership in the property and at the same time, reserve lifetime possession and enjoyment to himself. In *Laxmidas Bapudas Darbar v Rudravva*, principles relating to applicability of rent control legislations to a fixed term lease have been laid down.

The accomplishment of the present work was possible only because of the invaluable research and assistance rendered by my son, Devashish Bharuka despite his busy schedules as a practicing lawyer in the Supreme Court of India. I am thankful to my wife, Dr Hansa Bharuka, who has been by my side throughout extending fullest support and cooperation.

My thanks to the entire team of LexisNexis Butterworths and in particular, Ms Nisha Bopanna and Ms Richa Kachhwaha for their untiring work.

October 2005

GC Bharuka

Preface to the Ninth Edition

The present edition aims to cut out the dead wood besides updating the law on the subject. The idea is to make the commentary more relevant to a practising lawyer, while at the same time retaining the academic content and originality of the book.

New caselaw since the last edition has been incorporated within the commentary of the relevant sections; making it much easier for the reader, who does not have to refer to an addendum anymore like in the previous edition. Parts of the commentary that do not hold much relevance today have been deleted so that the book does not accumulate unnecessary bulk. However, utmost care has been taken to retain cases from which the principles have originated.

The most referred sections of the Act like s 53A, ss 105 to 111 have been specially paid attention to. The trend of passing of decrees under o 12, r 6 of the Civil Procedure Code 1908, too has been discussed.

The editor is beholden to a team of young budding lawyers for their invaluable contributions. Avinash Kumar, for sifting through the various law reports to dig out the relevant cases and classifying them; Monica and Anupam Srivastava, who painstakingly went through all the material—the book and the cases—and contributed at every step till the final draft. The book would never have seen the light of the day without them. Last but not the least—to Sushil Chauhan who was always there to provide helpful inputs besides listening to my woes. Dinesh Chopra, the computer operator, deserves special thanks for keeping the time schedule.

Vaibhav Kala, my business partner, deserves a very special thanks for taking the load off my back so that I could work on the book.

1999

Solil Paul

Preface to the First Edition

The amendments made in the Transfer of Property Act by the Amending Act 20 of 1929 have set at rest a mass of conflicting decisions, and have in some respects assimilated the law to that enacted in England by the Law of Property Act, 1925.

The changes effected in the law are so numerous that it has been thought desirable to exhibit in a table the plain text of the Act showing in the left hand-column, the sections as they were before the Amending Act and in the right-hand column, the sections as amended.

The commentary is exhaustive in its references to the case law, and attempts to give a concise and a clear explanation of the legal principles underlying each section of the Act.

Whenever a section has been altered by the Amending Act, there is an explanation of what the law was prior to the amendment, and of what the law is subsequent to the amendment.

If a section is based on the English Law that law is stated and the difference, if any, between that law and the Indian law is explained.

The author's acknowledgements are due to AG Touche, Esquire, Barrister-at-Law of Lincoln's Inn, for his valuable assistance in the revision of the proofs with reference to the English law.

The cases cited are from the authorised and unauthorised series upto the end of 1932.

The author also acknowledges gratefully the assistance rendered to him in bringing out this edition by JR Dhurandhar, Esquire, Acting District Judge, District Court, Poona; BK Desai, Esquire, Advocate (OS), High Court, Bombay; KS Shavaksha, Esquire, Middle Temple, Barrister-at-Law; KJ Khambatta, Esquire, Advocate (OS), High Court, Bombay; BP Sethna, Esquire, Advocate (OS), High Court, Bombay; MJC Mistree, Esquire, Advocate (OS), High Court, Bombay; BD Mehta, Esquire, Advocate (OS), High Court, Bombay and KDF Mulla, Esquire, Attorney-at-Law, High Court, Bombay.

The author desires to thank the Times of India Press, Bombay for the remarkable despatch in printing the work and for the accuracy throughout the work.

1933 DFM

Introduction

Prior to the Transfer of Property Act, 1882, there was practically no law relating to real estate in India. A few points were covered by the Regulations and Acts which were repealed either wholly, or in part by section 2. But for the rest of the law, the courts, in the absence of any statutory provisions, adopted the English law as the rule of justice, equity, and good conscience. This was not satisfactory, for the rules of English law were not always applicable to social conditions in India, and the case law became confused and conflicting. To remedy this state of affairs, Commission was appointed in England to prepare a code of substantive law for India.

The first Law Commission consisted of Lord Romilly, MR; Sir Edward Ryan, Chief Justice of Bengal; Lord Sherbrooke; Sir Robert Lush; and Sir John Macleod, who assisted Lord Macaulay in drafting the Indian Penal Code. This Commission drafted the Indian Succession Act, the Indian Contract Act, the Negotiable Instruments Act, the Indian Evidence Act, and the Transfer of Property Act.

The Transfer of Property Act, though drafted in 1870, was the last of these drafts to become law. The draft was sent to India by the Duke of Argyll who was then Secretary of State for India, and after some amendments, it was first introduced as a Bill in the Legislative Council in 1877. The Bill was then referred to a Select Committee, by whom it was revised and circulated for public criticism. In deference to this criticism, all matters not directly referring to transfers *inter vivos* were omitted; some clauses referring to trusts, powers and settlements were dropped; and other clauses were added with a view to save the provisions of local law and usage.

The Bill thus redrafted was referred to the Second Law Commission consisting of Sir Charles Turner, Chief Justice of Madras; Sir Raymond West; and Mr Whitley Stokes, Law Member of the Council of the Governor-General; but no less than seven Bills were prepared before the first Bill was introduced in the Legislative Council by Mr Whitley Stokes, and passed into law on 17 February 1882.

The Second Law Commission in their report of 1879 said "the function of the Bill was to strip the English law of all that was local and historical, and to mould the residue into a shape in which it would be suitable for an Indian population and could easily be administered by non-professional judges."

Some of the provisions of the Bill were borrowed from the enactments which it repealed and superseded, but the Bill was based mainly on the English law of real property. The Law of Conveyancing and Property Act, 1881 (44 and 45 Vict c 41) had been enacted in England before the Bill was passed into law, and some of the provisions of the Act, notably sections 57, 61 and 69, are borrowed from that statute.

The Act was afterwards amended on 12 separate occasions by the following Amending Acts:

1. Act 3 of 1885—amending sections 1, 4, 6(i), and 69. It abolishes exemptions from the Act on the ground of race, and reconciles the provisions of the Registration Act with those of the Transfer of Property Act.
2. Act 15 of 1895—which exempts government grants from the operation of the Transfer of Property Act.
3. Act 2 of 1990—amending sections 3, 6(e), and 6(h), and remodelling chapter VIII which deals with transfers of actionable claims.

4. Act 6 of 1904—amending sections 1, 59, 69, 107 and 117. It enables a local government to extend part of the Act of specified territories, and to apply the provisions of the Act relating to leases to particular classes of agricultural leases. It provides for the registration of certain mortgages and leases, and for equitable mortgages in ***moulmein, bassein*** and ***akyab.***
5. Act 5 of 1908—transferring the adjective law of mortgages to the Code of Civil Procedure.
6. Act 11 of 1915—amending section 69.
7. Act 26 of 1917—validating mortgages and gifts in Agra and Oudh executed before 1 January 1915, and attested on acknowledgement of execution.
8. Act 38 of 1920—omitting the words "with the previous sanction of the Governor-General in council" from sections 1 and 117.
9. Act 38 of 1925—amending section 130.
10. Act 27 of 1926—amending section 3 by inserting a definition of the word "attested"
11. Act 10 of 1927—amending section 3 by making the definition of the word "attested" retrospective.
12. Madras Act 3 of 1922—modifying the provisions of the Act to give effect to the provisions of the Madras City Tenants Protection Act, 1922.

Despite these amendments, there were conflicting decisions on nearly every section of the Act, and a further exposition of the law became necessary. Accordingly in 1927, a Special Committee, consisting of Mr SR Das, Law Member of the Council of the Governor-General, Mr BL Mitter (afterwards Sir Brojendro Lal Mitter), then Advocate-General of Bengal, Dr SN Sen, and Mr Dinshah Mulla (afterwards the Honourable Sir Dinshah Mulla, PC) were appointed to examine the provisions of a Bill prepared by the legislative department of the Government of the India for the purpose of making a general amendment of the Act. The Bill which was the result of their labour was, after a slight amendment in Select Committee, enacted in the Transfer of Property (Amendment) Act 20 of 1929.

The Act as amended sets at rest points on which decisions have been conflicting, and made several changes in the law, of which the most important are:

Section 3 – Registration amounts to notice.

Section 3 – Constructive notice to an agent is notice to his principal.

Section 15 – Validation of transfers to a class of some members as regards which it fails.

Section 53A – Statutory recognition of the doctrine of part performance.

Section 58 – In a mortgage by conditional sale, the condition must be embodied in the same deed.

Section 60A – A mortgagor entitled to redeem may require the mortgagees to transfer the mortgage debt to a third party.

Section 60B – Statutory recognition of the mortgagor's right of inspection of title deeds.

Section 61 – Mortgagor's right to redeem several mortgages to the same mortgagee separately, or simultaneously.

Section 63A – Statutory recognition of the mortgagee's right to compensation for necessary improvements.

Section 65A – Statutory recognition of the mortgagor's power to lease.

Section 67 – Abolition of the remedy of foreclosure in certain mortgages.

Section 67A – Mortgagee's obligation to enforce several mortgages by the same mortgagor simultaneously.

Section 69A – Provision for appointment of a receiver by a mortgagee exercising a power of sale without the intervention of the court.

Section 92 – An extension of the principle of subrogation.

Section 101 – A modification of the law of merger.

Section 107 – Provision requiring registered leases to be executed by both parties.

The amending Act involved amendments in various other Acts, of which the more important are as follows:

The Married Women's Property Act, 3 of 1874, has been amended to make it clear that section 8 of that Act is subject to section 10 of the Transfer of Property Act.

The Specific Relief Act, 1 of 1877, was amended in accordance with the statutory recognition of the doctrine of part performance in section 53A of the Transfer of Property Act. (The Act was re-enacted in 1963.)

The Code of Civil Procedure, Act 5 of 1908, is amended in O 34 relating to mortgages. Provision is made to allow a mortgagee to recover sums spent for necessary costs, charges and expenses. This is in accordance with section 63A which allows a mortgagee, compensation for improvements in certain circumstances. Mortgages by deposit of title deeds are included in rule 15 of O 34 as such mortgages are included in the definition in section 58, and the old rule 11 is omitted as the principle "redeem up foreclose down" is now embodied in section 94. Other amendments include provisions which make it clear that the right of redemption is not extinguished until a final decree for foreclosure has been made, or until a sale in execution of a mortgage decree has been confirmed.

The Indian Limitation Act, 9 of 1908, was amended by including suits for the enforcement of mortgages by deposit of title deeds in the 12-year period of limitation under Article 132.

The Indian Registration Act, 16 of 1908, was amended to provide that a mortgage by deposit of title deeds, though an oral transaction, cannot be displaced by a subsequently registered instrument; and also to allow an unregistered instrument to be admitted as evidence of part performance of a contract with reference to section 53A of the Transfer of Property Act.

The Indian Succession Act, 39 of 1925, was amended to correspond with amendments made in chapter II of the Transfer of Property Act with reference to transfers inter vivos.

All these amendments were made by a separate Act, the Transfer of Property (Amendment) Supplementary Act 21 of 1929.

Further amending Acts were passed after the legislation of 1929. Act 5 of 1930 amends explanation I to section 3 with reference to the operation of registration of a deed of notice when the deed is registered in a different district; and Act 16 of 1930 amends O 43, rule 1(o) of the Code of Civil Procedure in accordance with the amendments made in O 34, and Act 35 of 1934 inserts the word "naval" after the word "military" in clause (g) of section 6.

There have been few major changes since 1947. In that year, the Disposition of Property (Bombay) Validation Act, 1947, was passed to validate the bequests held void by the Privy Council in *Sopher's* case.

After 1947, the jurisdiction of the Privy Council was abolished, and the Federal Court and later the Supreme Court became the final court of adjudication in India.

Successive adaptation of orders in 1950 and 1956 have nominally altered the Act by, for example, altering the words "Province", "British India", "Part B State", etc.

In 1959, Parliament enacted the Miscellaneous Personal Laws (Extension) Act, 1959, which extended the Hindu Disposition of Property Act, 1916, to the whole of India except Jammu & Kashmir, and Madras Acts I of 1914 and 8 of 1921 were repealed.

The Limitation Act, 1963, has repealed and largely re-enacted the Act of 1908. Among the few changes relevant here is the new Article 63 (a), which provides for a period of 30 years for all suits for foreclosure; and the absence of a provision corresponding to the old Article 116, which provided for a period of six years for compensation for the breach of a contract that is registered. All such suits would now be treated on the same footing, irrespective of whether the contract is registered.

1963 also saw the enactment of the Specific Relief Act, 1963, which repeals and partly re-enacts the Act of 1977. Section 27A of the Act of 1877 which enacted the active equity of part performance as in English Law has not however, been re-enacted.

Benami Transaction (Prohibition) Act, 1988, takes away the plea of *Benami* purchase, and has made the litigation and transactions under the Transfer of Property Act, much simpler.

By Registration and other Related Laws (Amendment) Act, 2001 (Act 48 of 2001) which came into force from 24 September 2001, far reaching amendments have been made to the Registration Act, 1908, and section 53A of the Transfer of Property Act, 1882. On or after the commencement of the amending Act, if the document containing contract to transfer for consideration any immovable property is not registered, then, for the purpose of section 53A, the right to defend possession pursuant to part-performance will not be available.

The Parliament, by Transfer of Property (Amendment) Act, 2002 (Act 3 of 2002) which came into force on 31 December 2002, has substituted section 106 in order to eliminate the technical pleas so far taken on the basis of the language employed in unamended section 106, and avoid multiplicity of litigation leading to serious injustice. The transitory provisions made under the amending Act are very material since the provisions contained in amended section 106 have been made applicable even to the suits or proceedings pending at the commencement of the amending Act.

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Glossary

Ab initio.–(Latin). From the beginning.

Abadi.–A cultivated tract. A farm.

Abkari.–Revenue derived from duties on the manufacture and sale of intoxicating liquor.

Accessio cedit principali.–(Latin). The accession is added to the principal. A maxim of Roman law by which ownership is acquired by accession.

Adaimanam patram.–(Tamil). A deed of simple mortgage.

Adhlapi.–A transaction, customary in the Punjab, by which a person sinks a well and clears the land and receives in return a proprietary interest in a share of the land.

Advancement.–A payment to start a child in life or to make provision for him.

Alienojure.–(Latin). In the right of another.

Alio intuitu.–(Latin). With a different view of prospect. For a different purpose.

Ba Farzandan.–(Persian). With children, including descendants. The words indicate that the grant is to the grantee and his posterity.

Bai-bil-wafa,–*See* 'Bye-bil-wafa'.

Bandhak.–(Sanskrit). A pledge, a mortgage.

Bandhakikhat.–(Bengali). A deed of mortgage. Also bandhaknama and bandhak patra.

Bastu.–A house site, a building plot.

Batai.–(From Sanskrit *Vut,* to divide). A share. A division of the crop between the landlord and the cultivating tenant.

Battaki.–*See* Buttaki.

Bemaidi.–Without a term. Also *Bemeyadi.* For the construction of a bemaidi lease *see Janaki Nath v Dina Nath* (1933) 54 Cal LJ 412, 133 IC 732.

Benami.–Nameless, fictitious, A transaction under a false name.

Bhagbandhak.–A possessory mortgage.

Birt.–(From the Sanskrit *Vritti,* maintenance, means of livelihood). Fees to family priest. A right, custom or privilege derived from the performance of offices whether secular or religious. A grant of land to a person for maintenance or for religious or charitable objects Wilson's Glossary.

Birt-maha brahamani.–Fees or presents received by a Brahimin who conducts funeral ceremonies.

Brahmottar–(Bengali). Land granted rent free to Brahminsfor their support and that of their descendants. Such lands have frequently been acquired by non Brahmins.- Wilson's Glossary.

Burgadar.–A person who cultivates the land and gives, a share of the profits to the owner. He is not necessarily a lessee. *See Brahmamoyee v Sheikh Munsur* (1920) 32 Cal LJ 37.

Buttaki.–Proclamation by beat of drum.

Butwara.–Partition. Butwara proceedings are proceedings for partition with the sanction of the revenue authorities.

Bye-bil-wafa.–(Arabic). Literally a sale with faith. A mortgage by conditional sale.

Caveat emptor.–(Latin). Let a purchaser beware. "'*Caveat emptor* does not mean either in law or in Latin that the buyer must take chances, it means that the buyer must take care": *Wallis v Russell* (1902) 21R 585, p 615.

Cess.–A tax or rate. A great many miscellaneous cesses, imposts and charges were imposed under the Government of the Moghuls in addition to the land revenue both by the government and the zemindars. These have been either abolished or assimilated with the land revenue. The cesses abolished are called *siwai* (ie extras) or *abwa* or *mathaut:* S 74 Bengal Tenancy Act 8 of 1885. Other cesses indirectly connected with the use of land and water and called *sayar* the landlord was allowed to retain: S 3(4) Agra Tenancy Act, UP Act 3 of 1926. Such cesses were *Banker* or a tax on jungle products; and *Julfar,* a tax on fisheries; and *Phulkar,* a tax on fruit trees.

Cestui que trust–The beneficiary of a trust.

Chakran lands.–Lands held on service tenure. Generally speaking, the term includes all lands so held whether by police officials, chowkidars or persons whose duties are personal to the zamindar: *Ranjit Singh v Kali Dasi* 44 IA 117, (1917) ILR 44 Cal 841.

Champerty and maintenance.–Practices forbidden by English law which are the fomentation of litigation in which one has no interest of one's own. A bargain whereby one party is to assist another in recovering property and 'is to share in the proceeds of the suit.

Char.–Land formed by alluvion.

Chevisance.–The business of a scrivener, *ie,* a shroff or dealer in money.

Chose in action.–A term of English law, for a thing recoverable by action as contrasted with a thing or chose in possession. An actionable claim.

Chowk.–A courtyard. A square.

Ghowkidar.–A village watchman remunerated by an allotment of land held either rent free or at a low rent in consideration of services to be rendered to the zemindar, who, before the English occupation, was responsible not only for the payment of revenue, but also for the preservation of peace and order within his district. The chowkidar rendered not only police service, but personal service to the zemindar: *Ranjit Singh v Kali* Dasi 44 IA 117, (1917) ILR 44 Cal 841, 40 IC 981.

Chuck.–A corruption of 'Chak' (Sanskrit *Chak,* or *Chakra* a circle or district). A portion of land divided off. The detached fields of a village. A patch of rent free land. A separate estate or *farm.* A sub-division of survey number.–Wilson's Glossary.

Covinous.–Collusive. Covine is 'a secret assent determined in the hearts of two or more to the defrauding and prejudice of another.'- Co Litt, 357.

Damdupat.–A rule of the Hindu law of debts by which the interest recoverable at any one time cannot exceed the principal.

Darpatni.–A tenure subordinate to a patni. A sub-leasehold. *See* Patni.

Darpatnidar.–A holder of a darpatni.

Dartaluk.–A subordinate taluka or estate the holder of which pays revenue through a superior talukdar or zemindar.

Darwans.–Doorkeepers. Porters.

Debutter–(A corruption *of Deotar* from the Sanskrit *Devatra* belonging to the deity.) Land granted rent free for the support of a temple or idol.

De die in diem–(Latin). From day to day.

Demise–A transfer by way of lease.

Deorha.–One and half. Used to express interest in kind at the rate of fifty per cent.

Deshgat watan.–A hereditary district office remunerated by a cash allowance or a grant of rent free land.

Dharm.–(From the Sanskrit *Dhar,* to hold)- That which holds a man in the right path. Law, virtue, legal or moral duty.- Wilson's Glossary.

Dhrista bandhaka.–(From Sanskrit "Dhristi, sight and *Bandhak,* a pledge). A simple mortgage. Diggubhogyam.–(Tamil). A simple mortgage.

Dowlferist or Daulferist–A rent roll. A statement of rents demanded by zemindar from his tenants.

Ejusdem generis.–(Latin). Of the same nature. A rule of construction whereby general terms following particular ones are taken to apply to persons and things which are of the same nature as those comprehended in the particular terms.

En ventre sa mere.–(French). In his mother's womb.

Ex-proprietary tenant.–A landlord or proprietor who has lost his proprietary rights by alienation voluntary or involuntary and has become a tenant with a right of occupancy in his *sit* land and in land which he has cultivated continuously for a specified number of years.*See* The Oudh Rent Act 1886 (UP Act 22 of 1886) s 7 A; The Agra Tenancy Act 1926, (UP Act 3 of 1926) s 14; The North West Provinces Tenancy Act 1901, (NWP Act of 1901) s 10. *See* also 'Sir.'

Ex-proprietary tenant.–An ex-proprietary tenant is a landlord who has lost his proprietary right but who remains a tenant with a right of occupancy of his *sir* or home farm land; *See* The Agra Tenancy Act, UP Act 3 of 1926, ss 14 & 15; The North-West Provinces Tenancy Act, NWP Act 2 of 1901, s 10. *See* also 'Sir'.

Fee Simple.–A term of English real property law denoting an absolute estate. 'Fee signifieth inheritance and simple is added for that is descendible to his heirs generally that is simply without restraint to the heirs of the body or the like. The word (simple) properly excludeth both conditions and limitations that defeat or abridge the fee' (Co Litt 1 b: Halsb Vol 24, para 315).

Fee Tail.–A term of English real property law denoting a restricted estate or *feudum talliatum* or an estate tail. 'To hold in fee Tail or in Tail is where a man holdeth certain lands or tenements to him and to his heirs of his body begotten.' (Terms de la Ley; Halsb Vol 24, para 442.)

Feoffment.–A term of English real property law denoting a conveyance in fee simple.

Forehand rent.–Rent payable in advance.

Gage.–A pawn or pledge. (From the same root as the word engage.)

Gahan.–(Marathi). A pledge. A mortgage.

Gahan Lahan.–(Marathi). A mortgage by conditional sale.

Ghatwal.–Literally the guard of the ghat or hill pass. Ghatwal lands were holding created in frontier territories so that the holders might be 'wardens of the Marches. the State granting lands to be held free on condition of guarding the passes: *Baden Powell Land Systems of British India,* Vol I, p 532. The person holding the office of ghatwal is bound to perform police duties and quasi military duties in consideration of a remuneration which may take the form of the use of land or an actual estate in land, heritable and perpetual: *Narayan Singh v Niranjan Chakravarti* (1924) 51 IA 37, 3 Pat 183, 79.1C 825, AIR 1924 PC 5. The tenure, though peculiar because of a certain reserved power of selection, nevertheless ranks as hereditary: *Raja Durga Prasad v Tribeni* (1918) 45 LA 251, 46 Cal 362: *Secretary of State vJyoti Prasad* (1926) 53 IA 100, 53 Cal 533, 94 IC 974, AIR 1926 PC 41. The Birbhum yhatwallands were declared transferable and heritable subject to a rent fixed in perpetuity by Beng Reg 29 of 1814.

Gross.–A thing or right in gross is one which is independent of anything else. Thus a right or common of pasture appendant may exist in respect of arable land: *Tyrringham's* case (1584) 4 Co Rep 36a, 37. But a right or common of pasture in gross appertaineth to no land and must be in writing or prescription: Co Litt 122a.

Guzara.–From the Persian word *Guzarish.* Maintenance.

Hat.–A market, a market held on certain days, a fair.

Hathchitti.–A letter or note written or vouched by the hand of.

Havala.–A transfer of a debt from the original debtor to a person who becomes liable for it to the creditor.

Hereditament.–A term of English real property law. The word hereditament is of as large extent as any word, for whatever may be inherited, be it corporeal or incorporeal, real personal or mixt, is a hereditament: Co Litt 16a, 383a, b.— Tenement is a large word to grant realty but hereditament is the largest: Coke Inst, Vol 1, p 6 Jarman says that the most comprehensive words of description applicable to real estate are tenements and hereditaments as they include every species of realty corporeal as well as incorporeal.

Heriot.–A term of English real property law denoting the right of the Lord of the manor, on the death of a freeholder to the best beast or other chattel of such freeholder: Halsb, 2nd Ed vol 7, para 574.

Habi-bil-iwaz.–A gift with an exchange. A mutual gift. A gift for a consideration as when a man gives property to his wife in lieu of her dower.

Homestead land.–In Bengal, the expression denotes a permanent tenancy created before the Transfer of Property Act for the purpose of habitation when a pucca building has been erected of the land leased: *Safar Ali v Abdul Rasid* (1924) 39 Cal LJ 585. With reference to the Bombay Bhagdari Act (Born Act 5 of 1862), a homestead has been defined as including the site of the building, the dwelling house; the trees, wells and shrine and all the appendages which together constitute the usual surroundings of the ordinary village home: *Collector of Broach v Venilal* (1897) ILR 21 Bom 588, p 593.

Id certum est quod certum fieri potest–(Latin). Another reading is 'Id certum est quod certum reddi potest.' That is (sufficiently) certain which can be made certain. A maxim

of construction: *Owen v Thomas* (1834) 3 My and K 353 (a contract): *Adams v Jones* (1852) 9 Hare 485 (a will).

In esse.–(Latin). In being.

In gremio.–(Latin). In the bosom of.

In odium spoliatoris.–(Latin), The whole maxim is 'In odium spoliatoris omnia praesumuntur', Every presumption is made against a wrongdoer. A rule of evidence that as between an innocent party and a wrongdoer unexplained circumstances are presumed unfavourably to the wrongdoer: Halb, 2nd Ed, Vol 13, para 705.

In pari delicto potiorest conditio possidentis.–(Latin). In equal fault, the condition of the possessor is the stronger.

Inam.–An Arabic word meaning a gift or benefaction. A gift by a superior to an inferior. The term is applied to gifts of land rent free or at a quit rent in hereditary and permanent occupation. There are many classes of inam, but the word is of generic significance applicable to the grant as a whole.

Inter vivos.–(Latin). Between living persons,

Istimrari.–From the Arabic word *Istimrar meaning* perpetual. Permanent. Perpetual. The word may by usage refer to perpetuity during the lifetime of the grantee. *See* Istimrari Mokaniri. In the absence of such usage, an istimarari lease was held to convey a permanent and hereditary right: *Din Dayal v Sifat Ali* (1923) 10 OLJ 630. The istimarari estates in Ajmere are held in absolute proprietary right and only pay revenue to the government in the form of a permanent and unenhanceable tribute: *Baden Powell Land Systems of British India,* Vol II, p 336.

Istimrari Mokarari.–From the Arabic word *Istimrar* meaning perpetual in point of time, and the Arabic word *Mokarar* meaning fixed as to rent. A perpetual tenure at a fixed rent. But the words in their lexicographical sense do not imply any heritable character as mourasi does: *Narsingh Dyal v Ram Narain* (1903) ILR 30 Cal 883 approved in *Kamakhya v Rama Raksha* 55 IA 212, 109 IC 663, AIR 1928 PC 146. This is because permanence may only be during the lifetime of the grantee and the words by themselves only confer a life estate on the grantee: *Ramnarain Singh v Chota Nagpur Banking Association* (1916) ILR 43 Cal 332, 36 IC 321

Jaghir.–From the Persian word *Jai* meaning a place, and the Persian word *Gir* meaning a holder. A grant generally from the Moghul Government of the royal share of the revenue but not of the soil. Such grants were originally for life to a Court favourile or as an appanage to an officer or title and were resumable at pleasure. In time, either because of the decline of the Central Government or because it was thought below the dignity of the ruler to resume, the grant became permanent and hereditary and many assignments to revenue grew into landlord tenures. Again jaghir grants were sometimes made with the express object of settling waste lands so that the terms of the grant were such as to make the estate hereditary and alienable. *Baden Powell Land Systems of British India,* Vol I, p 189: *Ramakrishnarao v Nanrao* (1903) 5 Bom LR 983; *Maya Das v Gurdit Singh* 16 IC 855. See *Gulabdas v The Collector of Surat* 6 IA 54.

Jaghirdar.–The holder of a jaghir.

Jamma.–Total rent or assessment payable.

Jenmi or Janmi.–Probably a corruption of zemindar. A proprietor of land. *See* Malabar Tenancy Act, Mad, Act 14 of,1930, s 3(k). *See* also *Kanam.*

Joshi–A Brahmin versed in astrology. A priest.

Jote.–A holding for purposes of agriculture. It may mean a raiyiti or a non-raiyiti holding or any sort of holding. It does not necessarily mean an occupancy holding: *Upendra Kishore v Khalil* (1932) 55 Cal LJ 170, 139 IC 544, AIR 1932 Cal 568.

Jus ad rem.–A right to a thing. A contractual right.

Jus disponendi.–(Latin). The right to dispose of. The right of sale, control and management.

Jus in rem.–A right in a thing. A proprietary right.

Kabuliyat.–*See* Razinama and Kabuliyat.

Kadam sharif.–A Mahomedan religious ceremony.

Kamaki.–Waste land adjoining cultivated land. The adjoining ryot has certain rights called kamaki rights over the waste land, eg, the right of pasturage and of gathering leaves for manure.

Kanam.–A customary mortgage in Madras which partakes of the character of a mortgage and of a lease. It cannot be redeemed before 12 years and the mortgagor lessee or kanamdar is entitled to compensation for improvements on redemption. The annual payments to the mortgagor-lessor or janmi (probably a corruption of zemindar) are regulated by what remains of the fixed share of the produce after deducting interest. If the mortgage is nor redeemed, but is renewed at the expiry of 12 years, a renewal fee is payable to the janmi. This mortgage has a feudal origin, the mortgage debt having been originally a fee paid in token of feudal allegiance by the holder of the land to the lord: Baden Powell, *Land Systems of British India;* Vol III, pp 159-177. See *Ayyappan v Venkedeswam* (1962) ILR 2 Ker 614, AIR 1963 Ker 309. Kanam was defined in the Malabar Tenancy Act, Mad Act 14 of 1930, s 3(1), as follows:—

'**Kanam** means the transfer of consideration in money or in kind or in both by a landlord of an interest in specific immoveable property to another (called the kanamdar) for the latter's enjoyment, the incidents of which include:—

(1) a right in the transferee to hold the said property liable for the consideration paid by him or due to him which consideration is called 'kanartham',

(2) the liability of the transferor to pay to the transferee interest on the kanartham,

(3) the payment of 'michavaram' by the transferee,

(4) the right of the transferee to enjoy the said property for twelve years or any other period, and

(5) the liability of the transferee to pay a renewal fee to the transferor, if the transferee is permitted to enjoy the said property for a further period after the termination of the original period.'

The word 'michavaram' in the above definition is defined in s 3(q) of the said Act as 'whatever is agreed by a kanamdar in a kanam deed to be paid periodically in money or in kind or in both, to or on behalf of the janmi., Section 17 of the said, Act, gives the kanamdar a right of renewal and regulates the renewal fee.

Kanamdar.–*See* Kanam.

Karnam.–A village servant employed in revenue duties in Madras, and corresponding to a patwari in Northern Indian and kulkerni in Western India. The office is remunerated by a hereditary estate in land. The appointment and succession to the office is regulated by the Madras Hereditary Village-Offices Act, Mad Act 3 of 1895.

Kamavan.–A term of Malabar law denoting the manager of a tarwad. See'Tarwad'.

Kayam or Kaim.–Fixed. Imports non-fixity of rent but permanence of occupation; *Mehr Ali v Kalai Khalashi* (1915) 19 Cal WN 1129, 29 IC 461; *Shyama charan v Fakir Chandra* 101 IC 45, AIR 1927 Cal 546; *Chandra Kanta v Amjad Ali* (1920) 32 Cal LJ 296 (FB).

Kayam and Saswatham.–(Telugu). Fixed and permanent. Construed as equivalent to Istimrari Mokarari and therefore not necessarily hereditary: *Rajaram v Narsinga* (1891) 15 Mad 199.

Khata.–A ledger account. Also a current account. Also book in which account is kept.

Khatkabala.–A conditional, engagement. A mortgage by conditional sale.

Khewat.–The record or register of persons who hold shares in a co-parcenary village.

Khorposh or **Khor-o-posh.**–Literally food and clothing. A grant of maintenance.

Khot.–A hereditary farmer of Jand revenue. The khoti tenure is customary in the Konkan.

Khot nisbat.–Lands held by permanent tenants of the khot who have hereditary but not transferable rights. For the distinction between khot nisbat land and khot khasgi land which is the private property of the khot, see *Ganpati Gopal v Secretary of State* (1924) ILR 48 Bom 599, 83 IC 370.

Khudkast–(Literally, self sown). Land cultivated by the proprietor himself.

Kuttubadi.–(Telugu). A Madras revenue term for the quit rent of land granted to a public servant.

Lac.–Resin exuded from the bark of certain trees.

Lambardar.–From the English word *Number.* A cultivator who pays the assessment and is registered in the Collector's roll according to his number. He is representative of the co-sharers of his Mahal or village, collects their share of the revenue and has a right of suit against them for their share of the revenue, village expenses and other dues. *See* The Agra Tenancy Act, UP Act 3 of 1926, ss 221 and 265; The North-Western Provinces Tenancy Act, NWP Act 2 of 1901, s 159; The North–Western Provinces and Oudh Land Revenue Act, NWP Act 3 of 1901, ss 45, 144 and 184; The Central Provinces Land Revenue Act, CP Act 2. of 1917, ss 2(6), 187 am 188.

Lekha Muki.–A customary mortgage in Punjab where the mortgagee is in possession and is responsible for the accounts.

Locus poenitentiae.–Place or opportunity for repentance or change of intention.

Malikhana.–From the Arabic word *Malik* meaning a proprietor. An impost originally payable by the holders of the village to the proprietor of the parent estate from which their holdings were carved out. For a history of these imposts, see *Rameshwa Singh v The Secretary of State* (1906) 11 Cal WN 448.

Malikhandar.–The proprietor entitled to receive the malikhana allowance. *See* 'Malikhana.'

Math.–An abode for students of the Hindu religion. An establishment where Hindu religious mendicants reside. The origin of Maths is explained in *Sammantha v Settappa* (1878) ILR 2 Mad, p 179.

Melwaram.–(Tamil). The proportion of the crop claimed by government as opposed to the Kudivaram or the cultivator's share. See *Seethoyya v Subramanya* 56 IA 146, 117 IC 507, AIR 1929 PC 115.

Miras.–An Arabic word denoting inheritance or heritability: *Ajimanesse v Panna Lal* (1923) 27 Cat WN 1037. The permanency of Miras tenure is indisputable. The Mirasdar and his descendants from generation to generation enjoy the land so long as they pay the rent: *Khanderao v Ramji* (1899) 1 Bom LR 373; *Vithalbhai v Narayan* (1894) ILR 18 Bom 507.

Mohant–The head of a math. *See* 'Math.'

Mohurrum or Muharam.–The first month of the Mohamedan year when it is unlawful to make war. It is the month in which Hasan and Husain, the sons of Ali, were killed. This event is celebrated every year by the Shias with public mourning and lamentation.

Mokarari.–Derived from the Arabic word *Mokarar,* an agreement. Means agreed upon or fixed. The word is applied to a tenure with a fixed rental: *Gaydutullo v Girischandra* (1910) 15 Cal WN 175. But the word raises no presumption that the tenure is hereditary, for fixity may only be for the lifetime of the grantee: *Bilo.smoni v Raja Sheopershad* (1882) ILR 8 Cal 664, 9 IA 33; *Nabendra Kishore v Chaudhury Mian* (1931) 52 Cal LJ 583, 131 IC 584, AIR 1931 Cal 265.

Mortis causa.–(Latin). Because of death.

Mortuary.–A payment due by custom on a man's death out of his property to the person. (Halsb, Vol 3, para 917).

Mourasi.–Derived from the same root as *Miras,* an Arabic word meaning hereditary. It implies a succession from generation to generation, a heritable and permanent tenure: *Giribal v Kedar Nath* (1929) ILR 56 Ca1180, 117 IC 534, AIR 1929 Cal 454.

Muafi.–A tenure by which land is held rent free for a time.

Muddatta Kriyam or Muddata Kayam.–(Telugu). A mortgage by conditional sale.

Mukhtiar.–A law agent. A legal practitioner of an inferior grade.

Mukkadami.–The tenure of the mukkadam or headman of the village who is responsible for the collection of the revenue. In the absence of clear evidence to the contrary, it is not heritable or transferable; *Bhagwati v Hanuman* (1900) ILR 23 All 67.

Mulgeni.–A tenure in the Carnatic of new and previously uncultivated lands with hereditary succession. A hereditary farm at a fixed rate indefeasible as long as the stipulated rent is paid.

Murra.–A weight of grain; 25 maunds in some places and 28 maunds in other places.

Mustagharaq.–Security. A word indicating a hypothecation.

Mutawalli.–A person appointed to the care and management of wakf property. *See' Waif.*

Nankari.–From *nankar,* meaning bread for work. Nankari land is land given by a zamindar for service performed: *Harish Chandra v Qgsim Gani* AIR 1961 Pat 291.

Naslan bad Naslan.–Generation after generation. Words used to indicate an estate of inheritance: *Gnanendra Mohan Tagore v Upendra Mohan Tagore* (1870) 4 Beng LR 103, 192 OCJ; *Tulshi Pershad Singh v Ram Narain Singh* (1886) ILR 12 Cal 117, 12 IA 205.

Nazar or Naze.–A lump sum paid as a premium; a royalty or bonus or commission: a fine paid to the State on succeeding to office or property.

Nazarana or Nazrana.–A premium. A sum exacted by a superior in the guise of a present.

Nirantar.–Perpetually; for ever. *See* Bom HC Printed Judgments (1876) 227.

Non est factum.–(Latin). It is not done or executed. A plea by which a man charged upon a writing avers that it is not his deed: Halsb, Vol 10, para 721.

Novation.–A new contract whereby a liability under an existing contract is extinguished and a liability under a new contract is substituted for it: *Scarf v Jardine* (1882) 7 App Cas 345.

Omne majus continentt in se minus.–(Latin). The greater includes the less. He who has authority to do the more important act shall not be debarred from doing that of less importance.

Omne principal trahit ad se accessorium.–(Latin). Every principal draws the accessory after it. *See* 'Acessio cedit principali.'

Optimus rerum interpres usus.–(Latin). Usage is the best interpreter of things. *See Broom's Legal Maxims,* 7th Ed, P 592.

Otti.–A form of kanam mortgage in Madras in which the interest on the sum advanced covers the whole of the janmi's share of the produce. *See* 'Kanam.'

Owelty.–Compensation given for inequality of shares on a partition.

Pala.–A turn of worship. The right of the officiating priest in a temple to conduct public worship and receive the offerings in rotation with the other pujaris or priests.

Palyam.–(Tamil) Land settled on Polygars or rubber cheftains at a quit rent on condition of rendering police services. For a history of the tenure see *Appayasami Naicker v Midnapore Zemindari Co* 48 IA 100, 60 IC 953.

Paracudi.–(Tamil). A migratory or non-resident cultivator who does not belong to the village community. *See* 'Ulwadi'.

Pardanishin.–Sitting behind the screen. A woman who observes the rule of seclusion.

Parwarish.–(Persian). Cherishing or fostering. Maintenance.

Pata or Patta or Putta.–A lease. A generic term embracing every kind of engagement between a Zemindar and his Tenants, or Ryots: *Dhunput Singh v Gooman Singh* (1867) II MIA 433.

Patni.–An estate carved out of his proprietary interest by a Bengal Zemindar, either as a device for raising 'money, or to be relieved of the trouble of direct management: *Baden Powel Land Systems of British India,* Vol I, p 543; Wilson's Glossary. - A first the zemindar was prohibited from giving a lease for more than ten years. This restriction was removed by Regulation 5 of 1812 and the practice became common for the zemindar to create permanent subordinate tenures. These tenures are called Patni talooks and are by their very nature heritable and alienable, the zemindar retaining the status of zemindar, but parting with all control and interest, except as to a quit rent: *Tarinee Churn Gangooly v Watson & Co* (1869) 3 Beng LR 437 AC, 12 WR 413, Patni talooks created before the permanent settlement were recognised by Bengal Regulation Act 8 of 1793. The Patni Law, ie Bengal Regulation Act 8 of 1819 was enacted to grant facilities to the zemindar to create Patni talooks for the punctual payment of rent; *Surendra Narain Sinha v Bijoy Singh* (1925) ILR 52 Cal 655, 89 IC 785, AIR 1925 Cal 962.

Patnidar.–The holder of a Patni Talook. *See* 'Patni.'

Pattidar.–The owner of a patti or share of a mahal or village separately assessed to land revenue. He pays his share of the revenue through the Lambadar of the mahal. The shares are generally fractional according to the laws of inheritance: *Baden Powell Land Systems of British India,* Vol I, p 126. *See* The Central Provinces Land Revenue Act, CP Act 2 of 1917 ss 2(12), 97, 123 and 161. The North-West Provinces and Oudh Land Revenue Act, N-WP Act 3 of 1901 ss 84 (1)(c). 146(e) and 160. *See* also 'Lambadar.'

Patwari.–A village servant employed in the keeping of revenue accounts in Northern India corresponding to the karnam in Madras and the talati or kulkerni in Bombay. The appointment and remuneration of patwaris regulated by ss 22, 23 and 24 (b) of the North -West Provinces and Oudh Land Revenue Act, N-WP Act 3 of 1901. Patwaris are also in existence in some districts in the Central Provinces: SS 43 and 227(d) of the Central Provinces, Land Revenue Act, CP Act 2 of 1917.

Permutatio est vicina emptioni.–(Latin). Exchange is analogous to purchase,

Persona designata.–(Latin). A person designated. A person specified or nominated.

Peruarthum.–A customary mortgage in Malabar. It is a mortgage by conditional sale redeemable by payment of the market value of the land at the time of redemption: *Shekari Var.ma v Mangalom* (1876) ILR 1 Mad 57.

Pro tanto.–(Latin.) ,For so much, for as much as is paid.

Proprio motu.–(Latin.) Of his own motion, by his own act.

Proprio vigore.–(Latin.) By its own force.

Pujari.–A priest in a Hindu temple who conducts public worship and receives offerings either for himself or for the idol.

Quicquid inaedificatur solo, solo cedit.–(Latin). Whatever is built of the soil falls into or becomes part of the soil. Whatever is built on the soil belongs thereto.

Quicquid plantatur solo, solo cedit.–(Latin). Whatever is planted in the soil falls into, or becomes part of the soil. Whatever is planted in the soil belongs thereto.

Qui facit per alium facit per se.–(Latin). He who acts through another is deemed to act in person.

Qui prior est tempore est jure.–(Latin). He who is first in time prevails in law. He has the better title who is first in time. The equitable doctrine of priority.

Qui sensit commodum debet et setire onus.–(Latin). He who derives the advantage must sustain the burden.

Raiyat.–A cultivator; a peasant; a tenant who is given the right to bring the land under cultivation: *Hira Lal v Matukdhari* (1928) ILR 7 Pat 275, 109 IC 461, AIR 1928 Pat 316. *See* the definition in s 5(2) of the Bengal Tenancy Act 1885.

Ram Lila.–A public performance in the month of *Ashwin* of a drama illustrating the adventures of the God Rama.

Razinama and Kabulayet.–Surrender and agreement. The procedure by which one person relinquished his holding in land and another person agrees to become the holder or Khatedar under the Bombay Land Revenue Code, Bom Act 5 of 1879.

Regalia.–Royal rights pertaining to the Crown. Things belonging to the sovereign. The crown, sceptre, orb and other articles used at the coronation.

Rehan or Rahn.–(Arabic). A pledge; a mortgage.

Relief.–Money payable to the lord by a freeholder on his succession to land of which his ancestor died tenant of the manor. (Halsb, 2nd Ed Vol 7, para 594).

Rent note.–An agreement to lease signed only by the lessee.

Res communes.–Things that are common to all men. Things the property in which belongs to no one, but the use to all; such as air, light, running water, etc.

Res extra commercium.–Things not the subject of commerce or trade. Things which cannot be bought or sold.

Res gestae.–(Latin). Things done.

Restitutio ad integrum.–(Latin). Restoration in full.

Royalty.–In mining lease a royalty is a payment to the lessor proportionate to the amount of the demised mineral worked within a certain period: Halsb Vol 20, para 1418 —It is in reality the price paid for a portion of the soil the payment whereof is distributed over a number of years: *Krishna Kishore v Kasunda Nyadi Collieries* 65 IC 673, AIR 1922 Pat 36; *AG of Ontario v Mercer* (1883) 8 App Cas 767.

Ryot.–*See* Raiyat.

Sadavarat.–(Sanskrit). A guest house for the accommodation of travellers or religious mendicants.

San.–A form of anomalous mortgage unaccompanied with possession prevalent in Gujarat.

Sankalp.–(Sanskrit) A vow; a gift in accordance with a vow.

Sarabarakar.–A manager or land agent who collects rents, retains a portion as his profit and pays the balance to the zamindar. In some cases the office is hereditary but without right of alienation without the permission of zemindar.–Wilson's Glossary.

Sarabarakari interest.–The interest of a sarabarakar or middle man. *See* 'Sarabarakar.'

Saranjam.–The maharati equivalent of Jaghir. *See:* 'Jaghir'.

Saswatham.–(Telugu). Permanent. *See* 'Kayam' and 'Saswatham'.

Scheduled distriet.–A scheduled district is defined in s 3 (49) of the General Clauses Act to be a scheduled district as defined in the Scheduled Districts Act 1874. The Indian Statute Book contained from the earliest time 'deregulationizing' enactments barring the application of the ordinary law, which was at first contained in the old 'regulations' in the more backward ad less civilised parts of the country. These enactments became so complicated that it was difficult to ascertain what laws were and what laws were not in force in the 'deregulationized' tracts. The Scheduled Districts Act was passed to remove doubts as to the extent of these tracts and the law in force therein. It specifies and constitutes a number of the deregulationized tracts as scheduled districts and gives power to declare by notification what enactments are, and what enactments are not in force in any scheduled district. It further enacts that any district to which 33 Vict c 3 s 1 (giving power to make regulations for the peace and good government of British India) is made applicable, is a scheduled district. - *Illbert's Government of India,* p 214.

Seisin.–A term of English real property law. It signifies possession of a freehold so that a man cannot be said to be land unless he is in possession of the freehold either personally or by means of tenants; *Topham New Law of Property,* 4th Edn, p 12. It has nothing to do with seizure which is a forcible taking of possessions. It meant originally quiet possession

sitting on land, ie the possession of a settlor or squatter from the latin sessio, sitting. It was formerly used to chattels but is now a technical term of real property law.

Sheba.–(A corruption of *Seva).* Service. Attendance upon an idol. Worship.

Shebait.–The manager and superintendent of an endowed Hindu temple.

Shikmi.–A subordinate tenure the holder of which pays his revenue or share of revenue through some other person, and not direct. The word means belly and a shikmi tenure is a tenure which has been carved out of the head tenure. The word 'Shikmi' is a common expression meaning an undertenant: *Doma Sing. Gobind* 135 IC 93, AIR 1931 Pat 36.

Sir.–The world means 'his own'-The proprietor's Sir land is his own land as distinguished from the land in which the old tenants of the village have ancient rights. It is the home farm land in which the landlord or co-sharer in the joint village holds directly in his own management, either cultivating it himself or by his farm servants of personal tenants. Certain privileges attach to the Sir and if the landlord or sharer defaults in the payment of revenue and is put out of possession and becomes an ex-proprietary tenant, he still retains his Sir: *Baden Powell Land Systems of British India,* Vol 1, p 166. *See* also the Agra Tenancy Act, UP Act 3 of 1926, ss 4-7, 14, 15, 18 and 69; The Central Provinces Land Revenue Act, CP Act 2 of 1917, ss 2(17), 68, 93, 9,106, 120 and 137: The North-Western Province Tenancy Act, N-WP Act 2 of 1901, ss 10, 11 and 89; The North-Western Provinces and Oudh Land Revenue Act, N-WP Act 3 of 1901, ss 4(2), 4(l3), 122 to 127.

Specialty.–A contract under seal. A contract made by deed, eg, a mortgage.

Spes successionis.–(Latin). An expectancy to succeed to the property of a living person. It confers no actual interest in property, not even a contingent interest.

Stridhan.–Property held by a Hindu woman unconditionally and subject to no restriction. That alone is her peculiar property which she has power to give, sell or use independently of her husband's control: *Phukar Singh v Rangit Singh* (1878) 1 All 661.

Sudbharnabond.–From Sud, interest, and Bharna, paying in full. A usufructuary mortgage bond.

Suijuris.–(Latin). Literally, of his own right. A person capable of exercising his rights. An adult who is no-longer under the disability of infancy.

Suo jure.–(Latin). In one's own right.

Swadhin Adhamanam.–Literally possession deed. A possessory mortgage in Malabar.

Tabula in naufragio.–(Latin) Literally a raft in a shipwreck. A description applied to the English doctrine of tacking.

Tagavi or Takavi.–Literally assisting. Advances of money made by the Government to cultivators for the purchase of seed to be repaid when the crop is reaped.

Tahsildar.–An official in charge of the collection of the revenue of a tahsil or division of a district.

Thluka or Talook.–A division of a district. An estate. Talukas in Oudh were originally granted by the Moghul Government at a favourable assessment. *See* The Oudh Estates Act 1 of 1869 as amended by Act 3 of 1885. As to Gujarat *see* Bom Act 6 of 1888. As to Pami Talukas *see* 'Patni.'

Talukdar.–The holder of a taluka. See 'Taluka.'

Taran Gahan.–Literally security pledge. A simple mortgage in Bombay.

Tarward.–A term of Malabar law denoting a group of persons all of them tracing their descent from a common female ancestor, owning joint property under the absolute management and, control of the senior male member who is; alled the karnavan: *Shuppu Menon v Narayanan* (1905) ILR 28 Mad 182 (FB).

Tenant by curtesy.–'A tenant by curtesy of England is where a man taketh a wife *seised* in free simple or in fee tail general or *seised* as heir in tail general, and hath issue by the same wife, male or female, born alive albeit the issue after dieth or liveth yet if the wife, dies the husband shall hold the land during his life by the law of England - *Coke on Littleton* s 35 cited in *Eager v Furnivall* (1881) 17 Ch D 115, 120. - The husband was said to have an estate by curtesy meaning probably an estate given by the curia or court. The estate of courtesy has been abolished by the Admini istration of Estates Act 1925.

Tenement.–A term of English real property law. Blackstone says that a tenement though in its vulgar acceptation is only applied to houses and other buildings, yet in its original, proper and legal sense, it signifies everything that may be holden provided it be of a permanent nature.

Terminus a quo.–(Latin). The starting point from which.

Toda giras hak.–The right to an annual payment of toda giras. The custom of toda giras arose out of the dispossession by conquest of old Rajput Chiefs in Malwa, Gujarat and Central India. They were cadets of ruling Rajput families to whom territory had been assigned for giras or maintenance, the word *Giras* meaning literally a mouthful. When dispossessed they waged war and levied contribution all around them. Their exactions were compromised, the word *Toda* meaning a composition. Toda giras was, therefore, in its origin, a cash composition which secured protection and freedom from plunder. The allowance has now become an item in the rent roll of the villages: *Baden Powell Land System of British India* - Vol 3, pp 277, 281.

Transit in rem judicatum.–(Latin). Passes into or becomes a thing adjudged or finally decided. When the judgment is delivered the cause of action is extinguished and transit in rem judicatam or merges in the judgment.

Ulavadi.–(Tamil). A cultivator who has inherited land. A ulavadi mirasdar was held not to be a permanent tenant when he was also described as paracudi, ie, migratory: *Mayandi Chettyar v Chokkalingam* (1904) ILR 27 Mad 291, 31 IA 83.

Uraller.–The trustee or manager of a temple in Malabar.

Utbandi.–A system of cultivation in Bengal by which the tenant cultivates for a year or a season only and the rent is fixed by agreement when the crop is on the ground. Hunter's Statistical Account of Bengal cited in *Beni Madhub v Bhuban Mohun* (1891) ILR 17 Cal 393.

Ut lite pendente nihil innovetur.–(Latin). Let nothing be altered or renewed while the suit is pending.

Utpat.–A priest attached to the temple at Pandharpur.

Ut res magis valeat quam pereat.–(Latin). Literally rather let the matter prevail than let it perish or rather let it operate than let it be inefficient. A canon of construction, whereby, if a deed is capable of a twofold construction, that construction should be adopted which will uphold the deed.

Varashasan.–(Marathi). An annual allowance paid either by the Treasury or by assignment of the revenues of a village; and assignment or charge on the revenues of a village made by the proprietor.

Verumpattamdar.–A verumpattam tenant. *See* Verumpattam tenant.

Verumpattam tenant.–A tenant who has taken a lease for the cultivation of land or gardens without any loan or advance. *See* The Malabar Tenancy Act, Act 14 of 1930 s 3(w).

Vinaya.–A code of ecclesiastical law following the precepts of Buddha and recite by Buddh's, disciple Upali at the first Council ater Buddha's death. Rules of discipline for the monastic order.

Vritti.–A Sanskrit word meaning maintenance, means of livelihood or profession. A customary allowance; a payment or a fee to a Brahmin.

Wakf.–The word in Arabic means literally 'detention' or 'immobilisation'. Hence Baillie's definition–'The detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind' *Baillie's Mahomedan Law* p 558. Hamilton translates the word as appropriation. Hence the definition –'The appropriation of any particular article in such a manner as subjects it to the rules of divine property whence the appropriators right to it is extinguished and it becomes the property of God by the advantages resulting to his creatures.' *Hamilton's Hedayapp* 231. The definition in the Wakf Act is 'Wakf means the permanent dedication by a person professing the Mussalman law as religious, pious or charitable.' This represents the meaning now attached to the word in the courts.

Wajib-ul-arz.–(Arabic). Literally fit or worthy of representation. A record of rights prepared by a Settlement Officer in a co-parcenary village. In the North-West Provinces, it is the most important document relating to *the* administration of the village: *Mussammat Lali v Murli Dhar* 33 IA 97. It is a register of the shares and holdings in the village and states, the mode of payment of the revenue and the powers and privileges of the Lambardars. it is also an official record of local custom: *Balgobin v Badri Prasad* 50 IA 196.

Watan.–The word includes an office held hereditarily for the performance-of duties connected with the administration or collection of the public revenue or with village police. The Watan property, if any. the hereditary office, and the rights and priovileges attached to them together constitute the Watan. Watan land is land held or assigned for providing remuneration for the performance of the duties of the watandar or person holding the hereditary office. *See* Bom, Act 3 of 1874.

Yajman.–A person who employs a priest or priests to perform for him either fixed or occasional religious ceremonies; a: householder; a head of a family; a master or head of a caste.

Yajmari Vahis.–Books containing names of pilgrims who have visited the shrine in past years.

Yajman virtti.–An obligation imposed upon the purohit or family priest to perform certain religious rites, the performance of which carries with it certain emoluments: *Kadulal v Beharilal* (1932) 25 SLR 451,137 IC 136.

Zarichaharam.–A fourth part of the price; claimed by the zemindar as a perquisite on the sale of a holding.

Zur-i'peshgi.–Literally a payment in advance or a lease for a premium. A usufructuary mortgage in the form of a lease.

The Transfer of Property Act, 1882
(4 of 1882)

PREAMBLE

[*17th February, 1882*]

Synopsis

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An Act to amend the law relating to the Transfer of Property by act of parties.

Preamble.—WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; it is hereby enacted as follows:—

The true place of a preamble in a statute was at one time the subject of conflicting decisions. The modern rule is that where the enacting part is explicit and unambiguous, the preamble cannot be resorted to, to control, qualify or restrict it; but where the enacting part is ambiguous, the preamble can be referred to, to explain and elucidate it. This rule has been applied to Indian statutes by the Privy Council,[1] and also by the Supreme Court of India.[2] The substantive provision of the enactment is to be approached in the light of the policy and purpose deducible from the terms of the long title and the preamble, says the Supreme Court of India.[3]

(1) Define and Amend

The Transfer of Property Act, 1882 (TP Act) was intended to define and amend the existing law, and not to introduce any new principle.[4] It embodies principles of equity, justice and good conscience.[5] The chief objects of TP Act were initially to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution on death and thus, to furnish and complement the work

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1. *Secretary of State v Maharaja of Bobbili,* (1920) ILR 43 Mad 529 : 46 IA 302 : 54 IC 154. "The section must govern."
2. *State of Rajasthan v Leela Jain,* AIR 1965 SC 1296, p 1299; *Burakar Coal Co Ltd v UOI,* AIR 1961 SC 954, pp 956, 957; *UOI v Elphistone Spinning & Weaving Co Ltd,* AIR 2001 SC 724, p 740 : (2001) 4 SCC 139. For further reference, see *Mani Lall Singh v Trustees for the Improvement of Calcutta,* (1918) ILR 45 Cal 343 : 44 IC 770; *Nepra Sayer Pramanik* (1928) ILR 55 Cal 67 : 103 IC 662 : AIR 1927 Cal 763; *Sital Chandra Delanney* (1916) 20 Cal WN 1158 : 34 IC 450; *Keshab Panda Bhobani* (1913) 18 Cal LJ 187 : 21 IC 538; *Girja Nandan Hanuman Das* (1927) ILR 49 All 25 : 99 IC 161 : AIR 1927 All 1.
3. *Re: The Kerala Education Bill,* 1957 AIR 1958 SC 956 : [1959]1 SCR 995.
4. *Tajjo Bibi v Bhagwan,* (1899) ILR 16 All 295.
5. *Nalakath Suinuddin v Kooridakan Sulaiman,* (2002) 6 SCC 1, para 21 : AIR 2002 SC 2562.

commenced in framing the law of testamentary and intestate succession; and secondly, to complete the code of contract law so far as it relates to immovable property.[6]

(2) Act not Exhaustive

The Act is not exhaustive, and it does not profess to be a complete code.[7] This is apparent from the omission of the word "consolidate", which occurs, for instance, in the preamble to the Indian Evidence Act, 1872.[8] The preamble to the Indian Contract Act, 1872 is worded in terms similar to the preamble of TP Act.[9] In *Irrawaddi Flotilla Co v Bhugwandas,*[10] which was a case under the Contract Act, the Privy Council observed that the said Act did not profess to be a complete code dealing with the law relating to contracts, that is purported to do no more than to define and amend certain parts of that law, and that the legislature did not intend to deal exhaustively with the law relating to contracts. The facts stated in the Preamble and the Statement of Objects and Reasons appended to any legislation are evidence of legislative judgment. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalent state of affairs, impelling them to enact the law. These, therefore constitute important factors which amongst others will be taken into consideration by the Court in judging the reasonableness of any restriction imposed on the Fundamental Rights of the individuals.[11] The Privy Council[12] through the words of Lord Atkin had declared that "when the meaning of the words is plain, it is not the duty of the courts to busy themselves with supposed intentions". This principle was adhered by Supreme Court of India which also stated that the law has been consistent ever since then.[13]

(3) Legislative Competence

Both the Parliament and the state legislature have the power to make laws with respect to "Transfer of Property other than agricultural land", which matter is included in entry 6 of the concurrent list in the seventh schedule to the Constitution. Legislation relating to the relationship of landlord and tenant, including rent control with respect to non-agricultural land, will come under entry 6 of list III.[14] The subject of transfer of agricultural land is covered by entry 18 of the state list. A State law relating to the transfer of agricultural land may override the provisions of the TP Act, for instance, as to mortgages of agricultural land.[15] Transfer of agricultural land, whether belonging to scheduled tribes or other persons, would come under entry 18 of list II, which carries with it not only a power to make a law placing restrictions on transfers and alienations of such land including a prohibition thereof, but also the power to

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6. Whitley Stokes, Anglo-Indian Codes, vol I, p 726.
7. *HV Low & Co Ltd v Pulin Beharilal Sinha,* (1933) ILR 59 Cal 1372 : 143 IC 193 : AIR 1933 Cal 154; *Satyabadi Harabati* (1907) ILR 34 Cal 223, p 228; *Shafikul Huq v Krishna Gobinda,* (1919) 23 Cal WN 284 : 47 IC 428; *Bhupendra Wajihunnissa* (1917) 2 Pat LJ 293 : 39 IC 564; *Kishori Lal v Krishna Kamini,* (1910) ILR 37 Cal 377, p 382 : 5 IC 500; *Jatendra v Rangpur Tobacco Co,* AIR 1924 Cal 990, p 991; *Venkatalingam v Parthasarathy,* AIR 1942 Mad 558; See *Irrawady Flotilla Company v Bhugwandas,* 18 IA 121, p 129 (a case on the Contract Act where the preamble is exactly in the same terms).
8. *Collector of Gorakhpur v Palakdhari,* (1890) ILR 12 All 1, p 35.
9. Preamble to the Indian Contract Act, 1872: "Whereas it is expedient to define and amend certain parts of the law relating to contracts."
10. *Irrawaddi Flotilla Co v Bhugwandas,* (1891) ILR 18 Cal 620, p 628.
11. *State of Gujarat v Mirzapur Moti Kureshi Kasab Jamat,* AIR 2006 SC 212 : JT 2005 (12) SC 580 : 2005 (8) SCALE 661: (2005) 8 SCC 534.
12. *Pakala Narayana Swami v Emperor,* AIR 1939 PC 47 : (1939) 9 AWR (PC) 35 : 66 MIA 66.
13. *Tamil Nadu State Electricity Board v Central Electricity Regulatory Commission,* AIR 2007 SC 1711 : JT 2007 (6) SC 74 : 2007 (6) SCALE 26 : (2007) 7 SCC 636.
14. *Bapalal v Thakurdas,* AIR 1982 Mad 399.
15. See *Megh Raj v Allah Rakhia,* (1947) FCR 77, p 86.

make a law to re-open such transfers and alienations.[16] The Supreme Court has held that the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 in so far it deals with a licencee of premises other than premises belonging to the Central Government, falls in entries 6, 7 and 46 of list III.[17] Likewise, Benami Transactions (Prohibition) Act, 1988, is not an enactment relating to the transfer of property, but is a law relating to trusts and trustees and, therefore, cannot be related to the legislative head "Transfer of Property" in entry 6 of list III.[18]

(4) By Act of Parties

The Supreme Court, in the case of *Bharat Petroleum Corporation Ltd v P Kesavan*,[19] has held:

> As would appear from the preamble of the Transfer of Property Act, the same applies only to transfer by act of parties. A transfer by operation of law is not validated or invalidated by anything contained in the Act. A transfer which takes place by operation of law, therefore, need not meet the requirement of the provisions of the Transfer of Property Act or the Indian Registration Act.

These words exclude transfer by operation of law, ie, by sale in execution,[20] forfeiture, insolvency or intestate succession. It also limits the scope of the Act to transfers *inter vivos*, and excludes testamentary succession.[21]

(5) By Operation of Law

The principles embodied in some of the provisions have been applied to transfers by the operation of law in some cases.[22]

(6) Rules of Interpretation of Statutes

Before discussing the provisions of the TP Act in detail, it is advisable to state the principal rules for the interpretation of statutes:

(1) A cardinal rule of interpretation of statutes, which is often referred to as the golden rule is that the grammatical sense of the words used should be adhered to, technical words being construed according to their technical meaning, and other words in their most ordinary and popular acceptation.[23]

(2) It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily, but when it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was prior to the particular enactment, and to see whether the words used in the statue can be taken to effect the change that is suggested as intended.[24]

(3) If the meaning is clear, the court is not at liberty to look at the presumed intention of the legislature. The question for the court is not what the legislature meant, but what language of the Act means. In *Salomon v Salomon & Co*,[25] Lord Watson said:

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16. *Lingappa Pochanna v State of Maharashtra*, AIR 1985 SC 389 : (1985) 1 SCC 479.
17. *Accountant & Secretarial Services Pvt Ltd v* UOI, (1988) 4 SCC 324 : AIR 1988 SC 1708; *Ashok Marketing Ltd v Punjab National Bank*, AIR 1991 SC 855, pp 876, 877 : (1990) 4 SCC 406.
18. *S Mohammad Anwaruddin v Sabina Sultana*, (1989) 179 ITR 442, p 455.
19. *Bharat Petroleum Corporation Ltd v P Kesavan*, (2004) 9 SCC 772, para 12 : AIR 2004 SC 2206.
20. *Dinendronath Sannyal v Ramcoomar Ghose*, (1881) ILR 7 Cal 107 : 8 IA 65, p 75.
21. See section 2, clause (d), and notes under section 5.
22. See commentary on the sections.
23. *Queen Empress v Abdullah*, (1885) ILR 7 All 385, p 398.
24. *Abdur Rahim v Mahomed Barkat Ali*, (1928) ILR 55 Cal 519 : 55 IA 96 : 108 IC 361 : AIR 1928 PC 16; *Sales Tax Officer v Mukundlal Saraf*, [1959] SCR 1350 : AIR 1959 SC 135 : [1959] SCJ 53.
25. *Salomon v Salomon & Co*, [1897] AC 22, p 38 : [1895-9] All ER Rep 33.

> Intention of the Legislature is a common but a very slippery phrase, which properly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a court of law or Equity what the Legislature intended to be done, or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication.

(4) When the literal construction would lead to some absurdity, repugnance or inconsistency, the grammatical sense may be modified so as to avoid that difficulty but no further,[26] but it is a well-known rule that a *casus omissus* cannot be supplied by a court of law.[27]

(5) The literal construction ought not to prevail if it is opposed to the intention of the legislature as apparent from the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.[28]

(6) The construction should be as far as possible beneficial, ie, to suppress mischief and advance the remedy, if this can be done without violence to the language of the section.[29]

(7) A general Act must not be construed so as to derogate from a special Act.[30] The general maxim is *generalia specialibus non derogant.* When the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.[31]

(8) Statutes encroaching upon private rights must be strictly construed so as to save those rights as far as possible.[32] An intention to take away property without compensation should not be imputed to a legislature, unless it be expressed in unequivocal terms.[33]

(9) Statutes affecting substantive law or vested rights are not retrospective, unless expressed to be so; but statutes affecting procedure may properly have retrospective effect attributed to them, unless that construction be textually inadmissible.[34] The principles affecting the retrospective operation of statutes have been stated as follows:[35]

(a) Legislative enactments have no retrospective effect, unless explicitly stated to be so in the enactments themselves.

(b) Amending statutes should not be construed as having retrospective effect, if they affect vested rights.

(c) Statutes which are declaratory or explanatory are to be construed as having retrospective effect as they give an authoritative explanation of the words, phrases

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26. *Tirath Singh v Bachittar Singh,* [1955] 2 SCR 457 : AIR 1955 SC 830.
27. *Gurdial Singh v Central Board and Local Committee, Amritsar,* (1928) ILR 9 Lah 689, p 698 : 113 IC 769 : AIR 1928 Lah 337.
28. *Caledonian Rly Co v North British Rly Co,* (1881) LR 6 App Cas 114, p 122; *Rex v Halliday,* [1917] AC 260, p 303.
29. *Bengal Immunity Co Ltd v State of Bihar,* [1955] 2 SCR 603 : AIR 1955 SC 661.
30. *Municipal Council, Palai v TJ Joseph,* [1964] 2 SCR 87 : AIR 1963 SC 1561 : [1964] 2 SCJ 759.
31. *Barker v Edger,* [1898] AC 748, p 754.
32. *Suratee Bara Bazaar Co v Municipal Corpn of Rangoon,* (1927) ILR 5 Rang 772 : 107 IC 849 : AIR 1928 Rang 87; *Western Countries Rly Co v Windsor and Annapolis Rly Co,* [1882] 7 App Cas 178.
33. *Commr of Public Works (Cape Colony) v Logan,* [1903] AC 355; *Gopeshwar Pal v Jiban Chandra,* (1914) ILR 41 Cal 1125, p 1140 : 24 IC 37.
34. *Anant Gopal Sheorey v State of Bombay,* [1959] SCR 919 : AIR 1958 SC 915 : [1958] SCJ 1231; *Colonial Sugar Refining Co v Irving,* (1905) AC 369; *Delhi Cloth and General Mills Co v CIT,* 54 IA 421, p 425 : 30 Bom LR 60 : 106 IC 156 : AIR 1927 PC 242; *Mohammad Abdussamad v Kurban,* (1904) ILR 26 All 119 : 31 IA 30, p 37.
35. *Balaji v Gangamma,* (1927) 51 Mad LJ 641, p 643 : 99 IC 143 : AIR 1927 Mad 85.

or clauses used in a statute, and whenever the statute has to be applied the explanation also should be applied.

(d) No recital in a declaratory or amending statute can render void that which has been declared by the courts to have been rightly done under the law.

(e) Statutes which affect a mere procedure are retrospective in their nature.

The TP Act, however, expressly enacts in section 2(c) that it is not retrospective.

The retrospective operation of changes introduced by the Transfer of Property (Amendment) Act, 1929, has been fully considered by the Full Bench of the Patna High Court with reference to section 92 of the TP Act.[36]

(10) Proceedings of the legislative council are excluded from consideration in the judicial construction of an Act. The debates in the legislative council reports of Select Committees and statements of objects and reasons annexed to a Bill may not be referred to.[37] The Supreme Court has held that though the statement of objects and reasons cannot be taken into account for the purpose of interpreting the words of the section, it gives an indication of what the legislature wanted to achieve.[38]

(11) Headings of sections or groups of sections in the Act have the effect of preambles to those sections, and may be referred to as an aid to construction.[39]

(12) Marginal notes to the sections are not to be referred to for the purpose of construction. The Supreme Court has held that a marginal note cannot be invoked for construction where the meaning is clear.[40]

(13) Illustrations are instances of the practical application of the written law without which law would amount to nothing.[41] Since they explain the meaning of the section, they are useful as aids to construction, but they cannot control the plain meaning of the section.[42] The great usefulness of the illustrations which have, although not part of the sections, been expressly furnished by the legislature as helpful in the working and application of the statute, should not be impaired. The Supreme Court holds the same view.[43]

(14) "It is an error to rely upon punctuation in construing Acts of the Legislature."[44]

(15) Provisos to sections have the effect of excepting out of the preceding portion, or of qualifying it; a proviso cannot be construed as enlarging the scope of the enactment.[45] It is well-settled that the proviso and the portion of the section must be construed as a whole, each portion throwing light, if need be, on the rest.[46]

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36. *Tika Sao v Hari Lal,* (1940) ILR 19 Pat 752 : 189 IC 513 : AIR 1940 Pat 385.
37. *Administrator-General v Premlal,* (1895) ILR 22 Cal 788 : 22 IA 107, p 118; *Aswini Kumar Ghosh v Arubinda Bose,* [1953] 4 SCR 1.
38. *Workmen of Firestone Tyre & Rubber Co v Management,* AIR 1973 SC 1227, p 1239 : (1973) 1 SCC 813.
39. *Bhinka v Charan Singh,* [1959] 2 SCR 798 (Supp) : AIR 1959 SC 960.
40. *Western India Theatres Ltd v Municipal Corpn of Poona,* [1959] 2 SCR 71 (Supp) : AIR 1959 SC 586.
41. Whitley Stokes, Anglo-Indian Codes, vol 1, p xxv.
42. *Koylash Chunder v Sonatun,* (1880) ILR 7 Cal 132.
43. *Jumma Masjid, Mercara v Kodimaniandra Deviah,* [1962] 2 SCR 554 (Supp) : AIR 1962 SC 847 : [1962] 2 SCJ 303.
44. *Maharani of Burdwan v Murtunjoy,* (1887) ILR 14 Cal 365, p 372 : 14 IA 30, p 35; *Aswini Kumar Ghosh v Arabinda Bose,* [1953] 4 SCR 1 : AIR 1952 SC 369.
45. *Toronto Corporation v Attorney-General of Canada,* [1946] AC 32, p 37; Craies, Statute law, 6th Edn, p 217.
46. *CIT v Indo Mercantile Bank Ltd,* [1959] 2 SCR 256 (Supp) : AIR 1959 SC 713; *Tahsildar Singh v State of Uttar Pradesh,* [1959] 2 SCR 875 (Supp) : AIR 1959 SC 1012.

Once the Legislature has defined a term in the interpretation clause, it is not necessary for it to use the same expression in other provisions of the Act. It is well settled that the meaning assigned to a term as defined in the interpretation clause unless the context otherwise requires should be given the same meaning.[47] If two special enactments contain provisions which give overriding effect to the provisions contained therein, then the Court is required to consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions.[48]

47. *Chairman, Indore Vikas Pradhikaran v Pure Industrial Cock & Chem Ltd*, AIR 2007 SC 2458 : JT 2007 (7) SC 352 : 2007 (8) SCALE 110 : (2007) 8 SCC 705.
48. *Employees Provident Fund Commissioner v OL of Esskay Pharmaceuticals Ltd*, AIR 2012 SC 11 : JT 2011 (13) SC 104 : 2011 (12) SCALE 479 : (2011) 10 SCC 727.

CHAPTER 1

Preliminary

Sections 1–4, Transfer of Property Act, 1882

1. Short Title.—This Act may be called the Transfer of Property Act, 1882.

Commencement.—It shall come into force on the first day of July, 1882.

Extent.—[1][It extends[2] in the first instance to the whole of India except [3][the territories which, immediately before the 1st November, 1956, were comprised in Part B States or in the States of Bombay, Punjab and Delhi.]

[4][But this Act or any part thereof may by notification in the Official Gazette be extended to the whole or any part of the [5][said territories] by the [6][State Government] concerned].

[7][And any [8][State Government may [9][***] from time to time, by notification in the Official Gazette, exempt, either retrospectively or prospectively, any

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1. Subs. by the A.O. 1950, for the original third paragraph.
2. The application of this Act was barred in the Naga Hills District, including the Mokokchang Sub-Division, the Dibrugarh Frontier Tract, the North Cachar Hills, the Garo Hills, the Khasea and Jaintia Hills and the Mikir Hills Tract, by notification under sec. 2 of the Assam Frontier Tracts Regulation, 1880 (2 of 1880). The Act has been declared to be in force in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (1 of 1929), sec. 2, and continued in force, with modifications, in the territory transferred to Delhi Province by the Delhi Laws Act, 1915 (7 of 1915), sec. 3 and Sch. III. It has also been partially extended to Berar by the Berar Laws Act, 1941 (4 of 1941). The Act has been extended with effect from 1st January, 1893, to the whole of the territories, other than the Scheduled Districts, under the administration of the Govt. of Bombay. Sections 54, 107 and 123 have been extended from 6th May, 1925 to all Municipalities in the Punjab and to all notified areas declared and notified under sec. 241 of the Punjab Municipal Act, 1911 (Pun. Act 3 of 1911), *see* Punjab Gazette, Extra., 1925, p. 27. These sections and section 129 have been extended to certain areas in Delhi Province, *see* Notifications No. 198/38-III, dated 30th May, 1939, Gazette of India, 1939, Pt. I, p. 918, and No. 61/40-Judl., dated 16th November, 1940, Gazette of India, 1940, Pt. I, p. 1639, respectively. The Act has been extended to Manipur by the Union Territories (Laws) Amendment Act, 1956 (68 of 1956). It has been rep. as to Government Grants by the Government Grants Act, 1895 (15 of 1895) and rep. or modified to the extent necessary to give effect to the provisions of the Madras City Tenants Protection Act, 1921 (Madras 3 of 1921) in the City of Madras; *see* sec. 13 of that Act. It has been amended in Bombay by Bombay Act 14 of 1939, and in Uttar Pradesh by Uttar Pradesh Act 24 of 1954. It has been extended to Pondicherry by Act 26 of 1968, sec. 3, Sch., Part I.
3. Subs. by the Adaptation of Laws (No. 2) Order, 1956, for "Part B States".
4. Subs. by the A.O. 1937, for the original paragraph.
5. Subs. by the Adaptation of Laws (No. 2) Order, 1956, for "said States".
6. Subs. by A.O. 1950, for "Provincial Government".
7. Subs. by Act 3 of 1885, sec. 1, for the original paragraph.
8. Subs. by A.O. 1950, for "Provincial Government".
9. The words "with the previous sanction of the Governor General in Council" omitted by Act 38 of 1920, sec. 2 and Sch. I.

part of the territories administered by such State Government from all or any of the following provisions, namely:—

Sections 54, paragraphs 2 and 3, 59, 107 and 123.]

[10]Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, and sections 59, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, [11][1908] (16 of 1908) under the power conferred by the first section of that Act or otherwise.]

Synopsis

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(1) Amendment

The only change made by the Transfer of Property (Amendment) Act 20 of 1929, is to change the year of Registration Act from 1877 to 1908.

(2) Power of State Government

The Privy Council in *Empress v Burah*[12] upheld the validity of the power conferred on the provincial governments to vary the extent of the TP Act. Subsequent to the enactment of the Constitution the Supreme Court has held that such a power is valid, but the state government or the executive cannot modify the TP Act. As a part of an Act can be extended by an executive authority, it follows that a section or sections also can be picked out and applied.[13]

Though Article 162 of the Constitution extends the executive power of a state to the matters with respect to which the legislature of the state has power to make laws, yet, neither the Central Government, nor state government can exercise its executive powers in relation to the aspects of transfer of property which are covered by the TP Act.[14]

(3) Application of Provisions of Act, where Act does not Apply, as Rules of Justice, Equity and Good Conscience

The Himachal Pradesh High Court has held that in the territories where the T P Act was not in force, the courts can rely upon the various provisions of the TP Act for guidance, if

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10. Added by Act 3 of 1885, sec. 2 (with retrospective effect). Section 54, paras 2 and 3 and sections 59, 107 and 123 extend to every cantonment—*see* section 287 of the Cantonment Act, 1924 (2 of 1924).
11. Subs. by Act 20 of 1929, sec. 2, for "1877".
12. *Empress v Burah,* (1877) ILR 4 Cal 172 : 5 IA 178; *State of Bombay v Narottamdas Jethabai,* [1951] SCR 51.
13. See *Rajnarain Singh v Chairman, Patna Administration Committee,* [1955] 1 SCR 290.
14. See *A Citizen of India v State of Karnataka,* (1996) ILR Kant 3136 approved in *Medical Council of India v State of Karnataka,* AIR 1998 SC 2423 : (1998) 6 SCC 131.

such provisions are in consonance with principles of justice, equity and good conscience.[15] However, this rule may not apply to provisions which embody technical rules.[16]

2. Repeal of Acts.—Saving of certain enactments, incidents, rights, liabilities, etc.—In the territories to which this Act extends for the time being the enactments specified in the Schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

(a) the provisions of any enactment not hereby expressly repealed;

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force;

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability; or

(d) save as provided by section 57 and chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction;

and nothing in the second Chapter of this Act shall be deemed to affect any rule of [17][***] Muhammadan [18][***] law.

Synopsis

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(1) Amendment

The only amendment made in this section by the amending Act 20 of 1929 is to omit the words "Hindu" and or "Buddhist" in the last paragraph of the section. As a result of the amendment, chapter II now also applies to Hindus and Buddhists.

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15. *Gulab Singh v Dilbaru,* AIR 1989 HP 23, p 25.
16. *Teja Singh v Kalyan Das,* (1925) ILR 6 Lah 487 : 91 IC 778 : AIR 1925 Lah 575; *Kanwar Ram v Ghugi,* 108 IC 57 : AIR 1928 Lah 148; *Ratan Chand v Smail,* 149 IC 853 : AIR 1933 Lah 821; *Melka Singh v Shankari,* AIR 1947 Lah 1; *Ram Gopal v Gurbux Singh,* AIR 1955 Punj 215.
17. The word "Hindu" omitted by Act 20 of 1929, sec. 3.
18. The words "or Buddhist" omitted by Act 20 of 1929, sec. 3.

(2) Nothing herein Contained

These words refer to the whole Act, and not to this section only.[19]

(3) Clause (a)—Enactments not Expressly Repealed

The TP Act does not apply to *patnis* which are governed by the Patni Regulation and Bengal Regulation (8 of 1819) because these Regulations have not been expressly repealed by the TP Act.[20] A surrender of land by *razinama* and *kabulayet* under the Bombay Land Revenue Code is not affected by the provisions of the TP Act, and is not void for want of registration.[21] The effect of clause (a) is to maintain intact the statutory force which the legislature has given to local usage in Punjab and Oudh.[22] The Andhra Pradesh High Court has held that because of this clause, section 59 of the TP Act cannot prevail over O 21, rule 34 of the Code of Civil Procedure, and that mortgages executed under that rule need not be attested by two witnesses.[23]

(4) Clause (b)—Saving of Incidents of Contract and of Property

A right of partition is an incident of property held in joint tenancy or tenancy in common which is not affected by the Act, and partition may be made orally.[24] Another such incident would be a right of pre-emption.

A mortgagee is entitled to be reimbursed for all costs reasonably incurred in respect of the mortgage security;[25] and this has been described as an implied term of a mortgage saved by this clause.[26]

(5) *Zamindar's* Right to Share of Sale-price

In certain areas, the *zamindar* has a customary right to recover one-fourth of the sale consideration for a house sold by the *riyaya*. This is a customary right of antiquity mentioned in the *wajibularz* of the village. It is based not on contract or encumbrance, but arises only on sale and is saved by section 2(c) from the operation of section 55. The *riyaya* has no saleable interest in a house in an agricultural village, but such a right is given to him on the understanding that if he leaves or abandons it, the *zamindar* gets one-fourth as *zare chahorum*. This custom was acknowledged because in settling the house, the *zamindar* had to make certain investments, and thus the custom matured into a legal force. The custom is not unreasonable or opposed to law.[27]

(6) Clause (c)—Saving of Rights and Liabilities Created before the Act

This clause follows the general rule that in the absence of a clear indication to the contrary, statutes affecting substantive rights are not retrospective. All rights, liabilities and remedies constituted before the TP Act came into force, are left in precisely the same position as if the

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19. *Ulfat Hossain v Gayani Dass,* (1909) ILR 36 Cal 802 : 3 IC 994; *Promotho Nath v Kali Prasanna,* (1901) ILR 28 Cal 744, p 750; *contra Naba Krishna v Mohit Kali,* 9 IC 840.
20. *Surendra Narain Sinha v Bijoy Singh,* (1925) ILR 52 Cal 655 : 89 IC 785 : AIR 1925 Cal 962.
21. *Motibhai v Desaibhai,* (1917) ILR 41 Bom 170 : 38 IC 838.
22. Whitley Stokes, Anglo-Indian Codes, vol 1, p 746; The Punjab Laws Act, 1872; The Oudh Laws Act, 1876.
23. *Genamal v Ramaswamy,* AIR 1960 AP 465.
24. *Gyannessa v Mobarakannessa,* (1898) ILR 25 Cal 210.
25. *National Provincial Bank v Games,* (1886) 31 Ch D 582.
26. *Varadarajulu v Dhanlakshmi,* (1914) 16 Mad LT 365 : 26 IC 184. See Code of Civil Procedure 1908, O 34, rule 10.
27. *Lala Badri Prasad v Gouri Shanker,* AIR 1973 All 162.

TP Act had not been passed. Thus, a mortgage executed before the TP Act is not invalid on the ground that it does not comply with the requirement of section 59 as to attestation.[28]

The provisions of the TP Act do not apply to a tenancy created before the TP Act came into force.[29] Section 108 (j) is not retrospective, and a tenancy, which was not transferable before the TP Act, does not become so, by virtue of that section.[30] Provisions of section 108 (o) as to waste do not apply to a lease executed before the Act.[31] Similarly, section 111(d) has no application to leases executed before the TP Act, and a *mokarari* lease granted before the TP Act is not extinguished by merger in a *patni* subsequently granted.[32]

(7) Clause (d)—Transfer by Operation of Law

The TP Act, save and except certain exceptions referred to below, does not apply to transfers by the operation of law, but is limited, as stated in the preamble, to transfers "by act of parties". A transfer by the operation of law is not validated or invalidated by anything contained in the TP Act.[33] Transfers by operation of law occur in cases of testamentary and intestate succession, forfeiture, insolvency and court-sales. A purchaser at a court-sale acquires title by operation of law,[34] and at such sales, title is transferred without a registered deed;[35] a purchaser of a debt at an execution sale is not affected by section 135.[36] The title of the auction purchaser is derived from the sale certificate, and not from the *dakhalnama* which is simply a document of delivery of possession.[37]

Questions have arisen as to whether transfers between parties under orders or directions issued under legislation such as the Essential Commodities Act are "sales" within the meaning of the Sale of Goods Act. It has been held that there is no sale where the element of mutual assent is absent, as is the case when property is compulsorily acquired.[38] The Supreme Court in *Vishnu Agencies (Pvt) Ltd v Commercial Tax Officer,*[39] held that a mere regulatory law even if it circumscribes the area of free choice does not

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28. *Jati Kar v Mukunda Deb,* (1912) ILR 39 Cal 227, p 230 : 11 IC 884.
29. *Hiramoti v Annoda Prosad,* (1908) 7 Cal LJ 553; *Madhab Chandra v Bejoy Chand,* (1901) 4 Cal WN 574; *Ananda v Gobinda,* (1916) 20 Cal WN 322 : 33 IC 565; *Chota Nagpur Banking Association v Kamakhya Narayan,* (1928) ILR 7 Pat 341 : 109 IC 306 : AIR 1928 Pat 431; *Durgi Nikarini v Gobordhan,* (1914) 19 Cal WN 525, p 527 : 24 IC 183.
30. *Hari Nath v Raj Chandra,* (1897) 2 Cal WN 122; *Madhu Sudan v Kamini,* (1905) ILR 32 Cal 1023, p 1029; *Umakanta v Kashiram,* 23 IC 246; *Ananda v Gobinda,* (1916) 20 Cal WN 322; *Sarda Kanta v Nabin Chandra,* (1927) ILR 54 Cal 333 : 97 IC 817 : AIR 1927 Cal 39; *Sulin Mohan v Raj Krishna,* (1921) 25 Cal WN 420 : 60 IC 826 : AIR 1921 Cal 582.
31. *Meghlal v Rajkumar,* (1907) ILR 34 Cal 358, p 370.
32. *Hirendra Nath v Hari Mohan Ghosh,* (1914) 18 Cal WN 860 : 22 IC 966; *Ram Bissen Dutt v Haripada,* (1919) 23 Cal WN 830 : 51 IC 389.
33. *Bharat Petroleum Corpn Ltd v P Kesavan,* (2004) 9 SCC 772, paras 12 & 20 : AIR 2004 SC 2206; *Harishchandra Hegde v State of Karnataka,* (2004) 9 SCC 780, pars 13 & 17 : (2005) 11 JT 331; *Promotho Nath v Kali Prasanna,* (1901) ILR 28 Cal 744.
34. *Dinendronath Sannyal v Ramcoomar Ghose,* (1881) ILR 7 Cal 693 : 8 IA 65, p 75.
35. *Balaji v Dajiba,* (1889) 2 CP LR 137.
36. *Krishnan v Perachan,* (1892) ILR 15 Mad 382.
37. *Krishna Mohan v Balkrishna Chaturvedi,* AIR 2001 All 334, para 26.
38. *Kirkness v John Hudson & Co Ltd,* (1955) AC 696 : [1955] 2 All ER 345.
39. *Vishnu Agencies (Pvt) Ltd v Commercial Tax Officer,* (1978) 1 SCC 520, the court overruled its earlier decision in *New India Sugar Mills Ltd v Commr of Sales Tax,* [1963] 2 SCR 459 (Supp) : AIR 1963 SC 1207 wherein they held that under control legislations the seller is compelled to sell and the element of mutual consent is missing. See also *Indian Steel and Wire Products v State of Madras,* [1968] 1 SCR 479 : AIR 1968 SC 478.

take away the basic character, or the core of sale from the transaction. Such a law which governs a class, may oblige sellers to deal only with parties holding licences who may buy particular or allotted quantities of goods at specified prices, but an essential element of choice is still left to the parties between whom agreements took place. The court held that cases[40] of compulsory acquisition by the state stand on a different footing since in such cases, there is neither any question of offer and acceptance, nor of consent, either express or implied.

The principle of these decisions must be applied with caution to the provisions of TP Act, as an involuntary "sale" is not necessarily a transfer by the operation of law. Legislature can modify, annul and substitute the contracts *inter-vivos*. Therefore, when by a legislative provision parties to the lease are substituted, it cannot be held that there is assignment or transfer of the lease or sub-letting of the premises, by the lessee to the person or authority in whom the leasehold rights are vested by operation of law.[41]

However, although section 2(d) makes the TP Act inapplicable to transfers by operation of law, the principle of some sections, for instance section 36,[42] section 44,[43] and section 53[44] has been applied to such transfers.

Exception as to section 57 and chapter IV of the Act

An exception is made with reference to section 57 and chapter IV as the latter provides for the transfer and extinction of a mortgagor's interest by a decree of the court, and the former provides for the discharge of encumbrances by order of a court. With reference to these sections, section 2(d) overrides the provisions of section 5.[45]

(8) Mahomedan Law

Section 2 says that "nothing in the second Chapter of this Act shall be deemed to affect any rule of Mahomedan law." The reason for this provision is that some of the rules of law differ from the general rules as to the transfer of property enacted in chapter II. Thus, a Mahomedan may settle property in perpetuity for the benefit of his descendants, provided there is an ultimate gift in favour of charity.[46]

This rule is not affected by section 13 and 14 of the TP Act. The Mahomedan law of gifts is expressly saved by section 129. Under that law, writing is not essential to the validity of a gift,[47] but delivery of possession or of such possession as the subject-matter of the gift is susceptible of, is necessary for a transfer by way of gift.[48]

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40. For instance *Chhitter Mal Narain Das v Commr of Sales Tax,* (1970) 3 SCC 809; *Kirkness v John Hudson & Co Ltd,* (1955) AC 696 : [1955] 2 All ER 345.
41. *G Sridharamurthi v Hindustan Petroleum Corpn Ltd,* AIR 1991 Kant 249, p 252; see sections 3, 4, 5(1) of Esso (Acquisition of Undertakings in India) Act, 1974.
42. *Shivaprasad v Prayag Kumari,* (1934) ILR 61 Cal 711 : 154 IC 479 : AIR 1935 Cal 39.
43. *Puddipeddi Laxminarasamma v Gadi Rangnayakamma,* AIR 1962 Ori 147.
44. *Akramunissa Bibi v Mustafa-un-nissa Bibi,* (1929) ILR 51 All 595 : 116 IC 445 : AIR 1929 All 238; *Chattru Mal v Mt Majidan,* (1934) ILR 15 Lah 849 : 150 IC 888 : AIR 1934 Lah 460.
45. *Laxmi Devi v S M Kanwar,* [1965] 1 SCR 226 : AIR 1965 SC 834 : [1965] 2 SCJ 656.
46. See the Wakf Validating Act, 1913, to which retrospective effect was given by the Musalman Wakf Validating Act, 1930.
47. See *Kamar-un-Nissa v Husaini Bibi,* (1880) ILR 3 All 267.
48. *Sadik Husain v Hashim Ali,* (1916) ILR 38 All 627 : 43 IA 212 : 36 IC 104; *Chaudhri Medhi Hasan v Muhammad Hasan,* (1906) ILR 28 All 439 : 33 IA 68; *Mohammad v Fakhr Jahan,* 49 IA 195, 209 : 68 IC 254 : AIR 1922 PC 281.

Although section 2 saves rules of Mahomedan law, it does not follow that the general rules in chapter II cannot apply to Mahomedan transfers. These general rules are excluded only if there is an inconsistent rule of Mahomedan law. Where there is no inconsistent rule of Mahomedan law, the sections in chapter II apply *proprio vigore*, for all that section 2 says is that nothing in chapter II shall be deemed to affect any rule of Mahomedan law. However, in any case not covered either by the sections in chapter II or by Mahomedan law, the English law is applied on the ground of justice, equity and good conscience.[49]

(9) Hindu Law

The TP Act as it stood before the amending Act 20 of 1929, also saved rules of Hindu law. The word "Hindu" has been omitted as the differences between that law and the TP Act have now been removed. These differences were:

(1) The rule in *Tagore v Tagore*[50] and *Chundi Churn v Sidheswari*,[51] that bequests and transfer in favour of unborn persons are wholly void, was in conflict with sections 13, 14 and 20 of the TP Act. The Hindu law on this subject had been modified by the Hindu Disposition of Property Act, 1916, Madras Act, 1914, and Act 8 of 1921, which validated such transfers. These Acts have been amended by sections 11, 12 and 13 of Act 21 of 1929, and the effect of the amendments is that subject to the limitations in chapter II of TP Act and in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925, no transfer *inter vivos*, or by will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition. The TP Act is in consonance with these amendments and so the word "Hindu" is omitted in this section.

(2) Another difference was the rule enacted in sections 15 and 16 of the TP Act before the amendment in 1929, that if a transfer to a class fails as to some of its members by reason of remoteness, it fails as to the whole class. This was in conflict with Hindu law, and the sections have been amended so as to accord with the law.

(10) Rule of *Damdupat*

The Hindu rule of *damdupat*, under which interest exceeding principal cannot be received at any one time, ceases to operate from the date of a suit on a mortgage.[52] There are conflicting decisions as to whether the rule applies in the case of mortgages governed by the TP Act, it being held by Madras High Court that it does not,[53] and by Bombay and Calcutta High Courts,[54] that it does. The amendment of section 2(d) by Act 20 of 1929 does not affect those decisions.

(11) Buddhist Law

Prior to 1929, the TP Act saved rules of Buddhist law, but the words "or Buddhist" which occurred in section 2(d) have now been omitted.

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49. *Muhammad Raza v Abbas Bandi Bibi*, 59 IA 236 : (1932) All LJ 709 : 34 Bom LR 1048 : 63 Mad LJ 180 : 137 IC 321 : AIR 1932 PC 158.
50. *Tagore v Tagore*, (1872) 9 Beng LR 37.
51. *Chundi Churn v Sidheswari*, (1889) ILR 16 Cal 71 : 15 IA 149.
52. *Dhondshet v Ravji*, (1898) ILR 22 Bom 86; Re *Hari Lal Mullick*, (1906) ILR 33 Cal 1269.
53. *Madhwa v Venkata*, (1903) ILR 26 Mad 662.
54. *Jeewanbai v Manordas*, (1911) ILR 35 Bom 199 : 8 IC 649; *Kunja v Narsamba Debi*, (1915) ILR 42 Cal 826 : 31 IC 6. For a fuller discussion of the rule of *damdupat*, see *Mulla's Hindu Law*.

(12) Government Grants

Government grants are exempted from the operation of the TP Act by section 2 of the Government Grants Act, 1895. That Act excludes the operation of the TP Act to transfers made by or on behalf of the government.[55] Thus, the rights and obligations of parties would be governed by the terms of the provisions of the Government Grants Act, 1895, where under the government would be entitled to impose limitations and restrictions upon grants and other transfers made by it or under its authority.[56]

Where there is ambiguity in the document of grant, the terms of the grant have to be construed strictly against the grantor and in favour of the grantee.[57]

3. Interpretation-clause.—In this Act, unless there is something repugnant in the subject or context,—

"immovable property" does not include standing timber, growing crops, or grass;

"instrument" means a non-testamentary instrument;

"[58][attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;]

"registered" means registered in [59]["[60][any part of the territories] to which this Act extends] under the law[61] for the time being in force regulating the registration of documents;

"attached to the earth" means—

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

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55. *Dwarkaprasad v Kathleen,* AIR 1955 Nag 38; *West Bengal v Birendra Nath,* 59 Cal WN 610.
56. *Pradeep Oil Corporations v Municipal Corporation of Delhi,* AIR 2011 SC 1869 : (2011) 5 SCC 270.
57. *Shree Gujarati Harijan Co-operative Housing Society v Addl Collector, Bombay,* AIR 1992 Bom 263, p 267; *Sahebzada Mohamad Kamgarh Shah v Jagdish Chandra Deo Dhabal Deb,* AIR 1960 SC 953; *Delhi Development Authority v Durgachand Kaushish,* AIR 1973 SC 2609 : (1973) 2 SCC 825.
58. Ins. by Act 27 of 1926, sec. 2 as amended by Act 10 of 1927, sec. 2 and Sch. I.
59. Subs. by Act 3 of 1951, sec. 3 and sch., for "a Part A State or a Part C State" (w.e.f. 1-4-1951).
60. Subs. by the Adaptation of Laws (No. 2) Order, 1956, for "any State".
61. *See* the Indian Registration Act, 1908 (16 of 1908).

[62]["actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;]

[63]["a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:]

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (16 of 1908), and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.— Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.— A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

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62. Ins. by Act 2 of 1900, sec. 2.
63. Subs. by Act 20 of 1929, sec. 4 as amended by Act 5 of 1930, sec. 2 for the original paragraph.

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

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(1) Amendments

The only amendment made in this section by the amendment Act of 1929 is with regard to the definition of "a person is said to have notice".

(2) Immovable Property—General

The distinction between movable and immovable property was explained by Holloway J in an old case[64] decided by Madras High Court, as follows:

> Movability may be defined to be the capacity in a thing of suffering alteration of the relation of place immovability in capacity for such alteration. If, however, a thing cannot change its place without injury to the quality by virtue of which it is, what it is, it is immovable. Certain things such as a piece

64. *Sukry Kurdepa v Goondakull,* (1872) 6 Mad HC 71.

of land are in all circumstances immovable. Other things such as trees attached to the ground are, so long as they are so attached, immovable; when the severance has been effected they become movable.

The definition of "immovable property" in section 3(26) of the General Clauses Act is not exhaustive. That definition is as follows:

Immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

The TP Act defines the phrase "attached to the earth", but gives no definition of immovable property beyond excluding standing timber, growing crops and grass. These are no doubt excluded because they are only useful as timber, corn and fodder after they are severed from the land. Before they are so severed, they pass on transfer of the land under section 8 as things attached to the earth.

A "benefit to arise out of land" is an interest in land and, therefore, immovable property. The Registration Act, however, expressly includes as immovable property benefits arising out of land, hereditary allowances, rights of way, lights, ferries and fisheries.

From a combined reading of the definition of "immovable property" in section 3 of the TP Act and section 3(5) of the General Clauses Act, it is evident that in an immovable property, there is neither mobility, nor marketability as understood in the excise law.[65]

In the larger definition of "immoveable property" "anything attached to the earth" would normally be treated as immoveable property and a tree which is attached to the earth and seeks its nourishment and sustenance from the soil in which it stands will be deemed to be attached to the earth with the only distinction that if it was tree of a kind which is usually used as timber and was of sufficient size so as it could be used as such and is intended to be severed from the soil reasonably thereafter, it may be treated to be immoveable property. Therefore, apart from the size of the trees, the relevant consideration would be the intention to cut the tree or to let it remain attached to the earth. In the former case, it will be termed as "standing timber" while in the latter it must remain immovable property.[66]

(3) Various items of Property

The definition of immovable property in the General Clauses Act applies to TP Act.[67] Since the definition in the TP Act is negative and not exhaustive, section 3(26) of General Clause Act applies except as modified by the definition in the first clause of section 3.[68] In the absence of a special definition, general definition must prevail.[69]

The following have been held to be immovable property:

A tree (except standing timber),[70] *varashasan* or annual allowance charged on land;[71] a right to collect dues at a fair held on a plot of land;[72] a *haat* or market;[73] a right to

65. *Triveni Engineering & Industries Ltd v Commr of Central Excise,* (2000) 7 SCC 29 : AIR 2000 SC 2896.
66. *Jagdish (deceased by LRs v Mangal Pandey (deceased by LRs),* AIR 1986 All 182 : 1985 11 AWC 986 All.
67. See section 4 of the General Clauses Act, 1897; *Babu Lal v Bhawani,* (1912) 9 All LJ 776 : 15 IC 32.
68. *Tarkeshwar Sia Thakurji v Dar Das Dey Co,* (1979) 3 SCC 106.
69. *Shantabai v State of Bombay,* AIR 1958 SC 532, para 28; See also *Suresh Chand v Kundan,* (2001) 10 SCC 221, para 6 : (2000) 7 SCALE 620: "As there is no special definition of immovable property, the general definition contained in the General Clauses would prevail."
70. Ibid.
71. *Keshav v Vinayak,* (1899) ILR 23 Bom 22; *Collector of Thana v Hari Sitaram,* (1882) ILR 6 Bom 546.
72. *Sikander v Bahadur,* (1905) ILR 27 All 462.
73. *Surendra Narain v Bhai Lal,* (1895) ILR 22 Cal 752; *Golam Mohiuddin v Parbati,* (1909) ILR 36 Cal 665 : 1 IC 520; see also *Province of Bengal v Hingul Kumari,* (1945) 50 Cal WN 184 : 225 IC 130 : AIR 1946 Cal 217, where it was held that a *haat* of the kind then described was not land or immovable property.

possession and management of a *saranjam*;[74] a *malikana*;[75] a right to collect or *jana*;[76] a life interest in the income of immovable property;[77] a right of way;[78] a ferry;[79] a fishery;[80] a lease of land.[81] The Supreme Court has held that trees, which at the time of agreement for sale, were mere saplings on the land would vest in the transferee.[82] Right of enjoyment of immovable property under a lease (section 105) is immovable property, and would pass under a will which uses the words "all my movable and immovable properties."[83] The right of enjoyment contemplated by section 105 is an interest in the immovable property. The agreement of lease confers on the lessee the right to possess the immovable property which is subject matter of the lease. Where the words used in the will were "all my movable and immovable properties", those words would cover a tenancy also.[84] It has been held by the Supreme Court[85] that a right to enter upon land and to carry away fish from a lake is a right to *profits a pendre* and that it amounts to immovable property in India as a benefit arising from land. Therefore, the sale of tank excavated out of fertile land and on which fisheries rights were being exercised has to be made by registered instrument.[86] Similarly, a right to enter upon land and remove trees has been held by the Supreme Court to require registration.[87] A right to graze over the land of another is a profit.[88] Under these decisions, right to *profits a pendre* are benefits arising from land, and, therefore, immovable property, unless they relate to standing timber, growing crops or grass, which are specifically excluded by section 3. A contract for the purpose of felling, cutting, obtaining and removing bamboo from forest areas "for the purpose of converting the bamboo into paper pulp or for purposes connected with the manufacture of paper or in any connection incidental therewith" was held to be a grant of a *profit a prendre*, or a benefit to arise out of land.[89] A right given to rear lac has been held to amount to a loan interest in immovable property,[90] and so is a right to collect rents from tenants who pay for the use and occupation of land.[91] On the other hand, a royalty is not immovable property;[92] nor a right

74. *Narayan v Vasudeo*, (1891) ILR 15 Bom 247.
75. *Churaman v Balli*, (1887) ILR 9 All 591; *Hurmuzi Begum v Hirdaynarain*, (1878) ILR 5 Cal 921.
76. *Babu Lal v Bhawani*, (1912) 9 All LJ 776; *Bhudeb Chandra v Bikshukur Palta-Naik*, 196 IC 837 : AIR 1942 Pat 120; *Daw Yai v U Men Sin*, 187 IC 762 : AIR 1940 Rang 102.
77. *Nathha v Dhunbaiji*, (1899) ILR 23 Bom 1; *Moolla & Sons v Official Assignee, Rangoon*, 63 IA 340 : (1936) All LJ 832 : 38 Bom LR 1011 : 163 IC 418 : AIR 1936 PC 230.
78. *Bejoy Chandra v Bunku Bihari*, (1908) 13 Cal WN 451 : 4 IC 116.
79. *Krishna v Akilandu*, (1885) ILR 13 Mad 54, see also section 2(6) of Registration Act, 1908.
80. *Parbutty v Mudho Paroe*, (1876) ILR 3 Cal 276; *Fadu Jhala v Gour Mohun*, (1892) ILR 19 Cal 544; *Ram Gopal v Nurumuddin*, (1893) ILR 20 Cal 446; *Shibu Haldar v Gupi Sundari*, (1897) ILR 24 Cal 449; *Bhundal Panda v Pandol Pos Patil*, (1888) ILR 12 Bom 221, see also section 2(6) of Registration Act, 1908.
81. *Ramchandra v Subrayya*, AIR 1951 Bom 127. This passage was approvingly referred to from the fifth edn of this book by the Supreme Court in *State of Orissa v Titaghar Paper Mills Co Ltd*, AIR 1985 SC 1293, pp 1335–1336.
82. *Suresh Chand v Kundan* (2001) 10 SCC 221, para 6 : (2000) 7 SCALE 620.
83. *Kenneth Solomon v Dan Singh Bawa* AIR 1986 Del 1.
84. Ibid.
85. *Anand Behera v State of Orissa*, [1955] 2 SCR 919 : AIR 1956 SC 17; *Ganesh Chandra v State of West Bengal*, AIR 1958 Cal 114.
86. *Biranchi Padhan v Collector, Bolangir*, AIR 2017 Orissa 154 : LNIND 2017 ORI 244.
87. *Shantabai v State of Bombay*, [1959] 1 SCR 265 : AIR 1958 SC 532.
88. *White v Taylor, No 2* (1969) 1 Ch 160 : [1968] 1 All ER 1015.
89. *State of Orissa v Titaghar Paper Mills Co Ltd*, AIR 1985 SC 1293, p 1337.
90. *Parmanandy v Birkhu*, (1909) 5 Nag LR 21 : 1 IC 903; *Kamal Singh v Kali Mahton*, AIR 1955 Pat 402.
91. *Udaya Narayan v Badriya Dasi*, AIR 1952 Oudh 116.
92. *Krishna v Kusunda Collieries*, 65 IC 673 : AIR 1922 Pat 36.

to recover maintenance though charged on land;[93] nor the right of a purchaser to have the land purchased registered in his name.[94]

With reference to the Limitation Act, 1963, the Privy Council said that the words "immovable property" were used as something less technical than "real", and included all that would be real property under English law and possibly more, and that if the nature and quality of the property can only be determined by Hindu law and usage, the Hindu law may properly be invoked for the purpose.[95] Accordingly, a *todayira's hak* or an *inamdar's* right to an annual payment from a village is immovable property.[96] For the same reason, a priest's right to recover dues at a funeral;[97] a right granted by the Peshwas to levy toll on exports of grain;[98] and a right of assessment[99] have been held to be immovable property. On the other hand, a *pala* or turn of worship is movable property.[100] A *yajman vritti* though treated as immovable property, is not immovable property in the proper sense of the word and the assignment of a right to collect offerings from *yajmans* for a period of years is not a lease.[101] Similarly, the amount payable by a *yajman* to a panda when the former visits the holy place is not immovable property.[102] A vested remainder is immovable property.[103] Plant and machinery permanently embedded in the earth with an intention to use it as such has to be construed as immovable property.[104] The mere attachment to earth does not qualify a plant to be treated as immovable property and to qualify as immovable property, the attachment has to be for the permanent beneficial enjoyment of the land and should not have separate existence devoid of the land.[105]

(4) Mortgages

An equity of redemption is immovable property,[106] and so is the mortgagee's interest in the immovable property mortgaged.[107] There are many conflicting decisions as to whether a mortgage debt is immovable property, but since a mortgage debt has been excluded from the definition of an actionable claim by Act 2 of 1900, it seems that a mortgage debt is for all intents and purposes, immovable property,[108] though for the purposes of attachment it is treated as

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93. *Altaf Begam v Brij Narain,* (1929) ILR 51 All 612, p 618 : 116 IC 855 : AIR 1929 All 281.
94. *Bhikiji v Pandu,* (1895) ILR 19 Bom 43.
95. *Maharana Futtehsangji v Desai Kallinaraiji,* (1874) 1 IA 34, pp 50–51 : 13 Beng LR 254, approving *Krishnabhat v Kapabhat,* (1870) 6 Bom HC 137 and *Balwantrao v Purushotam,* (1873) 9 Bom HC 99; *Collector of Thana v Krishnanath,* (1881) ILR 5 Bom 322.
96. *Maharana Futtehsangi v Desai Kallianraiji,* (1874) 1 IA 34, pp 50–51.
97. *Raghoo v Kasshy,* (1883) ILR 10 Cal 73; *Sukh Lal v Bishambhar,* (1917) ILR 39 All 196 : 37 IC 661.
98. *Krishnaji v Gajanan,* (1909) ILR 33 Bom 373 : 2 IC 489.
99. *Madhavrao v Kashibai,* (1910) ILR 34 Bom 287 : 5 IC 599.
100. *Eshan Chander v Monmohini,* (1879) ILR 4 Cal 683; *Jati Kar v Mukunda Deb,* (1912) ILR 39 Cal 227 : 11 IC 884; *Narasingha v Prolhadman,* (1919) ILR 46 Cal 455 : 47 IC 25; *Nitya Gopal v Nani Lal,* (1920) ILR 47 Cal 990 : 56 IC 19; *Jagdeo Singh v Ram Saran Pande,* (1927) ILR 6 Pat 245 : 97 IC 332 : AIR 1927 Pat 7.
101. *Kodulal v Beharilal,* 137 IC 136 : AIR 1932 Sau 60.
102. *Balkreshna v Salegram,* AIR 1947 All 391.
103. *Sothamaya v Vallipallia,* AIR 1939 Mad 802.
104. *Duncan Industries v State of Andhra Pradesh,* (2000) 1 SCC 633, para 8 : AIR 2000 SC 355.
105. *Commissioner for Central Excise, Ahmedabad v Solid and Correct Engineering Works,* (2010) 5 SCC 122 : 2010 (3) SCALE 598 : [2010] 4 SCR 476.
106. *Mahalavu v Kusaji,* (1894) ILR 18 Bom 739; *Parashram v Govind,* (1897) ILR 21 Bom 226; *Kanti Ram v Kutubuddin* (1895) ILR 22 Cal 33.
107. *Paresh Nath v Nabogopal,* (1902) ILR 29 Cal 1; *Sohan Lal v Mohan Lal,* (1928) ILR 50 All 986 : 118 IC 177 : AIR 1928 All 726; *Jang Bahadur v Bhagatram,* (1930) ILR 52 All 232 : 122 IC 409 : AIR 1930 All 110; *Pralhad v Maganlal,* AIR 1952 Bom 454.
108. *Sakhiuddin v Sonaullah,* (1917) 22 Cal WN 641 : 45 IC 986; *Perumal v Perumal,* (1921) ILR 44 Mad 196 : 61 IC 461 : AIR 1921 Mad 137; *Official Receiver v Lakshman,* (1921) 41 Mad LJ 453 : 68 IC 752 : AIR 1921 Mad 681; *Elumalai v Balakrishna,* (1921) ILR 44 Mad 965, p 968 : 66 IC 168 : AIR 1922 Mad 344 (equitable mortgage); *Banarsi Das v Ramchander,* 141 IC 421 : AIR 1933 Lah 210.

movable property.[109] A Full Bench of the Rangoon High Court has said that a mortgage, being a transfer of an interest in immovable property, is immovable property, and that a suit to enforce a mortgage is a suit for land under the Letters Patent of the Chartered High Courts.[110]

(5) Standing Timber

Standing timber are trees fit for use for the purpose of building or repairing houses.[111] This is an exception to the general rule that growing trees are immovable property.[112] In order that trees may be considered to be standing timber, they must first be trees whose wood is suitable for use for building houses, bridges, ships, etc.[113] In English law, this would refer to oak, ash or elm trees;[114] and in India, to *neem, shisham,*[115] *babul,*[116] or teak trees.[117] If a tree is a growing tree, drawing sustenance from the soil, it is immovable property; where, however, it is to be cut soon, the amount of sustenance it will draw from the soil is negligible, and is to be disregarded. This distinction is well brought out by Sir Edward Vaughan Williams in a passage cited by Lord Coleridge CJ in *Marshall v Green*:[118]

> The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, is to be considered as a mere warehouse of the thing sold, and the contract is for goods.

In a separate but concurring judgment in *Shantabai v State of Bombay,*[119] Bose J has adopted the same test; and the same view has been taken in some other decisions.[120]

A fruit-bearing tree would not be standing timber, and would be classed as immovable property;[121] in areas, however, where mango trees are used for building or repairing houses, it

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109. *Tarvadi v Bai Kashi,* (1904) ILR 26 Bom 305; *Nataraja v South Indian Bank,* (1914) ILR 37 Mad 51 : 13 IC 91; *Debendra v Rup Lal,* (1885) ILR 12 Cal 546; *Karim-un-nissa v Phul Chand,* (1893) ILR 15 All 134; *Lal Umrao v Lal Singh,* (1924) ILR 46 All 917 : 80 IC 890 : AIR 1924 All 796.
110. *VERMNCT Chettyar v ARARRM Chettyar Firm,* (1934) ILR 12 Rang 370 : 151 IC 519 : AIR 1934 Rang 250.
111. *Krishnarao v Babaji,* (1900) ILR 24 Bom 31; *Joseph Annamma,* (1979) Ker LT 322.
112. *Sukry v Goondakull,* (1872) 6 Mad HCR 71.
113. See *Shantabai v State of Bombay,* [1959] 1 SCR 265 : AIR 1958 SC 532.
114. See *Halsbury's Laws of England,* 3rd Edn, vol 17, p 624; oak, ash and elm trees over 20 years old are standing timber, and not, trees less than six inches in diameter.
115. *Nanhe Lal v Ram Bharose,* (1938) ILR All 115; *Baijnath v Ramdhar,* (1963) All LJ 33 : AIR 1963 All 214.
116. *Ram Kumar v Krishna Gopal,* AIR 1946 Oudh 106.
117. *Kunhikoya v Ahmed Kutty,* AIR 1952 Mad 39 : (1951) 1 Mad LJ 453.
118. *Marshall v Green,* (1875) 1 CPD 35, p 39.
119. *Shantabai v State of Bombay,* [1959] 1 SCR 265 : AIR 1958 SC 532.
120. *Seeni v Santhanathan,* (1897) ILR 20 Mad 58; *Ali Hossain Shaik v Jonabali Mondal,* (1935) 62 Cal LJ 534 : 167 IC 206 : AIR 1936 Cal 770; *District Board, Banares v Churhu Rai,* 1956 All LJ 872 : AIR 1956 All 680; *Appalaraju v Yedu Kondala,* AIR 1958 Pat 713; *Baijnath v Ramadhar,* 1963 All LJ 33 per Beg, J dissenting. See however *Krishnarao v Babaji,* (1900) ILR 24 Bom 31; *Rameshwar Singh Bahadur v Bahadur v Basudeva Singh,* AIR 1923 Pat 95; *Ibadullah v Lachmi Narain,* 93 IC 358 : AIR 1926 All 350; *Nanhe Lal v Ram Bharose,* (1938) ILR All 115; *Baijnath v Ramnadhar,* 1963 All LJ 33, wherein it was held that irrespective of when the trees are intended to be cut they would be covered under the expression "standing trees". The decisions in light of both the legislative intent and the Supreme Court's ruling, it is submitted are incorrect.
121. *Alisaheb v Mohidin,* (1911) 13 Bom LR 874 : 12 IC 375; *Katwani v Ram Adhin,* (1912) 10 All LJ 516 : 17 IC 910: *Sakharam v Vishram,* (1895) ILR 19 Bom 207, p 208; *Moti Singh v Deoki Singh,* 160 IC 1054 : AIR 1936 Pat 46.

may be standing timber.[122] A *mahua* tree is not standing timber;[123] nor palm or date-trees used for the purpose of drawing toddy.[124] An agreement to sell standing and fallen mango and jackfruit trees on the estate is an agreement to sell immovable property.[125] In execution of a decree passed in a money suit, the trees and bamboo clumps in agricultural lands of the plaintiffs, who were having half-share in the land and were not parties to the money suit, were auctioned, treating the trees and bamboo clumps to be movable property (being standing timber). However, for nearly 10 years thereafter, no effort was made by the purchasers to cut the trees as timber, and there was nothing to show that the purchasers made any effort to either seek an auction of trees in order to share half the price for which they may be sold, or in any way to seek partition of same. It could not be presumed that the purchasers actually intended to cut away the trees as timber. Thus, the trees and bamboo clumps must be held to be immovable property and the Small Cause Court did not have jurisdiction to proceed to execute the decree by sale of the trees, treating them as "movable property".[126]

If all the factors go to indicate that the parties intended to deal with the tree as timber, then it would be called standing timber. Standing timber is not "immovable property" and a document relating thereto, does not require registration.[127]

(6) Growing Crops

These are not limited to annual crops or emblements as they are called in English law. Growing crops have been held to include all vegetable growths, which have no existence apart from their produce such as *pan* leaves[128] and sugarcane.[129]

(7) Grass

Grass is movable property, but it would appear that a right to cut grass would be an interest in land and, therefore, immovable property. A sale of growing grass to be moved and made into hay by the purchaser has been held in English law to be an interest in land,[130] but not so, if the vendor has to cut the grass and deliver it to the purchaser.[131] A lease of a mango grove entitling the lessee to the grass growing on the land is a lease in respect of immovable property. In a case decided by Full Bench of Madras High Court case,[132] Collins CJ said:

> It has long been settled that an agreement for the sale and purchase of growing grass, growing timber or underwood, or growing fruit, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land.

(8) Movable Property

There is no definition of movable property in the TP Act. Movable property has been defined in the General Clauses Act to mean "property of every description except immovable

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122. *Nahanchand v Modi,* (1907) ILR 31 Bom 183, p 197; *Bodhe Ganderi v Ashloka Singh,* (1926) ILR 5 Pat 765 : 98 IC 779 : AIR 1927 Pat 1.
123. *Chandi v Sat Narain,* 81 IC 650 : AIR 1925 Oudh 108.
124. *Moti Singh v Deoki Singh,* 160 IC 1054 : AIR 1936 Pat 66; *Sheik Jan Mohammad v Umanath Misra,* AIR 1962 Pat 441.
125. *Suresh Chander v Kundan,* 2007 (7) SCALE 620.
126. *Jagdish v Mangal Pandey,* AIR 1986 All 182.
127. *State of Himachal Pradesh v Motilal Pratap Singh & Co,* AIR 1981 HP 8.
128. *Atmaram v Doma,* (1897) 11 CPLR 87.
129. *Kalka v Chandan,* (1888) ILR 10 All 20.
130. *Crosby v Wadsworth,* (1805) 6 East 602.
131. *Washbourn v Burrows,* (1847) 1 Exch 107.
132. *Mahadev Prasad v Enayab Ilahi,* AIR 1951 All 608.

property". The Registration Act defines movable property to include property of every description excluding immovable property, but including standing timber, growing crops and grass.[133] Electricity is a movable property.[134]

(9) Instrument

The definition of movable property excludes a will. The word instrument is used in the sense defined in *Somu v Rangammal*[135] as being not only evidence of the transaction, but the transaction itself.

When execution of the Will is fully proved then in order to ascertain the wishes of the testator we have to look to the text of the Will. The intention of the testator has to be discerned from the language used in the Will. If a Will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Statute, a presumption of due execution and attestation applies.[136] The Supreme Court, in *Mathai Samuel v Eapen Eapen (dead) by LRs,*[137] declared that "subsequent events or conduct of parties after the execution of the document shall not be taken into consideration in interpreting a document especially when there is no ambiguity in the language of the document."

(10) Attested

The definition of the word "attested" was inserted by the Transfer of Property (Amendment) Act 27 of 1926, and was further amended by the insertion of the words "and shall be deemed always to have meant" by the Repealing and Amending Act, 1927, to show that the definition had retrospective effect.

Section 63 of the Indian Succession Act read with section 68 of the Evidence Act and section 3 of the TP Act makes a mandatory obligation to have the document attested, and evidence of such attestation be made available before the court at the time of the trial.[138]

In English law, attestation implies that the attesting witness was present at execution, and can testify that the deed was executed voluntarily by the proper person.[139] Prior to 1912, the courts in India were sharply divided as to whether the word is used in this narrow sense in the TP Act, or whether it includes attestation on admission of execution as in the case of Indian Succession Act. The Allahabad and Bombay High Courts put the latter wider construction upon the word,[140] while the Madras and Calcutta High Courts favoured the narrow construction,[141] subject perhaps to relaxation in the case of *pardanashin* women.[142] In 1912, however, the Privy Council in the case of *Shamu Patter v Abdul Kader,*[143] held that an attesting witness must have seen the executant sign. The Transfer of Property (Validating) Act, 1917 was passed to validate instruments attested on admission of execution in reliance on the decisions by Allahabad and

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133. *Seeni Chettiar v Santhanathan,* (1897) ILR 20 Mad 58.
134. *State of Andhra Pradesh v National Thermal Power Corpn Ltd,* (2002) 5 SCC 203; AIR 2002 SC 1895.
135. *Somu v Rangammal,* (1871) 7 Mad HC 13, approved in *Lakshmamma v Kameshwara,* (1890) ILR 13 Mad pp 281, 286.
136. *Gurdev Kaur v Kaki,* AIR 2006 SC 1975 : JT 2006 (5) SC 72 : 2006 (4) SCALE 436 : (2007)1 SCC 546.
137. *Mathai Samuel v Eapen Eapen (dead) by LRs,* AIR 2013 SC 532 : JT 2012 (11) SC 364 : 2012 (11) SCALE 167 : (2012) 13 SCC 80.
138. *N Kamalam v Ayyasamy,* (2001) 7 SCC 503, para 20.
139. *Freshfield v Reed,* (1842) 9 M & W 404; *Seal v Claridge,* (1881) 7 QBD 516, p 519.
140. *Ganga v Shiam Sundar,* (1904) ILR 26 All 69; *Ramji v Bai Parvati,* (1903) ILR 27 Bom 91.
141. *Girindra v Bejoy,* (1899) ILR 26 Cal 246; *Abdul v Salimun,* (1900) ILR 27 Cal 190; *Shamu Patter v Abdul,* (1908) ILR 31 Mad 215.
142. *Harmongal Narain v Ganaur Singh,* (1907) 13 Cal WN 40 : 31 IC 109; *Surur Jigar Begum v Barada Kanta,* (1910) ILR 37 Cal 526 : 5 IC 539.
143. *Shamu Patter v Abdul Kader,* (1912) ILR 35 Mad 607 : 39 IA 218 : 16 IC 250.

Bombay High Court. *Shamu Patter's* case was followed until the enactment of Act 27 of 1926, which inserted in the TP Act a definition including attestation on acknowledgement of execution.[144] The TP Act being declaratory of the law, was held in the undermentioned case[145] to be retrospective. In other cases, however, it was said that the words "attest means" cannot have the same meaning as "attest always meant",[146] and the legislature by Act, 10 of 1927 further amended the definition by adding after the word "means", the words "and shall always be deemed to have meant." This makes it clear that the definition is retrospective.[147]

To attest is to bear witness to a fact. It means signing of the document to signify the attestor, and his witness to the execution of the document. An attesting witness is one who signs the document in the presence of the executor after seeing the execution of the document, and after receiving a personal acknowledgment from the executant as regards the execution of the document.[148]

The essential conditions of a valid attestation are that two or more witnesses have seen the executant sign the instrument, or have received from him a personal acknowledgement of his signature, and each of them has signed the instrument in the presence of the executant to bear witness to this fact; it is essential that the attesting witness has put his signature *animus attestandie*, i.e., for the purpose of attesting the signature.[149] Where the attesting witnesses were neither present at the time of execution of the sale deed nor had even seen the executants, the deed is not validly executed.[150]

The essential ingredients of the proof of attestation are that it is necessary that the person relying upon a document must establish that the executant has signed or put thumb impression before the attesting witness, and the attesting witness must sign in presence of executant.[151] It is necessary for a party relying upon an attested document to plead specifically both the execution and attestation of it.[152]

The burden is on the propounder to prove due and valid execution of the will. The propounder is required to show by satisfactory evidence that the will was signed by the

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144. *Badri Prasad v Abdul Karim,* (1913) ILR 35 All 254 : 19 IC 451; *Padarath Halwai v Ram Nain,* (1915) ILR 37 All 474 : 42 IA 163 : 30 IC 366; *Paramasiva v Krishna,* (1918) ILR 41 Mad 535 : 43 IC 983; *Sama Rao v Vannajee,* (1923) ILR 46 Mad 64 : 71 IC 153 : AIR 1923 Mad 36; *Ganga Pershad v Ishri Pershad,* (1918) ILR 45 Cal 748 : 45 IA 94 : 45 IC 1.
145. *Balaji v Gamgamma,* (1927) 51 Mad LJ 641 : 99 IC 143 : AIR 1927 Mad 81.
146. *Nepra v Sayer Pramanik,* (1928) ILR 55 Cal 67 : 103 IC 662 : AIR 1927 Cal 763; *Girja Nandan v Hanuman Das,* (1927) ILR 49 All 25 : 99 IC 161 : AIR 1927 All 1, dissenting from *Mohammadi Bibi v Kashi,* 96 IC 775 : AIR 1925 All 725. The decision in *Balbhaddar v Lakshmi Bai,* (1930) 28 All LJ 623 : 125 IC 507 : AIR 1930 All 669 turned on the peculiar facts of the case.
147. *Abinash Chandra v Dasarath,* (1929) ILR 56 Cal 598 : 114 IC 84 : AIR 1929 Cal 123; *Veerappa v Subramania,* (1929) ILR 52 Mad 123 : 116 IC 367 : AIR 1929 Mad 1; *Motilal v Kasambhai,* (1928) 29 Bom LR 1334 : 105 IC 864 : AIR 1928 Bom 16; *Yacubkhan v Guljarkhan,* (1928) ILR 52 Bom 219 : 111 IC 287 : AIR 1928 Bom 267; *Firm SMARAL v RMMA Firm,* (1927) ILR 5 Rang 772 : 109 IC 468 : AIR 1928 Rang 101; *Balbhaddar v Lakshmi Bai,* (1930) 28 All LJ 623 : 125 IC 507 : AIR 1930 All 669; *Durgawati v Jagannath,* (1928) 27 All LJ 1891 : 118 IC 663 : AIR 1929 All 680.
148. *P Ramachandran Nair v Suparna Tapan Das,* AIR 2003 Bom 457, para 22 : (2003) 3 All MR 638 : (2003) 3 Bom CR 35.
149. *Abdul Jabbar v Venkata Sastri,* [1969] 3 SCR 513 : AIR 1969 SC 1147 : [1969] 2 SCJ 784 : (1969) 1 SCC 573. As to signature and manner of its authentication, see *Har Kaur v Gura Singh,* AIR 1988 P&H 41, p 42.
150. *B Rajegowda v H B Shankergowda,* AIR 2006 Kant 48 : (2006) 6 Kar LJ 237 : (2006) 1 KCCR 235.
151. *Chandan v Longa Bai,* AIR 1998 MP 1.
152. *P Ramachandran Nair v Suparna Tapan Das,* AIR 2003 Bom 457, para 22 : (2003) 3 All MR 638 : (2003) 3 Bom CR 35.

attestator, and that at the relevant point of time the attestator was in a sound and disposing state of mind, and that he understood the nature and the fact of dispossession when he put his signature to the document out of his own free will.[153] When such clinching evidence is adduced in support of the will and the witnesses are uninterested and satisfactory, the court would be justified in making the finding in favour of the propounder. If such evidence is brought on record which is clinching and proves the execution and attestation to be genuine and valid, then the burden would shift on the objector.[154]

(11) Who may Attest

Despite importance of attestation, no qualifications are stipulated in the TP Act in this regard.[155] An illiterate person may attest the signature of the executant by making his mark.[156] A party to a deed cannot be an attesting witness, for the object of attestation is protection against fraud and undue influence.[157] Where a person executes a deed as a power of attorney or an agent of another, he is a party to the deed, and he cannot attest his own signature.[158] However, a person interested in the transaction, such as a person interested in the money advanced under a mortgage, may be an attesting witness if he is not a party to the deed;[159] and the person who advanced the money may attest a mortgage in favour of his *benamidar.*[160]

The law in India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they do not have the usual means of fully understanding the nature of the effect of what they are doing, on account of certain disabilities. Thus, the disposition of property made by such a disabled person must be substantially understood and must really be the mental act, as against the execution which is a mere physical act of the person who makes it.[161] Where the deed was written in English; but both the executants, who was an old illiterate lady and the attesting witnesses did not know English, and no evidence was led to show that the contents of the deed were explained to her; it was held that the execution was invalid.[162]

(12) Forming Attestation

Attestation need not be in any particular form, a mere signature is sufficient;[163] it need not be made at any particular place in the deed,[164] but cannot take place before the

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153. *Indu Paintal v General Public,* (2011) 1 RCR (Civil) 126 : (2011) 97 AIC 761 : LNIND 2010 PNH 2278.
154. *Jamunabai v Surendra Kumar,* AIR 1995 MP 274 : 1996 Civil CC 126 : 1995 JLJ 477 : 1996 MPLJ 113.
155. *Peddavandla Narayamma v Peddasant Venkata Reddy,* AIR 2007 AP 137 : (2007) 2 ALD 817 : (2007) 4 ALT 260; *B Rajegowda v H B Shankergowda,* AIR 2006 Kant 48 : (2006) 6 KarLJ 237 : (2006) 1 KCCR 235.
156. *Nagamma v Venkataramayya,* (1935) ILR 58 Mad 220 : 68 Mad LJ 191 : 154 IC 777 : AIR 1935 Mad 178; *MRM Firm v Ma E Nyo,* 172 IC 613 : AIR 1937 Rang 293; *Chiranjilal v Poorna,* (1914) 12 All LJ 1114 : 26 IC 84; *Hiralal v Gokul* (1944) All LJ 7 : 211 IC 629 : AIR 1944 All 61.
157. *Harish Chandra v Bansidhar,* [1966] 1 SCR 153, pp 155–56 : AIR 1965 SC 1738 : [1966] 1 SCJ 145; *Seal v Claridge* (1881) 7 QBD 516, p 519; *Pearey Mohan v Sreenath,* (1909) 14 Cal WN 1046 : 7 IC 735; *Saurur Jigar Begum v Barada Kanta Mitter,* (1910) ILR 37 Cal 526 : 5 IC 539; *Debendra v Bihari,* (1911) 16 Cal WN 1075 : 15 IC 666.
158. *Gomathi Ammal v Krishna Iyer,* (1953) 2 Mad LJ 303 : AIR 1954 Mad 126.
159. *Harish Chandra v Bansidhar,* [1966] 1 SCR 153 : AIR 1965 SC 1738 : [1966] 1 SCJ 145; *Balu v Gopal,* (1911) 13 Bom LR 944 : 12 IC 531; *Durga Din v Suraj Bakshsh,* AIR 1931 Oudh 285.
160. *Durga Din v Suraj Bakshsh,* 134 IC 402 : AIR 1931 Oudh 285.
161. *Farid-Unnisa v Munshi Mukhtar Ahmad,* AIR 1925 PC 204.
162. *Sivakoti Dasaradharam v Sivakoti Yoganandam,* AIR 1996 Pat 273 : (1996) 1 ALT 306 : 1996 Civil CC 500.
163. *Abinash Chandra v Dasrath,* (1929) ILR 56 Cal 598 : 114 IC 84 : AIR 1929 Cal 123.
164. *Kadarbhai v Fatmabai,* AIR 1944 Bom 25.

execution of the deed.[165] Attestation prior to execution of the document is no attestation in the eyes of law.[166] However, the section requires that the attesting witness should have signed in the presence of the executant;[167] otherwise the deed is not validly attested even though the attesting witness did actually witness execution.[168] Where the executant, a *pardanashin* lady, sitting behind a curtain, put her hand out and made her thumb impression on the deed in sight of the witness and then her husband signed, and then the attesting witnesses signed as such, the Privy Council held that the witnesses signed "in the presence of the executant" and the document was duly attested.[169] However, where one out of two witnesses to a mortgage bond signed his name as an attesting witness for himself and on behalf of the other witness in the latter's presence, the attestation was valid though the other witness did not make his mark.[170] Where two deeds were prepared and executed as a part of one transaction, but the marginal witnesses were not common, it was held that merely from the circumstance that the disputed agreement had another set of marginal witnesses, it could not be inferred that the document was forged or fictitious.[171]

Scribe as Attesting Witness

It is necessary that the attesting witness should have signed for the purpose of authenticating the signature of the executant,[172] and not as a scribe,[173] or as a person merely indicating his consent to the transaction.[174] The Supreme Court has held that the effect of subscribing a signature on the part of the scribe is not of the same status as that of the attesting witness. The animus to attest is not available so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will.[175] A scribe who has signed on behalf of

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165. *Pran Nath v Jadu Nath,* (1905) ILR 32 Cal 729; *Sant Lal v Kamala Prasad,* [1952] SCR 116 : AIR 1951 SC 417; *Dhiren Bailung v Bhutuki,* AIR 1972 Gau 44; *S T Singh v S K Singh,* AIR 1973 Gau 64; *Tarachand v Kesarimal,* AIR 1973 Raj 123.
166. *Virendra Singh Pal v Kashibai,* AIR 1998 MP 324 : (1998) 2 MPLJ 203.
167. *Abinash Chandra v Dasrath,* (1929) ILR 56 Cal 596 criticising *Radha Mohan v Nripendra Nath,* (1928) 47 Cal LJ 118 : 105 IC 422 : AIR 1928 Cal 154; *Veerappa v Subramania,* (1929) ILR 52 Mad 123 : 116 IC 367 : AIR 1929 Mad 1; *Zamindar of Pollavaram v Maharaja of Pittapuram,* (1931) ILR 54 Mad 163 : 135 IC 17 : AIR 1931 Mad 140; *Ramanathan v Delhi Batcha,* (1931) 60 Mad LJ 302 : 131 IC 840 : AIR 1931 Mad 335; *Venkataramayya v Nagamuru,* 136 IC 343 : AIR 1932 Mad 272; *Mushrafi Begam v Lala Kundan Lal,* (1933) ILR 9 Luck 12 : 144 IC 860 : AIR 1933 Oudh 365 : on app 63 IA 326; *Bhikari Charan v Sudhir Chandra,* (1938) 42 Cal WN 1055 : 178 IC 992 : AIR 1938 Cal 702; *Mayurbhanj State Bank v Bhabatosh Das,* AIR 1961 Ori 178.
168. *Jadunandan v Surajdeo,* (1930) ILR 52 All 434 : 132 IC 37 : AIR 1930 All 223.
169. *Lala Kundan Lal v Musammat Mushrafi Begum,* 63 IA 326 : (1936) All LJ 810 : 163 IC 156 : AIR 1936 PC 207.
170. *Dahu v Jamadar,* (1949) ILR 25 Pat 188 : AIR 1950 Pat 368.
171. *Tribhuvan Dutt Tripathi v Ramji Tiwari,* AIR 1991 All 268, p 271.
172. *Abdul Jabbar v Venkata Sastri,* [1969] 3 SCR 513 : AIR 1969 SC 1147 : [1969] 2 SCJ 784 : [1969] 2 SCA 129 : (1969) 1 SCC 573; *Paramasiva v Krishna,* (1918) ILR 41 Mad 535 : 43 IC 983.
173. *Abinash Chandra v Dasrath,* (1929) ILR 56 Cal 598 : 114 IC 84 : AIR 1929 Cal 123; *Badri Prasad v Abdul Karim,* (1913) ILR 35 All 254 : 19 IC 451; *Ranu v Luxmanrao,* (1909) ILR 33 Bom 44 : 1 IC 464; *Rambahadur v Ajodhya,* (1916) 1 Pat LJ 129 : 34 IC 370; *Dalichand v Lotu,* (1920) ILR 44 Bom 405 : 55 IC 616; *Jadunandan v Surajdeo,* (1930) ILR 52 All 434 : 132 IC 37 : AIR 1930 All 223. Contra, *Radha Kishen v Fateh Ali,* (1898) ILR 20 All 532; *Raj Narain Gosh v Abdur Rahim,* (1901) 5 Cal WN 454; *Jagannath v Bajrang,* (1921) ILR 48 Cal 61 : 62 IC 97 : AIR 1921 Cal 208; *Veerapuddayan v Muthukarappan,* (1913) 24 Mad LJ 534 : 19 IC 589; *Ayyasami v Kylasam,* 26 IC 409.
174. *Sarkar Barnard v Alak Manjary,* (1924) 26 Bom LR 737 : 83 IC 170 : AIR 1925 PC 89.
175. *N Kamalam v Ayyasamy,* (2001) 7 SCC 503.

a party, e.g. an illiterate mortgagor, cannot be an attesting witness for that would amount to attestation of his own signature.[176] However, where an illiterate mortgagor has made his mark himself and the scribe wrote a description of the mark beside it, he was held to be competent to sign as an attesting witness.[177] In some earlier decisions therefore, it was held that a scribe is not a witness to the will, but a mere writer of the will,[178] and he may sign for him, if so authorised,[179] but not otherwise.[180]

A scribe, however, may perform a dual role. He may be an attesting witness as well as the writer. The fact that he signed as an attesting witness, that he did so with the necessary *animus* to attest, must be duly proved.[181] That is also the case with identifying witnesses.[182] A person can be called an attesting witness when he has witnessed the execution of the document, and has put his signature by describing himself as an attesting witness. Where a person had put his signatures on the document both, as a scribe and as an attesting witness, the inference is that he functioned both as scribe and as an attesting witness.[183]

(13) Registering Officer as Attesting Witness

There was a conflict of decisions as to whether the signature of the registering officer and of the attesting witnesses on the registrar's endorsement made to satisfy the requirements of the Registration Act, constitute a valid attestation if made in the presence of the executant. Some decisions had held such attestations to be valid;[184] but there were contrary decisions.[185] In *Abdul Jabbar v Venkata Sastri,*[186] the Supreme Court has held that

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176. *Rajani Kanta v Panchananda,* (1918) ILR 46 Cal 522 : 48 IC 820, also cited as *Upendra v Hukum Chand*; *Sristidhar v Rakshakali,* (1922) ILR 49 Cal 438 : 63 IC 507 : AIR 1922 Cal 168; *Paban v Badal,* (1921) 26 Cal WN 951 : 66 IC 906 : AIR 1921 Cal 276; *Ram Samujh v Mainath,* 91 IC 176 : AIR 1925 Oudh 737.
177. *Govind Bhikaji v Bhau Gopal,* (1917) ILR 41 Bom 384 : 39 IC 61; *Dinamoyee v Bori Behari,* (1902) 7 Cal WN 160; *Alagappa Chettiar v Ko Kala Pai,* 188 IC 759 : AIR 1940 Rang 134; *Jagdeo v Deo Chaudhari,* AIR 1958 Pat 566.
178. *N Kamalam v Ayyasamy,* (2001) 7 SCC 503, paras 26,27 : AIR 2001 SC 2802.
179. *Sasi Bhusan v Chandra,* (1906) ILR 33 Cal 861; *Lal Bahadur v Rameshwar Prasad,* (1928) ILR 3 Luck 113 : 105 IC 581 : AIR 1927 Oudh 510; *Bishwanath v Baburam* AIR 1957 Pat 485.
180. *Param Hans v Randhir Singh,* (1916) ILR 38 All 461 : 35 IC 748.
181. *Muhammad Ali v Jaffar Khan,* (1897) 17 All WN 146; *Dinamoyee v Bon Behari,* (1902) 7 Cal WN 160; *Paramasiva v Krishna,* (1918) ILR 41 Mad 535 : 43 IC 983; *Nageshwar Prasad v Bachu Singh,* (1919) 4 Pat LJ 511 : 53 IC 79; *Dharamdas v Ramoomal,* 101 IC 715 : AIR 1927 Sau 118; *Jogendranath Nath v Nitai Churn,* (1903) 7 Cal WN 384; *VRMRM Firm v Muhammad Kasim,* 98 IC 205 : AIR 1926 Rang 145; *Alagappa Chettiar v Ko Kala Pai,* 188 IC 759 : AIR 1940 Rang 134; *Venkata Sastri v Rahilna Bibi,* AIR 1962 Mad 111. Contra *Abinash Chandra v Dasrath,* (1929) ILR 56 Cal 598.
182. *Dharamdas Mondal v Kashi Nath,* (1959) 64 Cal WN 332 : AIR 1959 Cal 243.
183. *Dhruba v Paramanda,* AIR 1983 Ori 24, pp 25, 26.
184. *Ram Charan v Bhairon,* (1931) ILR 43 All 1 : 131 IC 241 : AIR 1931 All 101; *Sarada Prasad v Triguna Charan,* (1922) ILR 1 Pat 300 : 90 IC 402 : AIR 1922 Pat 402; *Ramanathan v Delhi Batcha* (1931) 60 Mad LJ 302 : 131 IC 840 : AIR 1931 Mad 335; *Venkataramayya v Nagamma,* (1931) Mad WN 1242 : 136 IC 343 : AIR 1932 Mad 272; *Neelima Basu v Johannal Sarkar,* (1934) ILR 61 Cal 525 : 38 Cal WN 753 : 151 IC 1063 : AIR 1934 Cal 772; *Harkisandas v Dwarkadas,* 161 IC 374 : AIR 1936 Bom 94; *Kanchedilal v Jabbarsha,* 166 IC 686 : AIR 1936 Nag 171; *Parshotam Ram v Keshodas,* (1943) ILR 25 Lah 495; see also *Venkata Sastri v Rahilna Bi,* AIR 1962 Mad 111.
185. *Tafaluddi Peada v Mahar Ali,* (1899) ILR 26 Cal 78; *Chandrani v Lala Sheo Nath,* 132 IC 337 : AIR 1931 Oudh 146; *Lachman Singh v Surendra Bahadur Singh,* (1932) ILR 54 All 1051 : 1932 All LJ 653 : 139 IC 1 : AIR 1932 All 527; *Thien Shin v Ma Ngwe Su,* 182 IC 924 : AIR 1939 Rang 211; *Timmavva v Channavva,* (1948) 50 Bom LR 260 : AIR 1948 Bom 322.
186. *Abdul Jabbar v Venkata Sastri,* [1969] 3 SCR 513 : AIR 1969 SC 1147 : [1969] 2 SCJ 784 : (1969) 1 SCC 573; *Venkata Sastri v Rahilna Bi,* AIR 1962 Mad 111; *Tarachand v Kesrimal,* AIR 1973 Rang 123. *Ramesh Dutt Sawan v State,* (1988) Rajdhani LR 387; AIR 1989 Delhi 47 (NOC).

such signatures can only amount to a valid attestation if the attesting witnesses had put their signatures with such animus; the court further held that ordinarily the registering officer put his signature in the performance of his statutory duty, and not with an intention to attest.

Proof of an Attested Instrument

Proof of an attested instrument is according to sections 68 to 71 of the Indian Evidence Act. The amendment of section 68 by Act 31 of 1926 makes it unnecessary to call any attesting witness in the case of a deed, unless the execution of the deed is specifically denied by the person by whom it purports to have been executed.[187] Where execution is specifically denied, at least one attesting witness must be called to prove the deed, if there be one alive, and subject to the process of the court. If the attesting witnesses are dead, their signatures can be proved by evidence of handwriting.[188] This is not necessary if execution is admitted;[189] but the admission must be not only of execution but of due execution;[190] for an admission will not render valid a document which the evidence shows to be invalid in law.[191] It has also been held that an admission will not suffice if it is established on evidence that the document has not been duly attested.[192] The admission by one mortgagor will not dispense with the necessity of proof against the other.[193] However, even where the execution of a mortgage is admitted, the party must prove that it was duly attested.[194]

(14) Attestation as Proof of Consent

Mere attestation does not effect an estoppel, for attestation does not fix an attesting witness with knowledge of the contents of the document.[195] Attestation does not of itself imply consent;[196] though there may be circumstances which show that the attesting witness had knowledge of the contents of the document he attested and consented to.[197] An attesting witness is not estopped by his mere signature, unless it can be established by independent

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187. *Yacubkhan v Guljarkhan,* (1928) ILR 52 Bom 219 : 111 IC 287 : AIR 1928 Bom 267; *Bishwanath v Kayastha, Trading and Banking Corpn,* (1929) ILR 8 Pat 450 : 119 IC 405 : AIR 1929 Pat 422.
188. Indian Evidence Act, 1872, section 69; *Shankarrao v Ramji,* (1904) ILR 28 Bom 58; *Uttam Singh v Hukum Chand,* (1917) ILR 39 All 112 : 38 IC 651; *Raja Venkataramayya v Kamisetti,* (1927) 53 Mad LJ 216 : 101 IC 498 : AIR 1927 Mad 662.
189. *Satish Chandra v Jogendra Nath,* (1916) ILR 44 Cal 345 : 34 IC 862; *Nageshwar Prasad v Bachu Singh,* (1919) 4 Pat LJ 511 : 53 IC 79; *Jagannath v Ravji,* (1923) ILR 47 Bom 137 : 76 IC 73 : AIR 1923 Bom 90.
190. *Arjun v Kailas,* (1922) 27 Cal WN 263 : 70 IC 532 : AIR 1923 Cal 149.
191. *Sheikh Kachu v Mahammad Ali,* (1927) 45 Cal LJ 577 : 105 IC 28 : AIR 1927 Cal 926.
192. *Ram Nahak v Sita Dakuani,* AIR 1970 Ori 82.
193. *Satish Chandra v Jogendra Nath,* (1916) ILR 44 Cal 345.
194. See notes under section 59.
195. *Raj Lukhee v Gokool Chunder,* (1869) 13 Mad IA 209, p 229 : 12 WR 47; *Banga Chandra v Jagat Kishore,* (1916) ILR 44 Cal 186 : 43 IA 249 : 36 IC 420; *Hari Kishen v Kashi Pershad,* (1914) ILR 42 Cal 876 : 42 IA 64 : 27 IC 674; *Hamidmiya Sarfudin v Nagindas Jivanji,* (1933) ILR 57 Bom 709 : 35 Bom LR 252 : 148 IC 385 : AIR 1933 Bom 217; *Fazal Hussain v Jivan Shah,* (1933) ILR 14 Lah 369 : 141 IC 454 : AIR 1933 Lah 551; *Sunder Kuer v Shah Udey Ram,* AIR 1944 All 42; *Suraj Khan v Hafiz Abdul,* AIR 1944 Lah 1 : 43 PLR 75 : 195 IC 291; *Rajammal v Sabapathi,* (1945) All LJ 264 : 47 Bom LR 642 : (1945) 1 Mad LJ 397 : 220 IC 257 : AIR 1945 PC 82; *Gurumukh Singh v Sadhu Singh,* AIR 1951 Pepsu 71.
196. *Pandurang v Markandeya,* (1922) ILR 49 Cal 334 : 49 IA 16 : 65 IC 954 : AIR 1922 PC 20.
197. *Tarabag Khan v Nanak Chand,* 138 IC 263 : AIR 1932 Lah 566; *Bhagwat Rai v Gorakh Rai,* 150 IC 765 : AIR 1934 Pat 93; *Abbao Alikhan v Mahomed Shah* AIR 1951 MP 92.

evidence that to the signature an express condition was attached to the effect that it was intended to convey something more than a mere witnessing to the execution, and was meant as involving consent to the transaction.[198]

(15) Registered

The registration must be valid according to the law for the time being in force. Thus, if the description is not sufficient to identify the property;[199] or if there is a fraud on the law of registration;[200] or if the property is situated in a different circle;[201] or if the deed was not presented by the proper person;[202] or if the description is insufficient to identify the property,[203] the registration is void.

(16) Attached to the Earth

The phrase "attached to the earth" occurs in the definition of immovable property in the General Clauses Act, and also in section 8 of TP Act with reference to the legal incidents of immovable property which pass, without express mention, on transfer; and again in section 108(h) with reference to things a lessee may remove. Section 3 defines the expression "attached to the earth" as including:

(a) things rooted in the earth such as trees;

(b) things embedded in the earth such as buildings; and

(c) things attached to what is so embedded, such as doors and windows.

(17) English and Indian Law of Fixtures

The English law as to fixtures is based on the maxim *quicquid plantatur solo, solo cedit*[204] as to trees, and *quicquid inaedificatur solo, solo cedit*[205] as to buildings, the application of these maxims is varied by a plethora of exceptions in favour of a tenant, and in favour of trade fixtures. The term "fixture" has no precise meaning in English law and is not found in *Termes de la Ley,*[206] but it is generally applied to something annexed to the freehold. The classification as immovable property of things attached to the earth, bears some analogy to the English law of fixtures, but the maxims on which the English law is founded do not generally apply in India. Long before the TP Act was enacted, *Paramanick's* case[207] settled that it was the common law of India that buildings and other improvements do not by the mere accident of their attachment to the soil become the property of the owner of the soil.

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198. *Pandurang v Markandeya,* (1922) ILR 49 Cal 334 : AIR 1922 PC 20.
199. *Baij Nath v Sheo Sahoy,* (1891) ILR 18 Cal 556; *Narasamma v Subbarayudu,* (1895) ILR 18 Mad 364; *Nahar Lal v Baij Nath,* (1928) 32 Cal WN 241 : 113 IC 855 : AIR 1928 Cal 385.
200. *Harendra Lal v Hari Dasi,* (1914) ILR 41 Cal 972 : 41 IA 110 : 23 IC 637; *Biswanath v Chandra,* (1921) ILR 48 Cal 509 : 48 IA 127 : 63 IC 770 : AIR 1921 PC 8; *Akshayalingam v Ramayya,* 120 IC 876 : AIR 1929 Mad 426.
201. *Jogini Mohan v Bhoot Nath,* (1904) ILR 31 Cal 146.
202. *Mujibunnissa v Abdul Rahim,* (1901) ILR 23 All 233 : 28 IA 15; *Halima Bee Bee v Khairunnissa,* (1925) ILR 3 Rang 398 : 91 IC 644 : AIR 1926 Rang 17; *Dottie Karan v Lachmi Prasad,* (1931) ILR 10 Pat 481 : 58 IA 58 : 131 IC 321 : AIR 1931 PC 52.
203. *Nahar Lal v Baij Nath,* (1928) 32 Cal WN 241.
204. Whatever is planted in the soil falls into, or becomes part of the soil.
205. Whatever is built in the soil falls into, or becomes part of the soil. Another reading substitutes *fixatur* (is fixed to) for *inaedificator* (is built in).
206. *Wiltshear v Cottrell,* (1853) 1 E1 & B1 674, p 682.
207. *Thakoor Chunder v Ramdhone,* (1866) 6 WR 228; approved and followed in *Narayan Das Khettry v Jatindranath,* (1927) ILR 54 Cal 669 : 54 IA 218 : 102 IC 198 : AIR 1927 PC 135; *Mirtinjai Bakhsh Singh v Hinga* 145 IC 627 : AIR 1933 Oudh 468; *Kochunni Kartha v Raman* (1966) ILR 2 Ker 211 : AIR 1967 Ker 22.

The general rule laid down by a Full Bench of the Calcutta High Court in the above mentioned case was as follows:

> We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building, or allowing the removal of the material remaining with the owner of the land, in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.

The Mahomedan law is the same.[208] The Indian legislature has departed from the English law of fixtures in section 2 of the Mesne Profits and Improvements Act, 1855, corresponding to section 51 of TP Act,[209] and again in section 108(h) of T P Act dealing with the lessee's right to remove fixtures.[210] The TP Act inclines to the law as recognised by Hindu and Mahomedan jurisprudence.[211]

(18) Things Rooted in the Earth

Trees and shrubs rooted in the earth are immovable property according to the definition in the General Clauses Act, but this definition is subject to the exception made in TP Act as to standing timber, growing crops or grass. In *Rustomjee Edulji Sheth v Collector of Tanna,*[212] the judicial committee said that the trees upon the land were part of the land, and that the right to cut down and sell those trees was incident to the proprietorship of the land. In the case of *Suresh Chand v Kundan,*[213] the Supreme Court has held that the standing trees, as also saplings being embedded in the earth are part of the land, and if there is any transfer of property and, unless there is any expressed or implied different intention appearing in the agreement, the interest in the property would also include anything attached with the land which is agreed to be sold. Trees growing out of a garden wall belong to the owner of the garden,[214] a mortgage with possession of a fruit bearing tree with the intention that the mortgagee is to enjoy the fruit but not fell the tree, is a mortgage of immovable property.[215]

Trees and shrubs may be sold apart from the land, to be cut and removed as wood, and in that case, they are movable property.[216] However, if the transfer includes the right to fell the trees for a term of years, so that the transferee derives a benefit from further growth, the transfer is treated as one of immovable property,[217] but the fact that a permit

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208. *Secretary of State v Charlesworth Pilling & Co,* (1902) ILR 26 Bom 1 : 28 IA 121.
209. *Ismail Kani Rowthan v Nazarali Sahib,* (1903) ILR 27 Mad 211.
210. *Chaturbhuj v Rennett,* (1905) ILR 29 Bom 323; *Beni Ram v Kundan Lall,* (1899) ILR 21 All 496 : 26 IA 58; *Sitabai v Sambhu,* (1914) ILR 38 Bom 716 : 28 IC 140.
211. *Mafiz Sheikh v Rashik Lal Ghose,* (1910) ILR 37 Cal 815 : 6 IC 796.
212. *Rustomjee Edulji Sheth v Collector of Tanna,* (1867) 11 Mad IA 295.
213. *Suresh Chand v Kundan,* (2001) 10 SCC 221, para 6 : (2001) 7 SCALE 620; See also *Divisional Forest Officer, Sarahan Forest Division v Daut,* AIR 1968 SC 612: "The expression right, title and interest of the landowner in the land in section 11 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1954 is wide enough to include trees standing on the land."
214. *Iqbal Hasen v Nand Kishore,* (1902) ILR 24 All 294.
215. *Shiv Dayal v Pattu Lal,* (1933) ILR 54 All 437 : 140 IC 491 : AIR 1933 All 50. See also *Manoharlal v State of Madhya Pradesh,* AIR 1959 MP 120, in which it was held that the right to rear trees and pluck fruit from trees was not an interest in land.
216. *Mathura Das v Jadubir,* (1906) ILR 28 All 277; *Mammikutti v Puzhukkal,* (1906) ILR 29 Mad 353; *Alisaheb v Mohidin,* (1911) 13 Bom LR 874 : 12 IC 375; *Natesa v Tangavelu,* (1915) ILR 38 Mad 883, p 885 : 23 IC 102.
217. *Seeni Chettiar v Santhanathan,* (1897) ILR 20 Mad 58; *Reference,* (1889) ILR 12 Mad 203; *Sukry Kurdepa v Goondakull,* (1872) 6 Mad HC 71; *Jones v Flint,* (1839) 10 Ad & El 753.

to fell trees extends over a period of several years does not necessarily imply that the transferee is to enjoy the benefit of further growth, and a permit to fell and remove trees for four years has been held to be a grant of movable property.[218] A right to collect lac from trees has been held to be immovable property.[219]

Where under an agreement[220] the plaintiff was given the right to remove soil and earth from the defendant's land, and was to level the plots after removal, it was held to be an agreement for sale of an interest in land. Where, however, there was a contract to draw and remove sludge from a tank and a lagoon, which was continuously being pumped into the tank and the lagoon, the Calcutta High Court held that the sludge was not immovable property as it had not lain long enough to become part of the earth, and had retained its identity.[221]

(19) Things Embedded in the Earth

A house being embedded in the earth is immovable property, and this is so even if it is sold for enjoyment as a house with an option to pull it down.[222] Under English law, the general rule is that whatever is annexed to the freehold becomes part of the realty under the maxim *quicquid plantatur solo, solo cedit.*[223] This maxim does not apply in India; nevertheless the question whether a chattel is embedded in the earth so as to become immovable property is decided by the same principles as those which determine what constitutes an annexation to the land under English law. This is a question which is difficult to determine. The classic instance is an anchor which may be embedded in the land temporarily to hold a ship, or permanently to support a suspension bridge. In *Holland v Hodgson*[224] Blackburn J said:

> There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land; but it is very difficult if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz. the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel; as was the case in *Wiltshear v Cottrel.*[225] However, even in such a case if the intention is apparent to make the articles part of the land, they do become part of the land as was the case in *D'Eyncourt v Gregory.*[226]
>
> Thus, blocks of stone placed one on top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be a part of the land, then it does not become part of the land. The anchor of a large ship must be very firmly fixed to the ground in order to bear the strain of the cable, yet no one could suppose

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218. *Rajendra v Malhoo Khan,* 112 IC 156 : AIR 1929 Oudh 93.
219. *Pannnanandy v Birkhu,* (1909) 5 Nag LR 21 : 1 IC 903.
220. *Kanjee and Mooljee Bros v Shanmugam,* (1933) ILR 56 Mad 169 : 63 Mad LJ 587 : 139 IC 870 : AIR 1932 Mad 734.
221. *Bengal Agricultural & Industrial Corpn v Corpn of Calcutta,* AIR 1960 Cal 123.
222. *Punnayya v Venkatappa,* 91 IC 754 : AIR 1926 Mad 343.
223. *Elwes v Maw,* (1802) 3 East 38.
224. *Holland v Hodgson,* (1872) LR 7 CP 328, p 334 (looms attached to the floor and beams of the worsted mill held to be fixtures); *Vaudeville Electric Cinema Ltd v Muriset,* (1923) 2 Ch 74 (tip-up seats affixed to the floor of a cinema are part of the building).
225. *Wiltshear v Cottrel,* (1853) 1 El & Bl 674, a granary resting by its own weight on straddles built into the land.
226. *D'Eyncourt v Gregory,* (1866) LR 3 Eq 382, tapestry, pictures in panels, statutes, heavy vases, garden seats, frames filled with satin and attached to the walls, all essentially part of a mansion house.

> that it became part of the land, even though it should chance that the ship owner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended, lies on those who assert they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue as a chattel, the onus lying on those who contend that it is a chattel.

The two tests, therefore, are:

(1) the degree or mode of annexation; and

(2) the object of annexation.

(20) Mode of Annexation, English Law

In *Wake v Halt*[227] Lord Blackburn said:

> The degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land;

and as Lord Hardwicke said in *Lawton v Lawton*:[228]

> You shall not destroy the principal thing by taking away the accessory to it. Thus looms attached to the floor and to the beams of a mill,[229] or tip up seats fastened to the floor of a cinema,[230] or advertisement hoardings firmly imbedded in the earth have been held to be part of the land.[231] But cisterns merely standing by their own weight,[232] or brewer's vats resting on brick-work and timber,[233] or tapestries which can be removed without structural injury to the house,[234] or green houses merely resting on the soil,[235] have been held to be chattels.

(21) Object of Annexation, English Law

The object of annexation is the more important consideration.[236] This is a question of fact to be determined by the circumstances in each case, an important element being the nature of the interest in the land possessed by the person who causes the annexation. Thus, if a tenant for years or a tenant for life fixes tapestry to a wall, it may readily be inferred that he did not intend them to become fixture,[237] though the circumstances may show that he did so intend.[238] Such an intention is more readily inferred in the case of a tenant in fee simple.[239] Articles which may be removed without structural damage and even articles merely resting by their own weight are fixtures, if they are added with the intention of permanently improving the premises. A gas engine fastened by bolts and nuts to a concrete floor by a tenant in fee

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227. *Wake v Halt,* (1883) 8 App Cas 195, p 204.
228. *Lawton v Lawton,* (1743) 3 Atk 15.
229. *Holland v Hodgson,* (1872) LR 7 CP 328.
230. *Vaudeville Electric Cinema Ltd v Muriset,* (1923) 2 Ch 74.
231. *Provincial Bill Posting Co v Lowmoor Iron Co,* (1909) 2 KB 344.
232. *Mather v Fraser,* (1856) 2 K&J 536.
233. *Horn v Baker,* (1808) 9 East 215.
234. *Leigh v Taylor,* (1902) AC 157 : [1900–3] All ER Rep 520.
235. *Dibble (HE) Ltd v Moore,* (1970) 2 QB 181 : [1969] 3 All ER 1465.
236. *Spyer v Phillipson,* (1931) 2 Ch 183 : [1930] All ER Rep 457.
237. *Leigh v Taylor,* (1902) AC 157 : [1900–3] All ER Rep 520.
238. *D'Eyncourt v Greygory,* (1866) LR 3 Eq 382.
239. Re *Whaley, Whaley v Roerich,* (1908) 1 Ch 615.

simple subject to a mortgage,[240] and looms in a mill fastened to beams,[241] and machinery fastened by bolts and nuts to concrete beds have been held to be fixtures.[242] Looms in a mill fastened to the floor pass under an assignment of fixed machinery.[243]

(22) The same Tests in Indian Law

The same two tests as to mode of annexation and object of annexation have been applied in India. In a case under the Registration Act, Jenkins CJ held that machinery was not immovable property, as it had been erected by a monthly tenant.[244] If the lease contemplates the removal of machinery, it cannot be regarded as having been permanently fixed.[245] Greater stress is, however, laid on the mode of annexation. In *Chaturbhuj v Bennet,*[246] the court said that for qualifying as fixture it must be attached to the earth as that expression is defined in section 3 of the TP Act. A hut is immovable property,[247] even if it is sold with an option to pull it down.[248] A mortgage of the superstructure of a house though expressed to be exclusive of the land beneath, creates an interest in immovable property,[249] as it is permanently attached to the ground on which it is built. Similarly, oil and flour mills and the machinery used in working them, are fixtures.[250] In another case,[251] it has been held that the test is whether the annexation is with the object of the permanent beneficial enjoyment of the land or building; so, machinery for metal-shaping and electro-plating which was attached by bolts to special concrete bases and could not be easily moved, was still held not to be a part of the structure housing it, or the soil beneath it. The court held that the machinery was not attached for the more beneficial enjoyment of either the soil, or the concrete; it was actually a case of the structure being built around the machinery to protect it. A corrugated iron shed which rested by its own weight on the foundation prepared, was held to be a chattel which may be removed by a lessee.[252]

(23) Trade Fixtures

With a view to encourage trade, English law[253] allows relaxation of the rules with reference to trade fixtures. These are regarded as accessory to the business, and not as an annexation to the premises. Thus, soap boiling vats,[254] engines for working collieries,[255] and machinery and buildings erected on a colliery by miners working under a local custom[256] are not fixtures. Similarly, in India, distillery vats in a house have been held to be movables, as they are for trade

240. *Hobson v Gorringe,* (1897) 1 Ch 182 : [1895] All ER Rep 1231.
241. *Holland v Hodgson,* (1872) LR 7 CP 328.
242. *Reynolds v Ashby,* (1904) AC 466 : [1904–7] All ER Rep 401.
243. *Boyd v Shorrock,* (1867) LR 5 Eq 72.
244. *Macleod v Kikabhoy,* (1901) 25 Bom 659, p 666; *Teja Singh v Hawer Singh,* AIR 1951 Pepsu 31.
245. *Lokashan Jain Udyog Mandir v Kalooram,* (1964) ILR 14 Raj 1006 : AIR 1965 Raj 15.
246. *Chaturbhuj v Bennet,* (1905) ILR 29 Bom 323.
247. *Nathu Miah v Nand Rani,* (1872) 8 Beng LR 508; *Deno Nath v Adhor,* (1879) 4 Cal WN 470.
248. *Punnaya v Venkatappa,* 91 IC 754 : AIR 1926 Mad 343.
249. *Narayana Pillay v Ramaswamy,* (1875) 8 Mad HC 100.
250. *Miller v Brindabun,* (1877) ILR 4 Cal 946; *Amritalal v Keshavlal,* (1926) 28 Bom LR 939 : 98 IC 696 : AIR 1926 Bom 495.
251. *Jnan Chand v Jugal Kishore,* AIR 1960 Cal 331; *Perumal v Ramaswami,* (1969) ILR 2 Mad 329 : (1968) 2 Mad LJ 493 : AIR 1969 Mad 346.
252. *Chaturbhuj v Bennett,* (1905) ILR 29 Bom 323.
253. *South Indian Bank Ltd v Krishna Chettiar,* (1975) 2 MJ 431.
254. *Pool's* case, (1703) 1 Salk 368.
255. *Lawton v Lawton,* (1743) 3 Atk 15.
256. *Wake v Hall,* (1883) 8 App Cas 195.

purposes, and not for the beneficial enjoyment of the house.[257] However, this principle has no application where the articles are affixed by persons who are themselves owners of the land.[258]

(24) Hire Purchase Agreement

The existence of a hire purchase agreement does not affect the question of the intention of the annexation.[259] This has been decided in cases where the contest was between the mortgagee of the premises, and the person who had hired the machine to the mortgagor.

ILLUSTRATION

A gas engine was let out on the hire-purchase system under an agreement in writing which provided that it should not become the property of the hirer until the payment of all the instalments, and should be removable by the owner on the failure of the hirer to pay any instalment. The engine was affixed to the land of the hirer by bolts and screws to prevent it from rocking, and was used by him for the purposes of his trade. Default having been made in the payment of the instalments, the engine was claimed by the owner, and also by a mortgagee of the land, who took his mortgage after the hiring agreement and without notice of it, and had entered into possession while the engine was still on the land. It was held that the engine was sufficiently annexed to the land to become a fixture, and that any intention to be inferred from the terms of the hiring agreement that it should remain a chattel, did not prevent it from becoming a fixture; and consequently it passed to the mortgagee as part of the freehold.[260]

(25) Attached to what is so Embedded

The attachment must be, as the section says for the permanent beneficial enjoyment of that to which it is attached. Thus, the doors, windows and shutters of a house are attached to the house, which is embedded in the earth, for the beneficial enjoyment of the house. They form part of the house, and have no separate existence.[261] Similar is the case with the movable parts of fixed machinery. However, if the attachment is not intended to be permanent, the articles attached do not form part of the house, e.g. window blinds and sashes,[262] and ornamental articles such as glasses and tapestry fixed by a tenant for life.[263]

A curious case is reported in the Solicitors Journal,[264] where a hired machine which rested by its own weight on the floor was driven by an engine, which was a fixture embedded in the earth. The machine could be lifted and bodily taken away, but it was claimed that it was a fixture because it was attached to the engine. Eve J however, repelled this contention and said:

> With regard to the indirect attachment to the motive power, if I were to hold that that constituted a fixture, then every motive power would be a connection which would change a chattel into a fixture.

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257. *Narayana Sa v Balaguruswami,* (1924) 45 Mad LJ 385 : 79 IC 838 : AIR 1924 Mad 187; *Veerappa Chetty v Ma Tin,* 88 IC 1011 : AIR 1925 Rang 250.
258. *Mather v Fraser,* (1856) 2 K & J 536; *Fisher v Dixon,* (1845) 12 Cal & F 312; *Climie v Wood,* (1869) LR 4 Ex 328.
259. *Hobson v Gorringe,* (1897) 1 Ch 182, p 195 : [1895-9] All ER Rep 1231.
260. *Hobson v Gorringe,* (1897) 1 Ch 182, p 195 : [1895-9] All ER Rep 1231.
261. *Climie v Wood,* (1869) LR 4 328, p 329 (Ex Ch); *Peru Bepari v Ronuo,* (1884) ILR 11 Cal 164; *Queen Empress v Sheikh Ibrahim,* (1890) ILR 13 Mad 518; *Purshotama v Municipal Council,* (1891) ILR 14 Mad 467.
262. *Rex v Hedges,* (1802) 2 East PC 590 N.
263. *Leigh v Taylor,* (1902) AC 157 : [1900-3] All ER Rep 520.
264. *Northern Press and Engineering Co v Shepherd,* (1908) 52 Sol J 715.

The same conclusion would be arrived at under this section, for the machine is not attached for the beneficial enjoyment of the engine, and it is the engine that is subordinate to the machine. If a thing is embedded in the earth or attached to what is so embedded, for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. Where the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. The question in each case is to be decided according to the circumstances. An oil engine as part of a cinema on the premises leased;[265] a cinema projector, and a diesel oil engine fixed on earth for the purposes of exhibiting shows in a touring cinema are movable properties.[266]

The machinery of a cotton baling press which was placed in a building to shelter it from the weather, is movable property,[267] as although the building is embedded in the earth, the machinery was not put there for the beneficial enjoyment of the building.

(26) Actionable Claim

The definition of actionable claim was originally contained in section 130. The chapter on actionable claims was remodelled by Act 2 of 1900, and the definition was amended and inserted in this section. The definition is explained in the notes to section 130.

In India, copyright which is chose in action in England, is a beneficial interest in the movable property in the actual or constructive possession of the owner thereof, although strictly not an actionable claim, but capable of being transferred by assignment evidenced by a writing executed by the assignor or by his duly authorised agent.[268]

(27) Notice

The equitable doctrine of notice which controls unconscionable transactions is recognised in various sections of TP Act. For instance, in section 39, if a transfer is made of property out of which a person has a right to receive maintenance, the transferee takes subject to that right if he had notice of it, but not otherwise. Similarly in section 40, if *A* conveys to *C* property which he had by a previous contract agreed to sell to *B*, then *B* can enforce the contract against *C*, if *C* had notice of it, but not otherwise. If *C* had notice of the prior contract, he purchases with knowledge that it was unconscionable of *A* to sell to him, and it is, therefore, unconscionable of him to buy. To the same effect is the second illustration to clause (b) of section 27 of the Specific Relief Act, 1872,[269] and section 91 of the Trusts Act, 1882. A person having full notice and knowledge of facts of existence of a previous contract, even through public notice published in a newspaper, cannot be held to be a *bona fide* purchaser without notice.[270]

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265. *Subramaniam v Chidambaram,* (1940) ILR Mad 527 : 51 Mad LW 155 : (1940) Mad WN 38 : 190 IC 825.
266. *Bamdev Panigrahi v Manormaraj,* AIR 1974 AP 226 : (1974) 1 APLJ 32.
267. *Meghraj v Krishna Chandra,* (1924) ILR 46 All 286 : 78 IC 243 : AIR 1924 All 365; *Jnan Chand v Jugal Kishore,* AIR 1960 Cal 331; *Lokashan Jain Udyog Mandir Ltd v Kalooram,* (1964) ILR 14 Raj 1006 : AIR 1965 Raj 15.
268. *Gramaphone Company of India Ltd v Shanti Films Corpn,* AIR 1997 Cal 63.
269. The Specific Relief Act, 1963, which repealed the Act of 1872, contains a corresponding provision section 19(b), but the illustrations have been deleted. See *Murlidhar Bapuji Valve v Yallappa Lallu Cheugule,* AIR 1999 Bom 358.
270. *Thomson Press (India) Ltd v Nanak Builders & Investors,* AIR 2013 SC 2389 : JT 2013 (3) SC 289 : 2013 (3) SCALE 26 : (2013) 5 SCC 397.

Notice may be either express or constructive, while notice to an agent is sometimes called imputed notice in so far as it affects the principal.

(28) Express Notice

Express notice, or actual notice is notice whereby a person acquires actual knowledge of the fact. It must be definite information given in the course of negotiations by a person interested in the property, as a person is not bound to attend to vague rumours or statements by strangers.[271] Notice must be given in the same transaction, as notice given in a previous transaction may have been forgotten.[272] Mere casual conversation is not enough, and in *Lloyd v Banks,*[273] Lord Cairns said that an encumbrancer who alleges that a trustee has notice of his encumbrance must prove "that the mind of the trustees has in some way been brought to an intelligent apprehension of the nature of the encumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it." A mere statement either in court, or somewhere else, that some person claims title, is not sufficient notice to an auction purchaser of a deed, if it is not disclosed at the auction sale.[274] However, when such an assertion is made to the intending purchaser, it is sufficient to put him to further inquiry as to the interest or title claimed,[275] and so, it would amount to constructive notice of facts which such enquiry would have disclosed.[276]

(29) Constructive Notice

Constructive notice is the equity which treats a man who ought to have known a fact, as if he actually does know it. A well-known case on the subject is *Jones v Smith*[277] where the following classic passage occurs in the judgment of Vice-Chancellor Wigram:

> It is, indeed, scarcely possible to declare *a priori* what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe, I may, with sufficient accuracy for my present purpose and without danger assert that the cases in which constructive notice has been established resolve themselves into two classes;
>
> first, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an enquiry after the charge, encumbrance or other circumstances affecting the property of which he had actual notice; and
>
> secondly, cases in which the court has been satisfied from the evidence before it that the party charged had designedly abstained from enquiry for the very purpose of avoiding notice...

The proposition of law, upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instrument, which in truth related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law, upon which the second class of cases proceed, is not that the party charged had incautiously neglected to make inquiries, but that he had designedly

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271. *Bamhart v Greenshields,* (1853) 9 Moo PC 18, p 36; *Ashiq Husain v Chaturbhuj,* (1928) ILR 50 All 328 : 108 IC 152 : AIR 1928 All 159.
272. *Warwick v Warwick,* (1746) 3 Atk 291, p 294.
273. *Lloyd v Banks,* (1868) LR 3 Ch 488, p 490.
274. *Nursing v Roghoobar,* (1883) ILR 10 Cal 609; *Jolland v Stanbridge,* (1797) 3 Ves 478.
275. *Gobind Chunder v Doorgapersaud,* (1874) 22 WR 248.
276. *Jones v Smith,* (1841) 1 Hare 43.
277. Ibid; *Doorga v Baney Madhub,* (1880) ILR 7 Cal 199, p 201.

abstained from such inquiries for the purpose of avoiding knowledge—a purpose, which if proved, would clearly show that he had a suspicion of the truth and a fraudulent determination not to learn it. Therefore, where there is no actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestae* would suggest to a prudent mind; if mere want of caution as distinguished from fraudulent and wilful blindness is all that can be imputed to the purchaser—there, the doctrine of constructive notice will not apply; there, the purchaser will in equity be considered, as in fact he is, a bona fide purchaser, without notice.

However, courts of equity had extended the doctrine from cases of fraudulent turning away to cases of gross negligence, and in a later case,[278] Wigram VC stated that there might be a degree of negligence so gross (*crassa negligentia*) that a court of justice might treat it as evidence of fraud, although morally speaking the party charged might be perfectly innocent. In truth, fraud and negligence are mutually exclusive conceptions, but courts of equity extended their jurisdiction from fraud to negligence and included gross negligence in the doctrine of constructive notice. In this respect the section follows the English law.

The courts have, however, been reluctant to extend the doctrine to cases where there is no real negligence, as the doctrine results in the imputation of knowledge to the person who does not in fact often possess it.[279]

Constructive notice has been said to arise from an irrebuttable presumption of notice. In *Plumb v Fluitt,*[280] Eyre, CB said:

> Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted.

Such a presumption, which is said to be irrebuttable,[281] can arise only in a case in which the party seeking the benefit of that doctrine has acted innocently. The doctrine of constructive notice will not be applied where the party seeking the benefit of that doctrine has been guilty of secrecy or fraud in the transaction with constructive notice of which he seeks to affect a purchaser; and, therefore, a vendor who is bound to disclose an encumbrance cannot plead that the purchaser had constructive notice of it.[282] A decree-holder bringing his judgment debtor's property to sale cannot set up a mortgage to himself which he has not disclosed, and plead that its registration was constructive notice to the purchaser.[283] The doctrine of constructive notice may be applied as against government.[284]

This legal presumption of knowledge arises from—

(a) Wilful abstention from an inquiry or search.[285]

(b) Gross negligence.[286]

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278. *West v Reid,* (1843) 2 Hare 249, pp 257–258.
279. *Hunt v Luck,* (1902) 1 Ch 45, p 48, affirmed (1902) 1 Ch 428 : (1900–3) All ER Rep 295; *Caunce v Caunce,* (1969) 1 All ER 722 : (1969) 1 WLR 286.
280. *Plumb v Fluitt,* (1791) 2 Anst 432, p 438.
281. *Hewitt v Loosemore,* (1851) 9 Hare 449, p 455; *Ashiq Husain v Chuturbhuj,* (1928) ILR 50 All 328 : 108 IC 152 : AIR 1928 All 159.
282. *Honnusji v Mankuvarbai,* (1879) 12 Bom HC 262; *Morgan v Govt of Haiderabad,* (1888) ILR 11 Mad 419.
283. *Ramchandra v Jairam,* (1898) ILR 22 Bom 686; *Dhondo v Raoji,* (1896) ILR 26 Bom 290. See notes to *Mulla's Code of Civil Procedure* 1908, O 21, r 66.
284. *Secretary of State v Dattatrya,* (1901) 3 Bom LR 923.
285. *N Kainath v Arun R Rawwli* AIR 2008 (NOC) 1620; *Mohideen Sahib v A Ameena Bi,* AIR 2007 Mad 133; *Peddavandla Narayanamma v Paddasani Venkata Reddy,* AIR 2007 AP 137; *B Rajamani v Azhar Sultana,* AIR 2005 AP 260 : (2005) 2 ALD 862.
286. *Motilal Jain v Prakash Bhartiya,* AIR 2007 (NOC) 377 (MP).

(c) Registration

(d) Actual possession

(e) Notice to an agent

(30) Wilful Abstention from an Inquiry or Search

These words recall the expression used by Wigrani, VC in his judgment in *Jones v Smith.*[287] In the corresponding section 3 of the English Conveyancing Act, 1882, now replaced by section 199 of the Law of Property Act, 1925, the words are: "If such enquiries and inspection had been made as ought reasonably to have been made by him." With reference to the duty of a purchaser to investigate title, Lord Selborne, in *Agra Bank v Barry,*[288] said:

> But this, if it can properly be called duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing bona fide in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow with a view to his own title and security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, or a design inconsistent with bona fide dealing, to avoid knowledge of the true state of the title.

The Calcutta High Court following this case have construed the words "wilful abstention from an enquiry or search" to mean such abstention as would show lack of bona fides.[289] Thus, a person refusing a registered letter cannot afterwards plead ignorance of its contents.[290] The principle that means of knowledge is equivalent to knowledge, has been applied to a banker's passbook so as to fix a customer with knowledge and ratification of entries therein.[291] Where a purchaser omits to inspect title deeds, he may be affected with notice of all facts which he would have discovered upon a proper investigation of title.[292] Similarly, the omission by a purchaser to inspect entries in the Record of Rights will amount to wilful abstention from inquiry under this section.[293] Where a charge was registered, but the agent of a subsequent mortgagee omitted to look into the register of the Registrar, the mortgagee was deemed to have had constructive notice of the charge.[294] However, where a charge was not registered in the Record of Rights, which a purchaser was bound to search, he would not be held to have had constructive notice thereof by his omission to inquire elsewhere, e.g., the *Mamlatdar's* office.[295]

ILLUSTRATIONS

(1) *B* borrows money from *C* and deposits with *C*, by way of equitable mortgage, the sale deed by which he had purchased a property from *A*. The sale deed recites that part of the purchase money had been retained by *B* to pay *A*'s debts. *B* had not paid these debts and *C*

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287. *Jones v Smith,* (1841) 1 Hare 43, p 55.
288. *Agra Bank v Barry,* (1874) LR 7 HL 135, p 157.
289. *Joshua v Alliance Bank,* (1895) ILR 22 Cal 185, p 203.
290. *Latif Ali v Pearee Mohun,* (1871) 16 WR 223; *Jogendro v Dwarka Nath,* (1888) ILR 15 Cal 681; *Ismail Khan v Kali Krishna,* (1902) 6 Cal WN 134, p 137. See, however *Vaman v Khanderao,* (1935) 37 Bom LR 376 : AIR 1935 Bom 247; see also cases noted under section 106 of Transfer of Property Act, 1882.
291. *Balakrishna Pramanik v Bhawanipur Banking Corpn,* (1932) ILR 59 Cal 662 : 138 IC 653 : AIR 1932 Cal 521; *McKenzie v British Linen Co,* (1881) ILR 6 Cal 82, p 92; *Jacobs v Morris,* (1902) 1 Ch 816, p 830.
292. *Mahomed Yunus Khan v Court of Wards,* 167 IC 962 : AIR 1937 Oudh 301.
293. *Harilal v Mulchand,* (1928) ILR 52 Bom 883 : 113 IC 27 : AIR 1928 Bom 427.
294. *Renukabai v Bhavan,* 185 IC 33 : AIR 1939 Nag 132.
295. *Lakshman v Secretary of State,* AIR 1939 Bom 183 : 41 Bom LR 257 : 182 IC 635.

makes no enquiry as to whether he had done so. *C* has constructive notice of *A*'s lien for unpaid purchase money, and the mortgage is subject to *A*'s lien.[296]

Actual notice of a deed is constructive notice of the contents of the deed, and of all other deeds to which it refers as affecting the same property. Thus, when a deed of sale referred to a partition deed under which the house has fallen to the vendor's share, the purchaser was affected with notice of a right of pre-emption reserved in the deed of partition.[297] Prior to the passing of the Law of Property Act, 1925, a person taking a lease had constructive notice of restrictive covenants entered into by the freeholder.[298] A person who agrees to buy a lease has constructive notice of the covenants in the lease, but only if he had an opportunity of inspecting it.[299] The Calcutta High Court, however, has held that a person acquiring a lease by private transfer, should call for the title deed of the vendor, and has constructive notice of a term in the lease providing for a high rate of interest on arrears of rent.[300] Where executors borrowed money on an equitable mortgage of the testator's title deeds, the mortgagee was held to have constructive notice of a charge on the property mortgaged, created by the will under which the executors represented the estate, if he had investigated the title, he would have had notice of the will and its contents.[301] The abstention from inquiry must be designed, as due to a desire to avoid an inquiry which would lead to ultimate knowledge. A mere omission to make enquiries is not sufficient.[302]

(2) *S* left his house and land to his sons by his first wife and appointed them executors of his will. He left ₹30,000 to his sons by his second wife, charged on the aforesaid house and land. The sons by the first wife borrowed ₹52,000 from the bank and deposited the title deeds of the house and land with the bank by way of equitable mortgage to secure the loan. The will was not among the documents of title deposited. When the bank enforced their mortgage and brought the house and land to sale, the sons of the second wife claimed that their charge had precedence. If the bank had made inquiry as to how the mortgagors derived title from *S*, they would have had cognizance of the will. The bank had therefore constructive notice of the charge, and the claim of the sons by the second wife prevailed over the mortgage.[303]

Where the mortgagors had dealt with the bank as executors, the bank would have been entitled to assume that they were acting for the purpose of administration.[304] However, even in that case the bank would have been affected with notice, if the circumstances of the transaction for instance, the fact that the mortgage was to secure advances to the mortgagors personally were such as to afford evidence that the executors were committing a breach of trust.[305]

On the other hand, notice to a purchaser by his title papers in one transaction, will not be notice to him in a subsequent and independent transaction in which the instruments containing the recitals are not necessary to his title.[306] This principle was enunciated by Lord

296. *Alwar Chetty v Jagannatha,* (1928) 54 Mad LJ 109 : 108 IC 291.
297. *Rajaram v Krishnasami,* (1893) ILR 16 Mad 301; *Abdul Razak Rowther v Abdul Rahiman Sahib,* (1933) 65 Mad LJ 390 : 149 IC 287 : AIR 1933 Mad 715.
298. *Wilson v Hart,* (1866) 1 Ch App 463; *Patman v Harland,* (1881) 17 Ch D 353; see also section 44 of Law of Property Act, 1925.
299. *Reeve v Berridge,* (1888) 20 QBD 523; *Molyneaux v Hawtrey,* (1903) 2 KB 487 : (1900-3) All ER Rep 472.
300. *Hamiduddin Khan v Ramani Kant Roy,* (1933) 56 Cal LJ 590 : 143 IC 117 : AIR 1933 Cal 321.
301. *Bank of Bombay v Suleman,* (1909) ILR 33 Bom 1 : 35 IA 139 : 1 IC 369.
302. *Kausalal Ammal v Sankara Muthiah,* (1941) Mad WN 621 : 53 Mad LW 744 : (1941) Mad LJ 815 : AIR 1941 Mad 707.
303. *Bank of Bombay v Suleman,* (1909) ILR 33 Bom 1 : 35 IA 139 : 1 IC 369.
304. *Geetaranee De v Narendra Krishna De,* (1933) ILR 60 Cal 394 : 144 IC 137 : AIR 1933 Cal 429.
305. *Hill v Simpson,* (1802) 7 Ves 152; *Goolam Hoosein v Bank of Bombay,* (1905) 7 Bom LR 407.
306. *Bepin Krishna v Priya Brata,* (1921) 26 Cal WN 36 : 66 IC 345 : AIR 1921 Cal 730.

Redesdale in *Hamilton v Royse,*[307] and quoted with approval by Smith MR in *Tressilian v Caniffe,*[308] as follows:

> If a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase as was then about, nor to take notice of more of the deed than affected his then purchase.

(3) If *B* buys two properties *X* and *Y* from *A*, leaves part of the purchase money unpaid and then sells *X* to *C* and informs *C* of *A*'s charge for unpaid purchase money, then *C*'s purchase of *X* will be subject to *A*'s charge. But if in the following year *C* also purchases *Y* from *B*, and *B* omits to inform *C* of *A*'s charge, the information *C* received when purchasing *X* will not operate as notice so as to make his purchase of *Y* subject to *A*'s charge.

There is a well recognised distinction between deeds which must affect the property, and deeds which may or may not affect it. Omission to inspect a deed which necessarily affects title and forms a link in the chain of title involves constructive notice, and a purchaser will not be excused even if the vendor has expressly stated that the deed contains nothing affecting title.[309] However, a purchaser is not presumed to know instruments which are neither directly, nor presumptively connected with the title and may only by possibility affect it.[310] Where the deed does not necessarily affect the property, and the purchaser is informed about the same, he may rely on such an assurance.[311] In *Jones v Smith,*[312] the intending mortgagee inquired of the mortgagor and his wife if any settlement had been made on their marriage, and was told that a settlement had been made which did not include the husband's property.; the mortgagee accepted his assurance and was not affected with notice that the property mortgaged was infact included in the marriage settlement.

Generally speaking, constructive notice will not be inferred, unless some specific circumstance can be shown as a starting point of an inquiry which if prosecuted, would have led to the discovery of the fact.[313] If the purchaser is informed that there are charges, he will be affected with notice of all charges which he could have ascertained on inquiry.[314] If the purchaser knows that rents are paid to some person other than the vendor, he will be affected with notice of that person's right.[315] Where the purchaser has knowledge that the deeds of the title are in the possession of a third party, he has constructive notice of the same. If the mortgagor says that the deeds are in the possession of the bank for safe custody, and the mortgagee makes no further inquiry of the bank, he will be affected with notice of the pledge, if the deeds prove to be pledged to the bank.[316]

(4) *A* borrows ₹7,000 from *B* on an equitable mortgage of 10 *bighas* of land and deposits the original title deeds with *B*. *A* then sells two *bighas* of the said land to *C* for ₹4,700 and gives a copy of the title deeds to *C* for inspection, *C* asked for the original deeds and *A* said that he had

307. *Hamilton v Royse,* (1804) 2 Seh & Let 315, p 327.
308. *Tressilian v Caniffe,* (1855) 4 Ir Ch Rep 399.
309. *Patman v Harland,* (1881) 17 Ch D 353.
310. *West v Reid,* (1843) 2 Hare 249, p 261.
311. *English and Scottish Mercantile Investment Co v Brunton,* (1892) 2 QB 700.
312. *Jones v Smith,* (1841) 1 Hare 43.
313. *Ramcoomar v McQueen,* (1873) 11 Beng LR 46, p 54; *Radhai Rai v Ram Rekha,* AIR 1964 Pat 144.
314. *Jones v Williams,* (1857) 24 Beav 47.
315. *Hunt v Luck,* (1902) 1 Ch 428 : [1900–3] All ER Rep 295.
316. *Imperial Bank of India v U Rai Gyaw,* 50 IA 283 : 76 IC 910 : AIR 1923 PC 211. See also *Varden Seth v Luckpathy,* (1862) 9 MIA 307; *Paras Ram v Mohan Manucha,* AIR 1944 PC 22 : (1944) 1 Mad LJ 282 : 48 Cal WN 342 : 211 IC 482.

not got them but promised to show them in a few days. *A* failed to do so and *C* made no further inquiry. *C* is affected with constructive notice of the equitable mortgage.[317]

(31) Gross Negligence

Mere negligence or "want of caution", to quote the phrase used by Wigram VC in *Jones v Smith,*[318] is not penalised with constructive notice. The phrase "gross negligence" was invented by the courts of equity in order to extend their jurisdiction. Equity cannot interfere with the legal title, except in cases of trusts, fraud or accident. Negligence is not fraud, as negligence implies indolence and indifference, while fraud is active dishonesty. However, in extreme cases, courts of equity over came the difficulty by assuming that the negligent person had wilfully shut his eyes to circumstances which called for inquiry. On this assumption, gross negligence was evidence of a fraudulent design which gave the Court of Equity jurisdiction to interfere.[319]

Wigram VC has said that gross negligence is:

> a degree of negligence so gross (*crassa negligentia*) that a Court of Justice may treat it as evidence of fraud—impute a fraudulent motive to it—and visit it with the consequences of fraud, although (morally speaking) the party charged may be perfectly innocent.[320]

Similarly, in *Ware v Lord Eqmont*[321] Lord Cranworth said:

> The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence.

In more modern times, the courts in England have departed from the doctrine thus laid down in the earlier equity cases in two respects. First, the adjectives "gross" and "culpable" as applied to negligence have been subjected to considerable criticism. Lord Cranworth himself said in the later case of *Colyer v Finch*:[322]

> Cases are very difficult to deal with when you are obliged to use vituperative epithets of that sort in order to enunciate a principle.

In *Wilson v Breit*[323] the same learned judge said that gross negligence is ordinary negligence with a vituperative epithet. Romer J in Re *City Equitable Fire Insurance Company*[324] explained that the real distinction between gross negligence and ordinary negligence lies in the difference between the extent of duty to take care imposed in each case. Secondly, the equitable doctrine that gross negligence is negligence which amounts to fraud has also been departed from. It was criticised by Fry LJ in *Northern Counties of England Fire Insurance Co v Whipp*[325] as involving an inconsistency, fraud "leads men to do or omit doing a thing not carelessly but for a purpose." Negligence does not import the existence of a duty to the public, as Fry LJ said in the case last cited, title deeds are not analogous to ferocious dogs which the owner is under a general duty to keep in safe custody. Lord Cranworth had said in *Colyer v Finch*[326] that "what constitutes gross

317. *Kshetranath v Harasukhdas,* (1927) 31 Cal WN 703 : 102 IC 871 : AIR 1927 Cal 538.
318. *Jones v Smith,* (1841) 1 Hare 43, p 55.
319. *Martinez v Cooper,* (1826) 2 Russ 198, p 217; *Farrow v Rees,* (1840) 4 Beav 18; *Evans v Bicknell,* (1801) 6 Ves 174, p 181.
320. *West v Reid,* (1843) 2 Hare 249, p 257.
321. *Ware v Lord Eqmont,* (1354) 4 De GM & G 460, p 473.
322. *Colyer v Finch,* (1856) 5 HLC 905, p 924.
323. *Wilson v Breit,* (1843) 11 M & W 113.
324. *City Equitable Fire Insurance Company,* (1925) Ch 407, p 428 : (1924) All ER Rep 485.
325. *Northern Counties of England Fire Insurance Co v Whipp,* (1884) 26 Ch D 482, p 489.
326. Ibid.

negligence is always excessively difficult either to define, or by way of anticipation to illustrate." In *Dixon v Muckleslon,*[327] Lord Selborne referred gross negligence to the doctrine of estoppel:

> But it must be something, which raises a positive equity against him, upon the principle which in equity, as distinct from law, is conveniently designated by the term "estoppel". In other words, the man who has conducted himself in such a manner is not entitled to deny the truth of his own representations if it be a case of express representation—he is not entitled to deny being bound by the natural consequences of his own acts, if it be a case of positive acts—he is not entitled to refuse to abide by the consequence of his own wilful and unjustifiable neglect, if that is the nature of the case. By one or other of those means, he may have armed another person with the power of going into the world under false colours; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person, he is bound upon equitable principles by the use made of that apparent authority and power.

This is a correct statement of the principle and the rule that is followed in England with reference to the postponement of legal mortgages laid down by Lord Lindley in *Oliver v Hinton*[328] that:

> to deprive a purchaser for value without notice of a prior encumbrance of the protection of the legal estate, it is not in my opinion essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior encumbrancer of his priority.

This case was followed by the Calcutta High Court in *Lloyds Bank Ltd v P F Guzdar & Co*[329] dissenting from the dictum of Jenkins J in *Monindra v Troylucko Nath*[330] that "gross neglect" in section 78 of TP Act means neglect that amounts to evidence of fraud.

Cases of gross negligence which estop a man from denying that he had notice of a fact generally, also fall under the heading "Wilful abstention from an inquiry or search" or under "Registration." Thus, if a purchaser is informed that the deeds of title are in the possession of a bank for safe custody and he omits to make further inquiry of the bank, that is gross negligence which will affect him with notice if the deeds prove to be pledged with the bank.[331] The Privy Council has said that omission to search the register kept under the Registration Act may amount to gross negligence, so as to attract the consequences which result from notice.[332] This ruling has been applied to an omission to search the Revenue Register.[333] Omission to inspect the title of property which a purchaser has contracted to buy, may amount to gross negligence,[334] but not the omission to inspect the title of an adjoining property which prima facie the vendor is under no obligation to produce.[335]

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327. *Dixon v Muckleslon,* (1872) 8 Ch App 155, p 160.
328. *Oliver v Hinton,* (1899) 2 Ch 264, p 274; see also *Bailey v Barnes,* (1894) 1 Ch 25, p 35.
329. *Lloyds Bank Ltd v P F Guzdar & Co,* (1929) ILR 56 Cal 868 : 121 IC 625 : AIR 1930 Cal 22.
330. *Monindra v Troylucko Nath,* (1898) 2 Cal WN 750.
331. *Imperial Bank of India v U Rai Gyaw,* 50 IA 283 : 76 IC 910 : AIR 1923 PC 211.
332. *Tilakdhari Lal v Khedan Lal,* 47 IA 239 : 57 IC 465 : AIR 1921 PC 112; *Punjab Banking Co v Muhammad Hasan Khan,* (1925) ILR 6 Lah 344 : 89 IC 615 : AIR 1925 Lah 542; *Parbhu Lal v Chattar,* 88 IC 398 : AIR 1925 All 557; *Kali Din v Madho,* 77 IC 862 : AIR 1923 All 169; *Ghulam Muhammad v Mirza,* (1924) ILR Lah 368 : 84 IC 174 : AIR 1925 Lah 25; *ALRM Chettiar Firm v LPR Chettiar Firm,* (1926) ILR 4 Rang 238 : 98 IC 19 : AIR 1926 Rang 195.
333. *Vaz v Muni Singh,* 117 IC 565 : AIR 1929 Rang 34.
334. *Doorga v Baney Madhub,* (1880) ILR 7 Cal 199, p 201; *Ram Charan v Joy Ram,* (1912) 17 Cal WN 10 : 16 IC 825; *Mahomed Yunus Khan v Court of Wards, Balarampur Estate,* 167 IC 962 : AIR 1937 Oudh 301.
335. *Chaturbhuj v Mansukhram,* (1925) 27 Bom LR 73 : 86 IC 19 : AIR 1925 Bom 183.

A Full Bench of the Allahabad High Court had held in *Nawal Kishore v Agra Municipality,*[336] approving *Ramjilal v Municipal Board, Lucknow*[337] and disapproving *Municipal Board v Roop Chand Jain*[338] that a person buying property in a municipal area must be deemed to be aware that municipal taxes are a charge on the property, that there is a possibility of such taxes being in arrears, and that it is his duty to inquire about such arrears; if he fails to do so, he would be deemed to have notice of such taxes. A similar view was also taken by the Calcutta High Court.[339] In *Ahmedabad Municipality v Haji Abdul,*[340] the Supreme Court has disapproved of *Nawal Kishore's* case, and held that no such general rule of law can be laid down; and, whether it was the duty of the transferee to inquire about such arrears must be judged on the facts of each case.

ILLUSTRATION

G deposited title-deeds of his house in Calcutta with bank *N* to secure an overdraft in his account. Subsequently, *G* represented to the bank that he wished to sell his house in order to clear his overdraft. According to the usual practice, the bank should have delivered the title-deeds to their solicitor in order to arrange for their inspection by the solicitor of the prospective purchaser. But *G* represented that if the prospective purchaser knew that the deeds were pledged, he would beat him down in price and ask for the deeds to be returned to him. Bank *N* complied and departing from the usual practice, returned the deeds to *G*. *G* then mortgaged the house to another bank *L*. Bank *N* was guilty of gross negligence which enabled *G* to induce bank *L* to advance money on the house as if it was unencumbered. The mortgage of bank *N* was postponed to the mortgage of bank *L*.[341]

Sale of part of property

Under the proviso to section 55(3), on selling part of the property, the seller is entitled to retain all the documents of title. Having regard to this provision, the purchaser of a part would not be held guilty of negligence in allowing the title-deeds to remain with the seller. It would, however, be prudent of a purchaser of a part, not getting the deeds, to stipulate that he should be allowed to endorse notice, of the sale on the deeds retained by the seller. Since registration is constructive notice, the risk to the purchaser is slight, but in the absence of a statutory provision making it compulsory to endorse notice of sale of part of the property on the documents retained, there is scope for the seller committing fraud on a third party, e.g. by depositing title-deeds with intent to create security thereon.

(32) Registration as Notice—Explanation I

Explanation I supersedes the former case law as to whether registration of a document under the Registration Act is constructive notice of its contents. The Bombay and Allahabad High Courts had held that registration is notice.[342] The Madras High Court had held that registration

336. *Nawal Kishore v Agra Municipality,* (1943) All LJ 53 : 205 IC 539 : AIR 1943 All 115; *Sampat Ram v Baboo Lal,* AIR 1955 All 24.
337. *Ramjilal v Municipal Board, Lucknow,* 164 IC 1034 : AIR 1937 Oudh 31 : AIR 1941 Oudh 305.
338. *Municipal Board v Roop Chand Jain,* AIR 1940 All 456.
339. *Chanduram v Municipal Commr,* AIR 1951 Cal 398.
340. *Ahmedabad Municipality v Haji Abdul,* AIR 1971 SC 1201 : (1971) 1 SCC 757.
341. *Lloyds Bank Ltd v P E Guzdar & Co,* (1929) ILR 56 Cal 868 : 121 IC 625 : AIR 1930 Cal 22.
342. *Lakshmandas v Dasrat,* (1882) ILR 6 Bom 168; *Dundaya v Chenbasapa,* (1885) ILR 9 Bom 427; *Chintaman v Dareppa,* (1890) ILR 14 Bom 506; *Narayan v Bapu,* (1892) ILR 17 Bom 741; *Bal Mukundas v Moti,* (1894) ILR 18 Bom 444; *Chunilal v Ramchandra,* (1898) ILR 22 Bom 213; *Dina v Nathu,* (1902) ILR 26 Bom 538; *Churaman v Balli,* (1887) ILR 9 All 591; *Janki Prasad v Kishen Dat,* (1894) ILR 16 All 478; *Nand Kishore v Anwar,* (1908) ILR 30 All 82; *Saiyed Muhammad,* (1909) ILR 31 All 523 : 3 IC 506.

is not notice on the ground that if the legislature had so intended, it would have said so.[343] The Calcutta High Court in some cases took the same view as Madras High Court;[344] but the prevailing view in Calcutta High Court was that whether registration operates as notice depends upon the circumstances of each case, i.e., whether the omission to search the register taken with the facts of the case would amount to gross negligence so as to attract the consequences which result from notice.[345] The Privy Council in *Tilakdhari Lal v Khedan Lal*[346] reviewed all the Indian decisions, and approved of the decision of Sir Lawrence Jenkins in *Monindra v Troylucko Nath*[347] that the question was not one of law, but of fact to be determined according to the circumstances of each case. Their Lordships stated that though registration had been held for two centuries not to operate as notice in England, yet the legislature, when framing different Registration Acts and the definition of notice in the TP Act, had omitted to enact the principle that registration is notice. This omission has now been supplied. The definite rule now enacted, the effect of which is to oblige all purchasers to exercise diligence in examining titles recorded in the register, avoids the uncertainty and the risk of perjury involved in taking parole evidence as to whether the omission to search the register should in any particular case be attributed to gross negligence. It also fulfils the chief object of registration, which is to provide a record on which every person dealing with property can rely for a full and complete account of all transactions by which his title may be affected.[348] The Supreme Court has set at rest all controversies by holding that registered deed is a constructive notice, and is a deemed notice under section 3 of the TP Act. It was further held that notice is actual as well as constructive, and a plea of bona fide purchaser without notice is not permissible.[349] Any person who wants to deal with an immovable property is deemed to have knowledge of all duly registered instruments relating to the said immovable property.[350]

An unregistered document is unenforceable in the eyes of law for the transfer of property.[351] As the registration of a document which is compulsorily registrable under law amounts to constructive notice on a person aggrieved by the title or interest created by such document, the registration of the perpetual sub lease produced is deemed to act as a constructive notice to the world at large.[352]

In Punjab where the TP Act was not in force, it has been held that the question whether registration operates as notice depends upon the facts of each case.[353] Where a document is

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343. *Shan Maun Mull v Madras Building Co,* (1892) ILR 15 Mad 268; *Madras Building Co v Rowlandson,* (1889) ILR 13 Mad 383; *Damodara v Somasundara,* (1889) ILR 12 Mad 429, p 435; *Rangasami v Annamalai,* (1908) ILR 31 Mad 7, p 10.
344. *Inderdawan v Gobind,* (1896) ILR 23 Cal 790; *Preonath v Ashutosh,* (1900) ILR 27 Cal 358, p 362; see also *Joshua v Alliance Bank,* (1895) ILR 22 Cal 185; *Nanda Lal v Abdul Aziz,* (1916) ILR 43 Cal 1052, p 1084 : 34 IC 115.
345. *Monindra v Troylucko Nath,* (1899) 2 Cal WN 750; *Bunwari v Ramjee,* (1902) 7 Cal WN 11; *Atul Kristo v Mutty Lal,* (1899) 3 Cal WN 30.
346. *Tilakdhari Lal v Khedan Lal,* 47 IA 239 : 57 IC 465 : AIR 1921 PC 112; *Ashiq Husain v Chaturbhuj* (1828) ILR 50 All 328 : 108 IC 152 : AIR 1928 All 159; *Maung Halw v MMS Chettyar Firm,* 145 IC 118 : AIR 1933 Rang 153.
347. *Monindra v Troylucko Nath,* (1899) 2 Cal WN 750.
348. Ghose, *Law of Mortgages,* vol 1, p 473; Story, *Equity Jurisprudence,* Article 534.
349. [1999] 3 LRI 506.
350. *G Raju v Govt of Andhra Pradesh,* (2011) 1 ALD 310; *M Ramakrishna Reddy v Sub-Registrar, Bangalore,* AIR 2000 Kant 46, para 5.2.
351. *Pravinbhai Becharbhai Viroja v Bhikhabhai Jethabhai Bagda,* 2010 SCC OnLine Guj 5607 : LNIND 2010 GUJ 14811.
352. *Lata Chauhan v L S Bisht,* (2010) 117 DRJ 715 : (2011) 181 DLT 101 (Delhi).
353. *DAV College Reg Society v Umrao,* 157 IC 92 : AIR 1935 Lah 410; *Gopal Singh v Thakar Singh,* AIR 1935 Lah 313; *Ghulam Fatma v Kachore Singh,* AIR 1940 Lah 269.

not compulsorily registrable, its registration does not amount to constructive notice.[354] Testamentary documents do not come within the purview of notice as contemplated by section 3, expln 1. They are not required to be registered.[355]

(33) Any Person Acquiring

These words indicate that registration is notice to transferees subsequent to the registration,[356] while the registration of a subsequent transaction is not notice to prior transferees.[357]

In a case decided by Allahabad High Court,[358] Sir John Edge said that any reasonably prudent man who was bringing a suit on a mortgage ought to search the registry in order to ascertain what were the dealings with the property whether the dealings were anterior to, or subsequent to his mortgage. This observation goes too far, and it can only have reference to the joinder of parties to the suit. Subsequent encumbrances cannot affect a title that has been vested. A prior mortgagee ought to join a subsequent encumbrancer in a suit for sale; but if he does not do so, the result is that the decree is not binding on the encumbrancer.[359]

The registration of a puisne mortgage is not notice to a prior mortgagee.[360] Nor is registration of a sub-mortgage notice to the mortgagor.[361]

ILLUSTRATION

A mortgages property to *B*, who grants a sub-mortgage to *C*. *A* in ignorance of the sub-mortgage, pays the mortgage debt to *B*. The fact that the sub-mortgage is registered does not amount to notice of the sub-mortgage to *A* so as to vitiate the payment.[362]

An equitable mortgage by deposit of title-deeds is entitled to priority over a subsequently registered mortgage, as it is a perfected conveyance, and not merely an oral agreement to which section 48 of the Registration Act applies.[363] Express provision is now made in this behalf by a proviso inserted in that section of the Registration Act by amending Act 21 of 1929.

Required by law to be registered

Registration is not notice when there is no duty to search the register. *A* mortgages his goods to *B* by a registered mortgage, but retains the goods in his own possession. *A* then sells the goods to *C*, who is not aware of the mortgage. *C* acquires a good title to the goods, the law does not require the registration of mortgages of movables, and there was no duty cast upon him to search the register.[364]

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354. *Hirachand v Kashinath,* (1942) 44 Bom LR 227 : AIR 1942 Bom 339; *Asharfi Devi v Prem Chand,* AIR 1971 All 457.
355. *24 Parganas Lawyer's Clerks Association v State of West Bengal,* AIR 1986 Cal 205.
356. *Baba Ramchandra v Kondeo Jagna,* 184 IC 797 : AIR 1940 Nag 7.
357. *Tilakdhari Lal v Khedan Lal,* 47 IA 239 : 57 IC 465 : AIR 1921 PC 112.
358. *Janki Prasad v Kishen Dat,* (1894) ILR 16 All 478, p 481.
359. *Het Ram v Shadi Lal,* 45 IA 130 : 45 IC 798 : AIR 1918 PC 34. See *Mulla's Code of Civil Procedure,* notes to O 34, r 1.
360. *Ram Narain v Bandi Pershad,* (1904) ILR 31 Cal 737, p 742; see also *Ashiq Husain v Chatarbhuj,* (1928) ILR 50 All 328 : 108 IC 152 : AIR 1928 All 159.
361. *Sahadev v Shekh Papa,* (1905) ILR 29 Bom 199; *Parbhu Lal v Chattar,* 88 IC 398 : AIR 1925 All 557.
362. *Sahadev v Shekh Papa,* (1905) ILR 29 Bom 199.
363. *Coggan v Pogose,* (1884) ILR 11 Cal 158, p 160; *Gokul Das v Eastern Mortgage & Agency Co,* (1906) ILR 33 Cal 410, p 422; *Stewart v Bank Upper India,* 34 IC 937.
364. *Backer Khorasanee v Ahmed Ismail,* (1927) ILR 5 Rang 633, p 634 : 106 IC 355 : AIR 1928 Rang 28; *Luddlao Heraman v Kashinath,* (1942) 44 Bom LR 227 : 1942 ILR Bom 339.

However, an assignment deed that conveys title in property for more than Rs. 100/ must be registered.[365]

(34) Time from which Registration Operates as Notice

If the instrument has been registered in the same sub-district as that in which the property is situated, it operates as notice from the date of registration. This is because any person seeking to acquire an interest in the property would inspect the register of that sub-district when investigating title. If, however, the property is situated in several sub-districts, or if registration has been effected under section 30(2) of the Registration Act in another district, the registered deed will not operate as notice until memorandum of such registration has been received and filed by the sub-registrar of the sub-district in which the property is situated under section 66 of the Registration Act.[366] The reason for this distinction is that, the purchaser cannot be expected to search the registers of other sub-districts. In *Alliance Bank of Simla v Bhai Kahan,*[367] a mortgage-deed affecting properties in more than one sub-district was registered at Lahore, and the chief court held that a purchaser of one of the properties in a different district had notice. The court said:

> As to the registration of the deed being effected in Lahore, the force of the argument is weakened when it is remembered that, when a deed affecting properties in more than one district is registered in Lahore, a copy is sent for record to each district in which any part of the property is.

The point as to the time from which the registration operated as notice did not arise in this case, but this is now settled by the amendment made in explanation I by amending Act 5 of 1930.

(35) Registration is Notice of Registered Instrument

If an instrument is registered in the manner prescribed by the Registration Act, a party cannot be heard to say that he searched the register without finding it, as he must take the consequences of his want of diligence.[368] Notice of a deed is notice of all material facts affecting the property which appear on the face of the deed, or can be reasonably inferred from its contents.[369] It is also notice of all documents recited in the deed and which an examination of the deed would have disclosed, provided the deed forms part of the chain of title and so necessarily affects the property.[370] Where a mortgage is mentioned in a conveyance, the purchaser has constructive notice of other encumbrances referred to in the mortgage. The report of a very old case—*Bisco v Earl of Banbury*[371] contains the following passage:

> But my Lord Chancellor declared; that there was sufficient notice in law, or an implied notice, for the mortgage to Hewet was excepted in the Defendant's Conveyance, and therefore they could not be ignorant of the Mortgage, and ought to have seen that, and that would have led them to the other *Deeds* in which, pursued from one to another, the whole case must have been discovered to them.

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365. *Durga Matha Building Constructions Co-op Housing Society Ltd v Sada Yellaiah,* AIR 2010 AP 231 : LNIND 2010 AP 503.
366. *Rajo Kuer v Brij Bihari Prasad,* AIR 1962 Pat 236.
367. *Alliance Bank of Simla v Bhai Kahan,* 25 IC 856.
368. *Akhoy Kumar v Kanai Lal,* (1912) 17 Cal WN 224 : 16 IC 618; *Renukabai v Bhavan,* 185 IC 33 : AIR 1939 Nag 132.
369. *Rajaram v Krishnasami,* (1893) ILR 16 Mad 301.
370. *Patman v Harland,* (1881) 17 Ch D 353; *Bepin Krishna v Priya Brata,* (1921) 26 Cal WN 36 : 66 IC 345 : AIR 1921 Cal 730.
371. *Bisco v Earl of Banbury,* (1676) 1 Cas in Ch 287, 291.

The High Court of Punjab and Haryana has held that this explanation has no relevance regarding the period of limitation, and does not state that the period starts only from the time when the person concerned came to know of the sale-deeds. The explanation deals with notice of the previous sale to the subsequent purchaser, and has no concern with limitation for pre-emption suits.[372]

ILLUSTRATION

A and his half brother *B*, effected a partition of the family property, and the deed of partition contained a mutual covenant that if either brother agreed to sell his share of the family house, he would give the other a right of pre-emption. *B* sold his half share of the house to *C* by a deed which described the share as acquired under a deed of partition. *C* had constructive notice of the covenant of pre-emption.[373]

The Bombay High Court had in some cases held that registration did not operate as notice of unregistered instruments referred to in the registered deed.[374] These cases, are no longer good law.

(36) Provisos to Explanation I

The provisos to explanation I are self-explanatory. The first proviso merely repeats what is enacted in the fifth paragraph of the section, that registration must be according to law. The second and third provisos make it clear that a purchaser will not be affected with notice of any fact which has not been correctly entered in the registers and indexes kept by the sub-registrar. In *Gordhandas v Mohunlal*,[375] the Bombay High Court held that the purchaser was not affected with notice of a registered agreement restricting the use of the property purchased because it was not shown that the agreement was indexed in relation to the property sold.

A mere defect of procedure will not invalidate registration.[376] Cases have occurred in which immovable property which ought to be registered in Book No 1 has been registered in the Miscellaneous Register Book No 4. There is a conflict of decisions as to whether such registration is valid,[377] or invalid.[378] However that may be, the second proviso shows that such misplaced entries will not operate as notice.[379]

(37) Record of Rights

Omission by a purchaser to inspect entries in the record of rights will, as already stated above, amount to wilful abstention from inquiry under the first part of the definition of notice.[380]

(38) Actual Possession as Notice of Title—Explanation II

Explanation II settles the law that actual possession is notice of such title as the person in actual possession has. It raises a statutory presumption of "notice" against any person who

372. *Vinod Kumar v Suresh Pal*, AIR 1985 P&H 361.
373. *Rajaram v Krishnasami*, (1893) ILR 16 Mad 301.
374. *Chunilal v Ramchandra*, (1898) ILR 22 Bom 213; *Sharfudin v Govind*, (1903) ILR 27 Bom 452.
375. *Gordhandas v Mohunlal*, (1921) ILR 45 Bom 170 : 59 IC 506 : AIR 1921 Bom 161.
376. *Sah Mukkum Lal v Sah Koondum Lall*, 2 IA 210; *Ma Pwa May v SRMMA Chettyar Firm*, (1929) ILR 7 Rang 624 : 56 IA 379 : 120 IC 645 : AIR 1929 PC 279.
377. *Narasamma v Subbarayudu*, (1895) ILR 18 Mad 364; *Najibulla v Nusir*, (1881) ILR 7 Cal 196; *Indra Bibi v Jain Sirdar*, (1908) ILR 35 Cal 845.
378. *Parashrampant v Rama*, (1910) ILR 34 Bom 202 : 4 IC 588; *Subbalakshmi v Narasimiah*, (1927) 52 Mad LJ 482 : 102 IC 360 : AIR 1927 Mad 586.
379. *K V Galliara v U Thet*, (1929) ILR 7 Rang 118 : 117 IC 580 : AIR 1929 Rang 117; *Pt Sita Ram v Raj Narayan*, 150 IC 145 : AIR 1934 Oudh 283.
380. *Harilal v Mulchand*, (1928) ILR 52 Bom 883 : 113 IC 27 : AIR 1928 Bom 427.

acquires any immovable property or any interest therein of the title, if any, of the person who is for the time being in actual possession thereof.[381]

In *R K Mohammed Ubaidullah v Hajee C Abdul Wahab,*[382] the Supreme Court has held:

> With reference to subsequent purchaser it is essential that he should make an inquiry as to the title or interest of the person in actual possession as on the date when the sale transaction was made in his favour. The actual possession of a person itself is deemed or constructive notice of the title if any, of a person who is for the time being in actual possession thereof. A subsequent purchaser has to make inquiry as to further interest, nature of possession and title under which the person was continuing in possession on the date of purchase of the property.

In *Barnhart v Greenshields,*[383] Lord Kingsdown delivering the judgment of the Board said:

> With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor v Stibbert,*[384] but also to interests under collateral agreements, as in *Daniels v Davison*[385] and *Alien v Anthony,*[386] the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be.

A mortgagor contracted to sell the mortgaged property to the mortgagee who was in possession, and then sold it to a third person. The purchaser having made no inquiries, was held to have had constructive notice of all the equities in favour of the mortgagee.[387] Similarly, in *Baburam Bag v Madhav Chandra,*[388] Sir Lawrence Jenkins CJ said:

> the occupation of the property by a tenant ordinarily affects one who would take a transfer of the property with notice of that tenant's rights, and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice.

A purchaser,[389] or a permanent lessee[390] of a village, is effected with notice of the rights of cultivating tenants about which he made no inquiry. In *H N Narayanaswamy Naidy v Davveramma,*[391] the vendor after executing a sale deed obtained an agreement for reconveyance of the property and while giving possession of the property to vendee, later entered into an agreement with him for the release of his rights under the agreement for re-conveyance. Subsequently, a "purchase" of the vendor's rights (under the agreement for reconveyance) was made by a person who was residing near the property in question. It was held by the Karnataka High Court that the subsequent purchaser would be deemed to have notice of the vendee's rights with reference to the agreement between the vendor and vendee.

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381. *Ram Niwas v Bano,* (2000) 6 SCC 685, para 7.
382. *R K Mohammed Ubaidullah v Hajee C Abdul Wahab,* (2000) 6 SCC 402, p 411.
383. *Barnhart v Greenshields,* (1853) 9 Moo PC 18, p 32.
384. *Taylor v Stibbert,* (1794) 2 Ves 437.
385. *Daniels v Davison,* (1809) 16 Ves 249, p 254 followed in *National Bank v Paul Hamilton Joseph,* AIR 1920 PC 274.
386. *Alien v Anthony,* (1816) 1 Mer 282.
387. *Faki Ibrahim v Faki Gulam,* (1921) ILR 45 Bom 910 : 60 IC 986 : AIR 1921 Bom 459; *Rangappa Goundan v Marappa Goundan,* (1958) 1 Mad LJ 188.
388. *Baburam Bag v Madhav Chandra,* (1913) ILR 40 Cal 565, p 569 : 19 IC 9.
389. *Ahmedbhoy v Balkrishna,* (1895) ILR 19 Bom 391; *Vinayakrao v Gyanoba,* (1921) 23 Bom LR 1062 : 64 IC 246 : AIR 1923 Bom 13.
390. *Bisheshar v Muirhead,* (1892) ILR 14 All 362.
391. *H N Narayanaswamy Naidy v Davveramma,* AIR 1981 Kant 93 : (1981) 1 Kar LJ 259.

Thus, in the case of unregistered sale deeds, the priority between buyers under interest, if any created by the unregistered sale deed is that the effect of possession under the first unregistered sale deed would terminate and prejudice the second buyer.[392]

Where a landlord has released the rent of a tenant and then mortgages the property leased, the possession of the tenant is constructive notice of the release and the mortgagee is not entitled to recover rent from the tenants; but a release after the mortgage is not binding on the mortgagee.[393] The first part of this proposition rests on the principle that the open possession of a tenant is notice, not only of the terms of the tenancy, but of collateral agreements as well, in the absence of all inquiry by the transferee.[394] Therefore, a notice of a tenant in possession, in the absence of inquiry, also constitutes constructive notice of the right of the tenant to claim part-performance under section 53-A.[395] However, a notice of tenancy is not notice of the tenant's equitable right to have the tenancy agreement rectified, as although the purchaser was bound to ascertain the terms under which the tenant held the land, he was under no duty to ascertain whether the terms accurately set out the bargain between the parties.[396]

Presumption of title from long possession will not apply against title holder

The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected; for instance, in the case of waste lands, or where nothing is known about possession one way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party.[397]

Possession to operate as notice must be actual

In order to operate as constructive notice, possession must be actual possession.[398] Constructive possession is not notice, and the possession of a tenant is not notice of the title of the lessor,[399] unless the purchaser had learnt that the rent was in fact paid to him in a manner inconsistent with the title of the seller.[400]

Thus, if *A* contracts to sell land to *B*, and after *B* has put his tenant in possession, *A* sells the land to *C*, then the possession of *B*'s tenant will not be sufficient to affect *C* with notice of *B*'s interest.

It does not matter that the party in possession under a contract of sale had previously been in possession as tenant of the vendor, as the purchaser has no right to assume that the former tenant has not subsequently acquired another title.[401] On the other hand, if a purchaser finds his vendor in possession, he is not affected with notice that he is in possession, as tenant of a third party.[402]

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392. *Ramesh Vajabhai Rabari v Pratiksha Real Estate,* (2014) 12 SCC 190 : AIR 2014 SC 2962 : 2014 (4) SCALE 555.
393. *Tiloke Chand Surana v J B Beattle and Co,* (1926) 29 Cal WN 953 : 94 IC 538 : AIR 1926 Cal 204; *Ashburton v Nocton* (1915) 1 Ch 274.
394. *Tiloke Chand Surane v J B Beattle and Co,* (1926) 29 Cal WN 953; *Rama Krishna v Mahadei,* AIR 1965 Pat 467.
395. *Mahadeo v S B Kesarkar,* (1971) 73 Bom LR 454 : AIR 1972 Bom 100.
396. *Smith v Jones,* [1954] 2 All ER 823 : (1954) 1 WLR 1089.
397. *State of AP v Star Bone Mill and Fertiliser Co,* 2013 (9) SCC 319 : JT 2013 (3) SC 401 : 2013 (2) SCALE 728 : (2014) 1 WBLR (SC) 422 : 2013 (3) WLN 68.
398. *Gunamoni v Bussunt,* (1890) ILR 16 Cal 414; *Birabaro Rout v Dullabh Raut,* (1972) 38 Cut LT 161.
399. *Banhart v Greenshields,* (1853) 9 Moo PC 18; *Gunamoni v Bussunt,* (1890) ILR 16 Cal 414, p 417.
400. *Hunt v Luck,* (1902) 1 Ch 428 : [1900–3] All ER Rep 295; *Gunamoni v Bussunt,* (1890) 16 ILR Cal 414, p 417.
401. *Balchand Mahton v Bulaki Singh,* (1929) ILR 8 Pat 316 : 117 IC 170 : AIR 1929 Pat 284; *Magu v Bholi Das,* (1914) 19 Cal LJ 352 : 20 IC 195.
402. *Moreshwar v Dattu,* (1888) ILR 12 Bom 569; *Pindee v U Hpa,* (1928) ILR 6 Rang 315 : 112 IC 230 : AIR 1928 Rang 237.

ILLUSTRATIONS

(1) *A* leased his land on 2 March 1901 to *B* for seven years. On 1 May 1901, *A* entered into an agreement with *B* for the renewal of the lease on the termination of the term. On 11 July, *A* purported to settle the land with *C* for seven years from 1 May 1908. *C* sued to recover possession on the ground that the lease to *B* had terminated but the court held that *C* had constructive notice of the agreement as *B* was in possession and that *C* was not entitled to possession.[403]

(2) *A* leased his land to *B*, and then in 1875, sold it to him for ₹75 by an unregistered deed of sale. *B*, who was originally the tenant, continued in possession as owner. In 1876, *A* sold the land to *C* by a registered sale deed. *C* sued *B* for the rent alleging that *B* was in possession as tenant. Although *C*'s deed being registered would have priority over *B*'s unregistered deed, yet *C* is not entitled to rent because having notice of *B*'s possession he had constructive notice of the title on which *B* held the land.[404]

(3) *A* sells land to *B* but remains in possession as tenant of *B*. The sale deed to *B* is unregistered, and *A* afterwards sells the same land to *C* by a registered deed. *C* is not deprived of the priority by the doctrine of notice, for he had no reason to suppose that *A* was in possession otherwise than as owner.[405]

Possession only of a portion where whole property sold

The rule depends upon the principle that when another is in exclusive possession of the property, and such possession would be prima facie inconsistent with the full rights of ownership of the vendor or mortgagor, and the purchaser does not choose to ask what that possession is, he must be taken to have got the information that he would have obtained if he had asked.[406] However, the doctrine must not be extended to the case of every person who may be on the premises; and possession of a small part of a house will not put a purchaser on constructive notice of that person's rights as to the whole house.[407] The principle of constructive notice thus, cannot be extended to a case where the person who claims on the basis of prior agreement is in possession of only a small fraction of the property. In such a case, it cannot be said that the person who purchases the property must make an inquiry about the previous contract from the plaintiff or any other tenant in occupation of a portion of the house.[408]

(39) State of the Property

A purchaser has been held to have notice of the rights of third parties from the state of the property purchased. Thus, the mortgagee of a burial ground has notice of the purposes to which it is devoted, and is bound by the rights of burial, temporary or in perpetuity, granted by his mortgagor, while left in possession.[409] If there is a shrine or tomb on the land to be sold, the purchaser will be put to an inquiry as to whether the land is a *wakf*.[410] Where a part

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403. *Baburam Bag v Madhav Chandra,* (1913) ILR 40 Cal 565 : 19 IC 9; *Kalyani v Krishnan Nambiar,* (1932) ILR 55 Mad 519 : 62 MIJ 525 : 138 IC 78 : AIR 1932 Mad 305.
404. *Kondiba v Nann,* (1903) ILR 27 Bom 408.
405. *Moreshwar v Dattu,* (1888) ILR 12 Bom 569.
406. *Parthasarthy v Subbaraya,* (1923) 45 Mad LJ 175 : 72 IC 558 : AIR 1924 Mad 67.
407. *Manji v Hoorbai,* (1910) ILR 35 Bom 342 : 8 IC 752; *Parthasarthy v Subbaraya,* (1923) 45 Mad LJ 175. See also *Hari Charan v Kaula Rai,* (1971) 2 Pat LJ 513 : 40 IC 142; *Muralidhar Marwari v Lalit Mohan,* AIR 1962 Ori 86; *Hunter v Walters,* (1871) 7 Ch 75.
408. *Mohd Mustaffa v Haji Mohd Hissa,* AIR 1987 Pat 5.
409. *Moreland v Richardson,* (1857) 24 Beav 33.
410. *Motisha v Hiresha,* (1877) PJ 3.

of an estate, agreed to be let upon building leases was sold and the purchaser had notice of the existence of an archway, which, on the completion of the buildings was to be the only access to the adjoining land, it was held that the state of the property being such as to put the purchaser upon inquiry, he was fixed with constructive notice of the right of way.[411] However, the mere fact of there being windows in an adjoining house, which overlooked a purchased property, is not constructive notice of an agreement giving a right to the access of light to them, as windows are frequently made in situations where they are liable to be obstructed.[412]

(40) Notice to an Agent

Explanation III amends the law as to notice to an agent. Prior to the amending Act of 1929, the definition of notice included a provision that a person is said to have notice of a fact "when information of the fact is given or obtained by his agent under the circumstances mentioned in section 229 of the Indian Contract Act, 1872. The words "given or obtained" suggested express notice. In a case decided by Calcutta High Court[413] Pontifex J said "for a purchaser to be affected with constructive notice through his solicitor, the latter himself must have actual notice." The words "given or obtained" have been omitted, and the reference to the section of the Indian Contract Act deleted, and the definition widened so as to include a fact of which the agent has notice, whether express or constructive. This accords with the principle *qui facit per alium facit per se*, i.e., he who acts through another is deemed to act in person, and that the agent stands in the place of his principal with reference to the business for which he is agent so that his acts and knowledge are the acts and knowledge of his principal.[414]

The expression "imputed notice" was first used by Lord Chelmsford in the following passage from *Espin v Pemberton*:[415]

> Constructive notice properly so called, is the knowledge which the courts impute to a person upon a presumption so strong of the existence of the knowledge, that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry, or from his wilfully abstaining from inquiry, to avoid notice. I should therefore prefer calling the knowledge which a person has either by himself or through his agent, actual knowledge or if it is necessary to make a distinction between the knowledge which a person possesses himself, and that which is known to his agent, the latter might be called imputed knowledge.

The Privy Council has held that it is a rule of law that imputes the knowledge of the agent to the principal, as the agency extends to receiving notice, on behalf of the principal, of whatever is material.[416]

An alienation of the property by the father in whose favour a power of attorney has been executed by the son, would bind the latter[417] as it would squarely come under the expression "when a person is said to have notice" as interpreted under section 3 of the Transfer of Property Act and he would be deemed to have notice of the acts and transactions executed by his agent.

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411. *Davies v Sear*, (1869) 7 Eq 427.
412. *Allen v Seckham*, (1879) 11 Ch D 790.
413. *Greender Chunder v Mackintosh*, (1879) ILR 4 Cal 897, p 910.
414. *Mohori Bibee v Dhurmodas Ghose*, (1903) ILR 30 Cal 539 : 30 IA 114, p 121; *Renukabai v Bhavan*, 185 IC 33 : AIR 1939 Nag 132.
415. *Espin v Pemberton*, (1859) 3 De G & J 547, p 554.
416. *Rampal Singh v Balbaddar Singh*, (1904) ILR 25 All 1 : 29 IA 203, p 212.
417. *P T Roy Babu v P T Rajan Babu*, LNIND 2017 KER 574 .

(41) Scope of the Rule as to Imputed Notice

The rule of imputed notice is subject to certain limitations. Notice should have been received by the agent (1) during the agency; (2) in his capacity as agent; (3) in the course of the agency business; (4) in a matter material to the agency business; and (5) should not have been fraudulently withheld from the principal. The first four conditions are implied by the words "whilst acting on his behalf in the course of the business to which that fact is material." The fifth condition is the subject of the proviso and will be considered separately.[418]

During the agency

It is essential that the knowledge should have been acquired by the agent, as agent and while acting in the agency business. Thus, if a canvasser for an insurance company negotiates a policy of insurance for a man who has lost the sight of one eye, against the loss of both eyes; the knowledge obtained by the canvasser, when acting as agent of the company, that the man had already lost one eye, will be imputed to the company.[419] Knowledge obtained before the commencement of the agency will not be imputed to the principal. A mortgagee is not held to have notice of prior charges because his solicitor had previously acted for the prior encumbrancers.[420] In *Chabildas Lalloobhai v Dayai Mowji*,[421] a mortgagee sold the property mortgaged under a power of sale, and one of the conditions of the sale was a depreciatory condition wholly unwarranted by the state of the mortgagor's title. The purchaser signed the contract the same day, and a few days later employed a solicitor to act for him in the preparation of a conveyance. The High Court set aside the sale on the ground that the solicitor knew enough about the title to see that the condition was unjustifiable. The Privy Council, however, said that this view imputed to the principal the knowledge of an agent not acquired in the business for which he was agent, and to use it to upset a transaction at the date the agency commenced, was an extension of the doctrine of constructive notice with which the Council could not concur. Knowledge acquired by an agent after the agency has terminated, cannot be imputed to the principal.

In his capacity as agent

It is necessary that the transaction should be such as to constitute the relation of principal and agent. It has been held that notice to the agent of a country solicitor is notice to the person employing the solicitor.[422] On the other hand, if a mortgagee allows a mortgagor-solicitor to endorse the deed of mortgage, he does not constitute the solicitor his agent, and is not affected with knowledge of an encumbrance known to him.[423] Where company *A* lends money to company *B*, and if a director of company *A* is by reason of a personal interest in company *B* aware that the loan is required for an ultra vires purpose, that knowledge will not be imputed to company *A*, as the director is under no duty to disclose how the money borrowed would be applied.[424] However, if a director in his personal capacity has notice of a charge on shares of the company, that will amount to notice to the company.[425] Similarly, if a director charges his own shares, notice of the charge will be imputed to the company.[426]

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418. The rule is analogous to that in the law of agency. See section 229 of the Indian Contract Act, 1872, and *Bowstead on Agency*, 12th Edn, Article 107, p 242.
419. *Bawden v London Assurance Co*, (1892) 2 QB 534. However, see the criticism of this case in *Newsholine Bros v Road Transport and General Insurance Co Ltd*, (1929) 2 KB 356 : [1929] All ER Rep 442.
420. Re *Cousins*, (1886) 31 Ch D 671.
421. *Chabildas Lalloobhai v Dayai Mowji*, (1907) ILR 31 Bom 566 : 34 IA 179.
422. *Norris v Le Neve*, (1743) 3 Atk 26, p 37.
423. *Espin v Pemberton*, (1859) 3 De G & J 547.
424. Re *David Payne & Co*, (1904) 2 Ch 608; Re *Hampshire Land Co*, (1896) 2 Ch 743.
425. *Rainford v James Keith and Blackman Co Ltd*, (1905) 2 Ch 147.
426. Re *Union Indian Sugar Mills Co Ltd*, (1933) ILR 55 All 810 : [illegible] AIR 1933 All 607.

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In the course of the agency business

Employment of a solicitor in one transaction will not make him an agent for receiving notice in a subsequent transaction.[427] Where the purchaser employed the same solicitor as the vendor, and the solicitor had heard of certain restrictions in the course of his previous employment by the vendor, notice of the restrictions was not imputed to the purchaser since his solicitor would not have discovered them if he had investigated title in the usual way.[428]

Material to the business

The knowledge must, of course, be material to the business for which the agent is employed. It is not a part of the duty of an agent to acquire knowledge of a fact which is not material to the business of the agency, nor would it be his duty, if he did acquire such knowledge, to communicate it to his principal.[429]

Ratification

If a principal ratifies the act of an agent, notice to the agent will be imputed as notice to the principal, as the effect of the ratification is to constitute the agent an agent ab initio.[430]

Communication by agent not necessary

That the knowledge of the agent is knowledge of the principal has been said by the Privy Council to be a rule of law and an inference of fact.[431] In the absence of fraud, it does not matter that there has been no communication by the agent.[432] In *Kettlewell v Watson,*[433] Fry LJ said:

> The court, therefore, receives evidence of the agency and it receives evidence of the act of the principal, but it will not receive evidence whether the agent recollected the fact at the time, or whether he communicated it to his principal. It deals with those matters by way of irrebutable presumption when the circumstances are known.

The Privy Council has taken the same view.[434]

(42) Proviso as to Imputed Notice: Fraudulent Concealment of Fact by Agent

Fraud on the part of the agent exempts the principal from the rule of imputed notice. Such conduct raises a necessary presumption that the notice has not been communicated, as a fraudulent person will never communicate it to one of his victims. In *Cave v Cave,*[435] it is pointed out by Fry LJ that this exception has been based on two grounds:

> (1) that the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that it is not to be imputed to the principal as an act done by his agent; and

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427. *Saffron, Walden Building Society v Rayner,* (1880) 14 Ch D 406, p 409; *Prakash Narain v Raja Binendra,* 132 IC 51 : AIR 1931 Oudh 333.
428. *Rowell v Satchell,* (1903) 2 Ch 212, p 221.
429. See *Saffron Walden Building Society v Rayner,* (1880) 14 Ch D 406 where notice of an incumbrance was given to a solicitor who was not the general agent of the trustees; *Ex parte Warren* (1885) 1 TLR 430 where notice of bankruptcy petition was given to man left in possession by sheriff, as the man was only an agent to the sheriff for the purpose of levying, selling the goods, and handing over the proceeds.
430. *Coote v Mammon,* (1724) 5 Bro PC 355.
431. *Rampal Singh v Balbaddar Singh,* (1904) ILR 25 All 1 : 29 IA 203.
432. *Bradley v Riches,* (1878) 9 Ch D 189; *Berwick & Co v Price,* (1905) 1 Ch 639; *Rolland v Hart* (1871) 6 Ch 678.
433. *Kettlewell v Watson,* (1882) 21 Ch D 685, p 705.
434. *Rampal Singh v Balbaddar Singh,* (1904) ILR 25 All 1.
435. *Cave v Cave,* (1880) 15 Ch D 639.

(2) that circumstances raised the inevitable conclusion that the notice had not been communicated.

In the case already cited,[436] Lord Wrenbury (then Buckley J) said:

> I understand the law to be this: that if a communication be made to an agent which it would be his duty to hand on to his principals, and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of tact he does not communicate it, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not in his interest to disclose and which he did not disclose.

This passage was cited with approval by the judicial committee in *Texas Co Ltd v Bombay Banking Co.*[437] In that case, *V* who was an agent of the bank, had an overdraft in his private banking account which he discharged with money belonging to the Texas Company, who were his principals in an oil business. It was contended that as *V* was agent of the bank, knowledge of the ownership of the money should be imputed to the bank. However, Lord Buckmaster said:

> It would be straining the doctrine of notice beyond all reasonable limits to hold that in such circumstances moneys received in absolute good faith should be earmarked with some independent ownership, because the debtor, who was also a servant of the company committed a fraud in order to discharge his obligations.

Where a party has connived with the agent and information has been fraudulently withheld from the principal by the agent, he cannot take advantage of his fraud and impute notice to the principal. A common solicitor of both parties colluding with one does not affect the other with notice, "for it would be an encouragement of fraud to apply the rules of notice which were established for the safety of mankind to a transaction like this; it would be sanctioning a scheme to rob a man by colluding with his solicitor".[438]

ILLUSTRATIONS

(1) A solicitor, *CC,* who was trustee of a settlement, purchased with the trust money, land in the name of his brother *FC.* The brother, *FC,* mortgaged it to a mortgagee who employed *CC,* as his solicitor. The mortgagee was no party to the fraud and was not affected with the knowledge of the trust which his solicitor possessed.[439]

(2) A solicitor acts for a husband and wife seeking to mortgage the wife's property, which is in fact caught by a covenant to settle. He also acts for the intending mortgagee. The solicitor, who has notice of the covenant, tells the mortgagors that he will not disclose it to the mortgagee. The mortgagee is not affected with constructive notice of the covenant.[440]

The exception of fraud, however, will not altogether exclude the doctrine of imputed notice, and if the agent is a fraudulent solicitor, notice will be imputed of anything which an honest solicitor, employed in the place of the fraudulent solicitor, would have discovered in the ordinary course of the business of the agency. In *Kennedy v Green,*[441] a lady was mortgagee of leasehold property belonging to her solicitor who fraudulently obtained her signature to an assignment of the mortgage to himself. He then raised money on a mortgage of the same property as unencumbered leasehold to another client

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436. Re *David Payne & Co,* (1904) 2 Ch 608, p 611.
437. *Texas Co Ltd v Bombay Banking Co,* 46 IA 250, p 258 : 54 IC 121 : AIR 1919 PC 20. See also *Kwei Tek Chao v British Traders etc Ltd,* [1954] 2 QB 459 : [1954] 1 All ER 779.
438. *Sharpe v Foy,* (1868) 4 Ch App 35.
439. *Cave v Cave,* [1880] 15 Ch D 639.
440. *Sharpe v Foy,* [1868] 4 Ch App 35.
441. *Kennedy v Green,* [1836] 3 My & K 699, pp 720–1.

K. The assignment by the lady to the solicitor was drawn in an informal and irregular manner, which would have excited the suspicion of a professional man, and so money was paid to her. It was held that though *K* could not be deemed to have notice of the fraud of, yet if an independent solicitor had been employed, an examination of the deed signed by the lady would have at once shown the suspicious character of the transaction. *K* was, therefore, affected with notice that consideration had not been paid, on the ground that the deed and the endorsed receipt thereon, were drawn in a peculiar form. As Lord Brougham LC said:

> For Bostock, had he been wholly free from the guilty knowledge and only employed as a solicitor to act for and advice Mr Kirby must on seeing the deed, have had his attention at once called to the suspicious circumstances under which it was executed.

In this case the fraud was in the obtaining of the deed. There was no attempt to conceal it from *K*

4. Enactments relating to contracts to be taken as part of Contract Act and supplemental to the Registration Act.—The Chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872 (9 of 1872).

[442][And section 54, paragraphs 2 and 3, and sections 59, 107 and 123 shall be read as supplemental to the Indian Registration Act [443][1908 (16 of 1908)].]

Synopsis

(1) Amendment 54
(2) Contract Act 54
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(1) Amendment

The only amendment made by the amending Act 20 of 1929 was to change the year of the Registration Act from 1877 to 1908. However, even before this amendment, the reference to the Registration Act, 1877, was by virtue of the General Clauses Act, 1907, construed as referring to the Act of 1908.

The second para was added by the amending Act 3 of 1885.

(2) Contract Act

The reference to the Indian Contract Act, 1872 is explained by the following passage from the report of the Indian Law Commission on 15 November 1879:

> We would declare that all chapters and sections of the bill which relate to contracts should be taken as part of the Contract Act, 1872. When the body of substantive civil law for India is arranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the Legislature, the chapters of Sale, Mortgage, Lease and Exchange, contained, in the present Bill, will probably be placed in close connection with the rules contained in the Contract Act. But till then they may fitly be left in a law containing what the Contract Act does not contain, namely, general rules regulating the transmission of property between living persons.

442. Added by Act 3 of 1885, sec. 3.
443. Subs. by Act 20 of 1929, sec. 5, for "1877".

The Indian Succession Act and the Indian Contract Act had been passed before the TP Act, and, as already stated in the notes to the preamble, one of the objects of the TP Act was to bring the rules which regulate the transmission of property between living persons into harmony with the law of testamentary and intestate succession, and to complete the code of contract so far as relates to immovable property.[444] The provisions of TP Act complete the law of contract, as most transfers of property are executed contracts.

In deciding whether a party to a transfer has performed his obligations, the court must consider his obligations under the contract.[445]

Difference between contract and transfer

The section says that the chapters and sections of TP Act which relate to contracts are to be taken as part of the Indian Contract Act. Thus, the word "consideration," wherever it occurs in the TP Act, is used in the same sense as in the Indian Contract Act.[446] Section 137 of TP Act must be read as part of the Indian Contract Act.[447] However, it must be observed that the section does not say that the provisions of the Indian Contract Act are to be read in for the TP Act. There is a clear distinction between a completed conveyance and an executed contract.[448] Therefore, a conveyance or completed transfer cannot be rescinded under section 39 of the Indian Contract Act, 1872, and a mortgagee being a transferee of an interest in property is entitled to enforce his mortgage for the amount he has advanced, although he has failed to advance the whole amount of the mortgage money.[449]

This distinction has been recognised in decisions in *Tatia's* case, *Rashik Lal's* case and *Dip Narain Singh v Nageshar,*[450] approved by the Supreme Court in *State of Kerala v Cochin Refineries*[451] where the Supreme Court held that a mortgage was valid even though no part of the mortgage-money had been advanced.

(3) Registration Act

The Registration Act, 1908 (Registration Act) makes registration optional in the case of immovable property of the value of less than ₹100. Thus, while under the Registration Act a sale or mortgage for ₹99 need not be registered, yet under TP Act such a sale (section 54) or mortgage (section 59) may be made either by a registered instrument or by delivery of the property. Similarly, while under the Registration Act, a lease of immovable property other than a lease from year to year, or for a term exceeding one year, or reserving a yearly rent need not be registered, yet under TP Act, such a lease (section 107) may be made either by a registered instrument, or by oral agreement accompanied by the delivery of possession. Similarly, while under the Registration Act a gift of movable property need not be registered, yet under TP Act such gift (section 123) may either be made by a registered instrument, or by delivery. This inconsistency between the Registration Act and the TP Act was

444. Whitley Stokes, *Anglo-Indian Codes*, vol I, p 726.
445. *Nathulal v Phoolchand,* [1970] 2 SCR 854 : AIR 1970 SC 546 : (1969) 3 SCC 120.
446. See section 2(d) of Indian Contract Act, 1872.
447. *Amerchand v Ramdas,* (1914) ILR 38 Bom 255 : 21 IC 343; *Ramdas v S Amerchand & Co,* (1916) ILR 40 Bom 630 : 43 IA 164 : 35 IC 954; *Mercantile Bank of India v Official Assignee of Madras,* (1933) ILR 56 Mad 177 : 64 Mad LJ 320 : 143 IC 641 : AIR 1933 Mad 207.
448. *Tatia v Babaji,* (1898) ILR 22 Bom 176, p 188.
449. *Makhan Lal v Hanuman,* (1917) 2 Pat LJ 168 : 38 IC 877; *Rasik Lal v Ram Narain,* (1912) ILR 34 All 273 : 13 IC 573; see see also 56(h).
450. *Dip Narain Singh v Nageshar,* (1930) ILR 52 All 338 : 122 IC 872 : AIR 1930 All 1; see also *Life Insurance Corpn of India v Devendrappa Brijjappa Kadali,* AIR 1987 Kant 129, p 134.
451. *State of Kerala v Cochin Refineries,* [1968] 3 SCR 556 : AIR 1968 SC 1361 : [1969] 1 SCJ 475 : [1969] 1 SCA 67.

noticed by Garth CJ[452] and the intention of the amending Act of 1885 was to remove this difficulty, and to make the provisions of the TP Act as to registration absolute.[453] Thus, although equitable mortgages are recognised in the Punjab, yet when section 59 (prior to its amendment in 1929) was applied to an area in the Punjab, the requisition for registration became absolute and an equitable mortgage could no longer be accepted in that area, if the amount secured was not less than ₹100.[454]

(4) Supplemental

It will be observed that while parts of the TP Act are to be "taken as part of the Indian Contract Act" and are thus, incorporated in it, the provision as to the Registration Act is differently expressed, as the specified sections are to be "read as supplemental to the Registration Act." It had been held that the effect of the provision as to the Registration Act was merely to add to the list of documents which are compulsorily registrable. It did not go to the length of saying that these supplementary documents were deemed to be included in section 17 of the Registration Act. The provisions of section 49 of the Registration Act, rendering an unregistered document, of which registration is compulsory under section 17, inadmissible as evidence of any transaction affecting such property, were held not to apply to documents in this supplementary list. This was the view taken by a Full Bench of the Allahabad High Court in *Sohan Lal v Mohan Lal*[455] by Macleod CJ in *Dawal v Dharma,*[456] and by a majority of judges in a decision of Full Bench of the Madras High Court.[457] However, this view seems to be over astute, and to attribute to the different expressions used in the two paragraphs of the section a meaning, which was not intended. The difference of language is probably only due to the difference of subject matter. Parts of the TP Act refer to contracts and these parts might be described as to be "taken as part of the Indian Contract Act"; whereas, a similar expression would not have been appropriate to an extraneous subject like the Registration Act. Those decisions, however, have now been superseded by legislation, as the Act 21 of 1929 by inserting in section 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882," has made it clear that documents in the supplementary list, i.e., documents of which registration is necessary under the TP Act but not under the Registration Act, fall within the scope of section 49, and if not registered are not admissible as evidence of any transaction affecting any property comprised therein, and do not affect any such property.[458]

From a combined reading of sections 4 and 54 of the TP Act and, section 17 of the Registration Act, as applicable to the state of Uttar Pradesh, and as amended by Uttar Pradesh Act 57 of 1976, it is clear that every contract of sale of an immovable property shall be made only by a registered instrument.[459]

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452. *Narain Chunder v Dataram Roy,* (1882) ILR 8 Cal 597.
453. *Makhan Lal v Bunku Behari,* (1892) ILR 19 Cal 623.
454. *Gurdas Mal v Punjab Singh Bank Ltd,* 147 IC 942 : AIR 1933 Lah 972.
455. *Sohan Lal v Mohan Lal,* (1928) ILR 50 All 986 : 118 IC 177 : AIR 1978 All 726.
456. *Dawal v Dharma,* (1918) ILR 41 Bom 550 : 41 IC 273.
457. *Rama v Gowra,* (1921) ILR 44 Mad 53 : 59 IC 350 : AIR 1921 Mad 337.
458. *Raghunath v Kedar Nath,* [1969] 3 SCR 497 : AIR 1969 SC 1316 : [1970] 1 SCJ 63 : (1969) I SCC 497.
459. *Surendra Kumar v Amarjeet Singh,* AIR 2004 All 335, para 23 : (2004) 4 AWC 3134 : (2004) 97 RD 192.

CHAPTER 2

Of Transfers of Property by Act of Parties

Sections 5 – 53A, Transfer of Property Act, 1882

(A) Transfer of Property, whether moveable or immoveable

5. "Transfer of property" defined.—In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, [1][or to himself[and one or more other living persons; and "to transfer property" is to perform such act.

[2][In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

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1. Ins. by Act 20 of 1929, sec. 6.
2. Ins. by Act 20 of 1929, sec. 6.

(1) Amendment

The section has been amended by the Act of 1929.

(2) Scope

Transfer of Property has been defined in section 5 of the TP Act meaning "an act by which a living person conveys property, in present or in future to one or more other living persons and "to transfer property" is to perform such act".

"Living person" has been defined to include a company or association or body of individuals whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to the transfer of property to or by companies, associations or bodies of individuals.[3]

(3) Property

The legislature has not attempted to define the word "property", but it is used in TP Act in its widest and most generic legal sense.[4] Section 6 says that "property of any kind may be transferred". Thus, an actionable claim is property;[5] and so is a right to a re-conveyance of land.[6]

Property is not only the thing which is the subject-matter of ownership, but includes also *dominium* or the right or ownership or of partial ownership, and as Lord Langdale said it is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have.[7] It is used in this dual sense of the thing and the right of the thing in section 54 which contrasts, "tangible immovable property" with "a reversion or other intangible thing". Property includes rights such as trademarks, copyrights, patents and personal rights capable of transfer or transmission such as debts. In English real property law, the distinction between tangible and intangible things is expressed as corporeal and incorporeal hereditaments. A share in the company is a movable property freely alienable in absence of any express restrictions under the articles of association of the company, and the vendee of the shares cannot be denied the registration of the shares purchased by him on a ground other than stated in the articles.[8]

It has been observed by J Bhagwati in *Jugalkishore v Raw Cotton Co*[9] that the words "in present or in future" in section 5 qualify the word "conveys" and not the word "property". A transfer of property not in existence operates as a contract to be performed in the future, which is specifically enforceable as soon as the property comes into existence. Where the operative portion of the sale deed recorded that all rights and privileges in and concerning the property either in present, or accruing in future as vesting in the vendor were the subject matter of the sale, and that the vendor retained no right of any kind, it was held that even the right of the vendor of reconveyance of the property was transferred by the sale deed.[10]

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3. *Naranbhai v Suleman,* (1975) 16 Guj LR 289.
4. *Mata Din v Kazim Husain,* (1891) ILR 13 All 432, p 473; *Bansigopal v V K Banerji,* AIR 1949 All 433.
5. *Rudra Perkash v Krishna,* (1887) ILR 14 Cal 241, p 244; *Muchiram v Ishan Chander,* (1894) ILR 21 Cal 568.
6. *Narasingarji v Panaganti,* (1921) Mad WN 19 : AIR 1921 Mad 498, on app 51 IA 305 : 82 IC 993 : AIR 1924 PC 226.
7. *Jones v Skinner,* (1835) 5 LJ Ch 87, p 90.
8. *V B Rangaraj v V B Gopalkrishnan,* (1992) 1 SCC 160, p 164 : AIR 1992 SC 453, p 455. See also *S P* Jain *v Kalinga Tubes Ltd,* AIR 1965 SC 1535 : 35 Comp Cas 351; *Tett v Phoenix Property & Investment Co Ltd,* (1986) 2 BCC 99, p 140; *Swaledale Clearners Ltd,* Re, [1968] 1 All ER 1132.
9. *Jugalkishore v Raw Cotton Co,* [1955] 1 SCR 1369, p 1413 : AIR 1955 SC 376 : [1955] SCJ 871.
10. *Khiria Devi Jagdish Sao v Rameshwar Sao Parsadi Sao,* AIR 1992 SC 1482, p 1483.

(4) Interests in Property

As ownership consists of a bundle of rights, the various rights and interests may be vested in different persons, eg. a mortgagor and a mortgagee, a lessor and a lessee, or a tenant for life and a remainder man. Absolute ownership is an aggregate of component rights such as the right of possession, the right of enjoying the usufruct of the land, and so on.[11]

These subordinate rights, the aggregate of which make up absolute ownership, are referred in the TP Act as interests in property; and in English law, real rights. A transfer of property is either a transfer of absolute ownership, or a transfer of one or more of these subordinate rights such as a right to transfer of possession.[12] In section 58, however, the word interest is not distinguished from absolute ownership. With reference to an English mortgage it is used to express an absolute interest, i.e., ownership which is not the less absolute because it is subject to a covenant to reconvey.

The term interest is not defined in the Act. In P Ramanatha Aiyar's, *The Law Lexicon*, the term "interest" is explained thus:

> Legal concern, right, pecuniary stake, the legal concern of a person in the thing or property or in the right to some of the benefits or use from which the property is inseparable; such a right in or to a thing capable of being possessed or enjoyed as property which can be enforced by judicial proceedings. The word is capable of different meanings, according to the context in which it is used or the subject-matter to which it is applied. It may have even the same meaning as the phrase "right title and interest" but it has been said also to mean any right in the nature of property, but less than title. The word is sometimes employed synonymous with estate, or property.

The Supreme Court in *Zelia M Xavier Fernandes E Gonsalves v Joana Rodrigues*,[13] held that the word "interest" has a basic meaning of participation in advantage, profit and responsibility. "Interest" is a right, title or share in a thing. If a right of fishing is an interest in an immoveable property, it may be said with greater force that a right to rear and appropriate lac from lac bearing trees is an interest in immoveable property.[14]

A mortgage is a transfer of an interest in specific immoveable property, and what the mortgagee acquires under the transaction is a mortgagee's interest in specific immoveable property which can only be immoveable property and not moveable property.[15]

(5) Future Interests in Property: Reversion and Remainder

Some interests in property are future, and are called in English law reversions and remainders. A reversion is the residue of an original estate which is left after the grantor has granted a smaller estate. Thus, the interest of a lessor is a reversion, a future estate pending the termination of a lease. A remainder is an interest granted out of the original estate at the same time as, but in succession to a precedent interest. Thus, if an estate is granted to *A* for life and then to *B*, the estate of *B* is the remainder, and the estate of *A* is the particular estate which supports it. The terms "reversion" and "remainder" are commonly used in judgments of the courts in India. The act uses the word "reversion" in section 54, but it occurs nowhere else in the TP Act, not even in the chapter dealing with leases. The word "remainder" does

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11. *Indar Sen v Naubat Sen*, (1885) ILR 7 All 553, p 556.
12. *Bombay Stock Exchange v V S Kandalgaon*, (2015) 2 SCC 1 : AIR 2015 SC 193 : 2014 7 MLJ 489 SC : 2014 (11)SCALE 442.
13. *Zelia M Xavier Fernandes E Gonsalves v Joana Rodrigues*, AIR 2012 SC 988 : JT 2012 (2) SC 373 : 2012 (4) MhLj 686 : 2012 (2) SCALE 328 : (2012) 3 SCC 188.
14. *Ramlal Ganjhee v Lodha Munda*,AIR 1952 Pat 201.
15. *Prahlad Dalsukhrai v Maganlal Muljibhai Tewar*, AIR 1952 Bom 454 : 1952 (54) BOMLR 519 : ILR 1952 Bom 1090.

not occur in the TP Act, but in section 13 the phrase "remaining interest" is used instead. A vested remainder is capable of being attached,[16] and so is a contingent interest.[17]

(6) Legal and Equitable Estates

English law recognizes other interests which are not created by transfer or grant. Thus, in a trust of land the legal estate is in the trustee, and the interest of the *cestui que trust* or beneficiary is an interest in land called the equitable interest, or equitable estate. Similarly, an agreement for the sale of land leaves the legal estate in the seller, but creates an equitable estate in the buyer.

The law in India recognizes no distinction between legal and equitable estates.[18] In *Webb v Mac Pherson*,[19] the Privy Council said:

> The law of India, speaking broadly, knows nothing of that distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England.

And in a still later case,[20] their Lordships said:

> By that law (the law of India), therefore, there can be but one "owner", and where the property is vested in a trustee, the "owner" must, their Lordships think, be the trustee. This is the view embodied in the Indian Trusts Act, 1882, sections 3, 55, 56, etc.

The interest of the beneficiary of a trust is defined in section 3 of the Indian Trusts Act, 1882 not as an interest in the trust property, but as a right against the trustee as owner of the trust property. Where the trust and the educational institutions started by trust were separate entities, and the property was not the trust property but the property belonging to the educational institution, there would be no bar to transfer such property and the property can be validly transferred.[21]

The mere expectation as to or likelihood of conveyance of title, however well founded does not create any interest in the property.[22] Similarly, a contract of sale does not, of itself, create any interest in, or charge on, the property. This is expressly declared in section 54 of TP Act, while the fiduciary character of the personal obligation created by a contract for sale is recognised in section 2 of the Specific Relief Act, 1963, and in section 91 of the Indian Trusts Act, 1882.

The personal obligation created by a contract of sale is described in section 40 as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein. The section further enacts that the obligation cannot be enforced against a transferee for consideration without notice. Section 63 of the Indian Trusts Act, 1882 similarly enacts that the rights of a beneficiary of a trust cannot be enforced against a transferee in good faith without notice of the trust.

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16. *Umesh Chunder v Zahoor Fatima*, (1891) ILR 18 Cal 164 : 17 IA 201; *Gulamhusein v Fakirmahomed*, (1946) 48 Bom LR 733 : 231 IC 328 : AIR 1947 Bom 185.
17. *Ma Yait v Official Assignee*, 57 IA 10 : (1930) ILR 8 Rang 8 : 121 IC 225 : AIR 1930 PC 17.
18. *Tagore v Tagore*, (1872) 9 Beng LR 37.
19. *Webb v Mac Pherson*, (1904) ILR 31 Cal 57 : 30 IA 238, p 245; *Rani Chhatra Kumari v Mohan Bikram*, (1931) ILR 10 Pat 851 : 58 IA 279 : 133 IC 705 : AIR 1931 PC 196; *Imperial Bank of India v U Rai Gyaw*, (1923) ILR 1 Rang 637 : 50 IA 283 : (1924) ILR 51 Cal 86 : 76 IC 910 : AIR 1923 PC 211; *Surendra Mohan v Mohendra Nath*, (1932) ILR 59 Cal 781 : 140 IC 662 : AIR 1932 Cal 589.
20. *Rani Chhatra Kumari v Mohan Bikram*, 58 IA 279, p 297 : (1931) ILR 10 Pat 851 : 133 IC 705 : AIR 1931 PC 196.
21. *Nair Service Society, Changanacherry v Jnana Ashram*, AIR 2017 (NOC) 1103 (Ker) : 2017 (3) KHC 916.
22. *Mumbai International Airport Private Limited v Regency Convention Centre and Hotels Pvt Ltd*, (2010) 7 SCC 417 : AIR 2010 SC 3109 : 2010 (6) SCALE 273 : [2010] 7 MLJ 153.

Therefore, these personal rights resemble the equitable estate or interest of the *cestui que trust*, and of the person who has agreed to purchase in English law, in that they are liable to be defeated by a purchaser for value without notice. The rule against perpetuity which applies to equitable estates in English law has sometimes been applied to these personal rights by way of analogy. This, it is submitted, is a mistake as explained in the notes to section 14.

(7) Transfer

The word "transfer" is defined with reference to the word "convey". This word in English law in its narrower and more usual sense refers to the transfer of an estate in land; but it is sometimes used in a much wider sense to include any form of an assurance *inter vivos*. The word 'conveys' in section 5 of the TP Act is used in the wider sense referred to above. Transferor must have an interest in the property. He cannot sever himself from it and yet convey it.[23] A lease comes within the meaning of the word "transfer".[24] A transfer of property or creation of an interest may be accompanied by conditions, covenants or restraints, unless there is some provision of law which annuls or invalidates such conditions, restraint or limitation.[25]

There is a discernible difference between a case of settlement of property with reservation of a benefit to the settlor on the one hand, and the case where what is settled is only a share or interest or part of the property—excluding the part of the share corresponding to the benefit that the settlor has chosen to retain. In the latter case, there is no transfer at all.[26]

A registered settlement deed cannot be cancelled by executing a cancellation deed. If at all the said document is to be cancelled, it has to be done under the provisions of Specific Relief Act, by approaching a competent civil court for cancellation of such document.[27] Thus, where a registered sale deed is executed in favour of the transferee for the mining lease with full consent of the owner, the Mines Commissioner is not empowered to pass orders negating the same.[28] A "transfer of property" as defined in the present section does not necessarily involve the execution of an instrument of transfer or conveyance. In the case of movables and generally in the case of immovable property of a value of less than ` 100, a transfer may be effected by delivery of possession. Leases other than leases from year to year or for a time exceeding one year or reserving a yearly rent, may be made by oral agreement accompanied by delivery of possession. The fundamental rule is that a transfer cannot be effected in any way not prescribed by the TP Act.[29]

The definition of transfer of property in this section does not exclude property situated outside India or in the territories to which the TP Act does not apply. It does not matter that the property is situated outside India, or in the territories where the TP Act does not apply;[30] for if the transfer is effected where the TP Act is in force, the rights of the parties are to be determined by the court under the TP Act leaving it to the party affected to prove that by the

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23. This passage has been approvingly quoted by the Supreme Court in *Krishna Kumar Khemka v Grindlays Bank PLC*, (1990) 3 SCC 669, pp 673–674 : AIR 1991 SC 899, p 902; See further *Samrathi Devi v Parasuram*, AIR 1975 Pat 140; *State of Rajasthan v Bhilwara Spinners Ltd*, AIR 2001 Raj 184, para 35.
24. *Krishna Kumar Khemka v Grindlays Bank PLC*, (1990) 3 SCC 699, p 674 : AIR 1991 SC 899, p 903.
25. *Subbegowda v Thimmegowda*, (2004) 9 SCC 734 : AIR 2004 SC 2428.
26. *Dipti Narayan Srimani v Controller of Estate Duty, WB* AIR 1988 SC 1511, p 1516. See *St Anbyn v Attorney General*, [1951] 2 All ER 473, p 496.
27. *V Ethiraj v S Sridevi*, AIR 2014 Kar. 58 : 2013 (4) AKR 759 : 2014 (1) Kar LJ 273.
28. *Shankar Yadav v State of Jharkhand through Secretary-cum-Commissioner, Department of Mines and Geology, Government of Jharkhand*, AIR 2012 Jhar 21 : 2011 (4) JCR JHA 427 : LNIND 2011 JHAR 992.
29. *Immudipattam Thirugnana v Periya Dorasami*, (1901) ILR 24 Mad 377 : 28 IA 46, p 53; *Palikandy v Krishnan*, (1917) ILR 40 Mad 302, p 307 : 34 IC 381.
30. *Prethi Singh v Ganesh* AIR 1951 All 462.

lex rei sitae, i.e., by the law of the land where the property is situated, the transaction is invalid or defective.[31]

If legislative intent of an enactment is to give an extended meaning to the expression transfer, it need not be confined to the statutory concept of transfer under section 5 of the TP Act. Section 71-A of the Chhotanagpur Tenancy Act contemplated that where possession has passed from one to another and as a physical fact the member of the scheduled tribe who is entitled to hold possession has lost it and a non-member has come into possession, would be covered by transfer. The Supreme Court held that it was not proper to confine the meaning of transfer in section 71-A to transfer as defined in section 5 of the TP Act.[32] Thus the occupancy rights of a tribal cannot be transferred or even bequeathed by any tribal to a non tribal in view of the restriction under section 73 AA of the Bombay Land Revenue Code or section 63 of Bombay Tenancy Act.[33]

Auction Sale

Section 5 does not apply in respect of the property sold in auction sale.[34]

Transfer by or on behalf of the government

The provisions of the Transfer of Property Act shall not be applicable to any grant or other transfer of land or of any interest therein to be made by or on behalf of the Government.[35]

Charge

A charge is not a transfer of property, for in a charge no right in rem is transferred, but a personal obligation is created—a *jus ad rem* or a right to payment out of the property specified.[36] In the Insolvency Acts, a transfer of property is, however, defined as including a charge.[37] That definition is wider because any obligation incurred by a debtor affecting his property may be voidable as a fraudulent preference.[38]

Compromise

A compromise of doubtful rights is not a transfer, but is based on the assumption that there was an antecedent title of some kind in the parties which the agreement acknowledged and defined.[39] The position would be different if such a compromise also transferred properties to a person who has neither a pre-existing title, nor a claim to such title.[40]

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31. *Central Bank of India v Nusserwanji,* (1933) ILR 57 Bom 234 : 34 Bom LR 1384 : 142 IC 130 : AIR 1932 Bom 642; *Varden Seth v Luckpathi,* (1862) 9 MIA 303.
32. *Pandey Oraon v Ram Chandra Sahu,* (1992) 2 SCC 77, p 79 (Supp).
33. *Shamjibhai Keshavjibhai Kansagra v Principal Secretary, Revenue Dept,* AIR 2011 Guj 55 : LNIND 2010 GUJ 66.
34. *Krishna Mohan v Bal Krishna Chaturvedi,* AIR 2001 All 334 : (2001) 3 AWC 2080.
35. *Essar Steel Ltd v Superintendent of Stamps,* (2010) 51 (1) GLR 744 : (2010) 1 GLH 758; *Amar Jyoti Pictures v Himadri Das,* 2010 SCC OnLine Cal 948; *Bank of Baroda v Mumbai Metropolitan Regional Development Authority,* (2010) 3 Mah LJ 819 : (2010) 2 Bom CR 509 : (2010) 4 AIR Bom R 194.
36. *Gobinda Chandra v Dwarka Nath,* (1908) ILR 35 Cal 837; *Jawahir Mal v Indomati,* (1914) ILR 36 All 201 : 22 IC 973.
37. Presidency Towns Insolvency Act, 1909, section 2(i); Provincial Insolvency Act, 1920, section 2 (f).
38. *Ex Parte Lancaster,* Re *Marsden,* (1883) 23 Ch D 311; *Butcher v Stead,* (1875) IR 7 HL 839.
39. *Khunni Lal v Gobind Krishna,* (1911) ILR 33 All 356 : 38 IA 87 : 10 IC 477; *Hiran Bibi v Sohan Bibi,* (1914) 18 Cal WN; ILR 24 IC 309; *PC Basangowda v Irgowdatti,* (1923) ILR 47 Bom 597 : 73 IC 196 : AIR 1923 Bom 276; *Abbas Bandi Bibi v Muhammad Raza,* (1929) ILR 4 Luck 452, p 473, 120 IC 387 : AIR 1929 Oudh 193; *Krishna Tankaji v Aba,* (1910) ILR 34 Bom 139 : 4 IC 833; *Balkrishna v Rangnath,* (1950) ILR Nag 618 : AIR 1951 Nag 171.
40. *Reddiar, MP v A Ammal,* (1971) 1 Mad LJ 225 : AIR 1971 Mad 182. And see *Hussain Banu v Shivnarayan,* AIR 1966 MP 307.

Deed of Appointment

A transfer is not necessarily contractual, and included a deed of appointment.[41] The section does not require that the "living person" who conveys should necessarily be the same person as he who owns, or owned, the property conveyed. All that is required is that there should be an act of conveyance by some living person; under the section, there may be a transfer by a person exercising powers over the property of another. Thus, where the donee of a power of appointment, having power to appoint a beneficial interest in the property, exercises that power, it would amount to a transfer.[42]

Power of Attorney

A General Power of Attorney (GPA)/WILL or Special Power of Attorney (SA) does not ipso facto constitute an instrument of transfer of an immovable property. GPA Sales or Sale Agreement or Will transfers' are creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him. It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.[43] A power of attorney given by a fisherman co-operative society to another to manage fishery does not create an interest in the property and therefore would not amount to transfer.[44] The fixing of different rates of stamp duty when a Power of Attorney is executed in favour of blood relative as against in favour of outsider as agent is not unconstitutional. It is to curb tendency of transferring immovable properties through Power of Attorney and inappropriate documentation and levy of stamp duty on such ostensible documents, whose real intention is to transfer immovable property.[45]

Easement and licence

The creation of an easement[46] or a right under a licence[47] does not involve a transfer.

Exchange

An exchange is a mutual transfer of the ownership of one thing for another.[48]

Family Arrangement

It has been held by the Supreme Court that a family arrangement, like a compromise, is "based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they

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41. *Joshua v Alliance Bank,* (1895) ILR 22 Cal 185, p 202.
42. *U Theta v U Aresena,* 199 IC 903 : AIR 1939 Rang 76.
43. *Joginder Kumar Goyal v Government of NCT Delhi,* 2016 (158) DRJ 241 (Delhi High Court); *Suraj Lamp and Industries (P) v State Of Haryana,* AIR 2009 SC 3077 : 2009 (76) ALR 792 : 2010(6) ALT 11 (SC) : 2010 (3) BomCR 808 : 2011 (6) KarLJ 62 : 2009 (6) MhLJ 11(SC) : 2009 MPLJ 315(SC) : 2009 (9) SCALE 36 : (2009) 7 SCC 363 : [2009] 10SCR 1048.
44. *Jayanta Ghosh v State of West Bengal,* AIR 2008 NOC 303 (Cal).
45. *State of MP v Rakesh Kohli,* (2012) 6 SCC 312 : AIR 2012 SC 2351 : 2012 (5)SCALE 467 : LNIND 2012 SC 326.
46. See *Sital Chandra v Delanney,* (1916) 20 Cal WN 1158 : 34 IC 450; *Bhagwan Sahai v Narsingh Sahai,* (1909) ILR 31 All 612 : 3 IC 615; *Konadayya v Veeranna,* 92 IC 672 : AIR 1926 Mad 543; *Satyanarayana v Lakshmayya,* (1929) 57 Mad LJ 46 : 115 IC 145 : AIR 1929 Mad 79; See also Transfer of Property Act, 1882, section 6(c).
47. *Joyden Sen v State of West Bengal,* AIR 2010 (NOC) 256 (Cal).
48. See Transfer of Property Act, 1882, section 118.

had previously asserted it, to the portions allotted to them respectively".[49] It is not necessary that every party taking a benefit under such a settlement must be shown to have, under the law, a share in the property; it is enough if they have a possible claim or even, if they are related, a semblance of a claim.[50] It may in certain cases include non family members as well.[51] In absence of proof of details of family settlement and any consideration paid in lieu of such settlement, no title can be claimed.[52] If, however, there is no real dispute or claim at all, the transaction might amount to a transfer.[53] Such an arrangement is not a transfer, and requires no conveyance to pass the title. This, of course, only applies to parties to the arrangement and to persons claiming under them.[54] A deed of family settlement is not required to be compulsorily registered even where it has been reduced to writing and would be admissible in evidence where it was already acted upon by the parties, who acknowledged the antecedent title,[55] but a mere caption of family arrangement given to the document is not decisive to exempt it from registration. The contents of such document are to be read as a whole to determine whether it is a family arrangement.[56] A family arrangement cannot override the mode of devolution as reflected in the will indicating the manner of disposition of the property.[57] Further, if the legal claims are settled by bona fide family arrangement which is fair and equitable, the same is final and binding on the parties.[58] A memorandum of understanding actuated by desire to resolve disputes can be treated as family settlement.[59] In *M N Aryamurthy v M D Subbaraya Setty*,[60] the Supreme Court laid down three requirements for a family arrangement. In the first place, there must be an agreement amongst the various members of the family intended to be generally and reasonably for the benefit of the family. Secondly, the agreement should be with the object either of compromising doubtful or disputed rights, or for preserving the family property, or the peace and security of the family by avoiding litigation or for saving its honour. Thirdly, being an agreement, there is consideration for the same, the consideration being the expectation that such an agreement or settlement will result in establishing or ensuring amity and good-will amongst the relations. Where the parents had distributed their property under a deed of settlement in 2005 and the plaintiff had enjoyed the property under this settlement and even alienated some of it, his challenge to the family settlement nine years after having benefitted from it on the ground that it was invalid would be not only barred by limitation but would also not be

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49. *Sadhu Madho Das v Pandit Mukand Ram*, [1955] 2 SCR 22, pp 42, 43 : AIR 1955 SC 481 : [1955] SCJ 417 : [1955] SCA 1057; *Venkataraju v Yedu-Kondalu*, AIR 1958 AP 147. As to what is family arrangement see *Thayyullthil Kunhikannan v Thayyullathil Kathani*, AIR 1990 Ker 226, p 234 : 1990 KLJ 114. See also *Ganeshi v Ashok*, AIR 2011 SC 1340 : [2011] 4 SCR 215 : (2011) 2 RCR (civil) 892.
50. *Ram Charan Das v S Girjanandini Devi*, [1965] 3 SCR 841 : AIR 1966 SC 323 : [1966] 1 SCJ 61; *Tek Bahadur v Debi Singh*, AIR 1966 SC 292, p 295 : [1966] 2 SCJ 290; *Golak Behari Biswal v Karunakar Rout*, AIR 1987 Ori 236, p 239; *Atava Akkulamma v Gajjela Papi Reddy*, AIR 1995 AP 166, holding that settlement as a mode of transfer of property is not known under TP Act.
51. *Zaheda Begum v Lal Ahmed Khan*, AIR 2010 AP 1 : (2009) 6 ALD 432 : (2009) 6 ALT 565.
52. *Amrit Lal v Savitri*, AIR 2017 P&H 130 : (2018) 189 PLR 79.
53. *Sashi Kantha v Promoda Chandra*, AIR 1932 Cal 600; *Kaulashwari Kuer v Surajnath*, AIR 1957 Pat 456; *Kisto Chandra v Anila Bala*, AIR 1968 Pat 487.
54. *Sadhu Madho Das v Pandit Mukand Ram*, [1955] 2 SCR 22, pp 42, 43; *Venkataraju v Yedu-Kondalu*, AIR 1958 AP 147.
55. *Vikram Singh v Ajit Inder Singh*, AIR 2014 Del 173 : 2014 (210) DLT 145 : LNIND 2014 DEL 482.
56. *Nilkanth Krishnarao Apte v Ramchandra Krishnarao Apte*, AIR 1991 Bom 10, p 15.
57. *Chetti Balakrishnamma v Chetti Chandrasekhar Rao*, AIR 1991 Ori 333, p 336.
58. *K Jagannathan v AM Vasudevan Chettiar*, AIR 2001 Mad 184, para. 23; See also *Nani Bai v Gita Bai*, AIR 1958 SC 706 : 1959 SCR 879; *Hansraj Agarwal v CIT*, (2003) 2 SCC 295.
59. *Ramdev Food Products Pvt Ltd v Arvindbhai Rambhai Patel*, AIR 2006 SC 3304 : JT 2006 (8) SC 393 : 2006 (8) SCALE 631 : (2006) 8 SCC 726.
60. *M N Aryamurthy v M D Subbaraya Setty*, AIR 1972 SC 1279 : (1972) 4 SCC 1 : 1972 (4) UJ 84.

tenable in court.[61] In *Saroj Kumari Bandyopadhyay v State of West Bengal*,[62] a mother who was member of a co-operative society transferred property in favour of the son, and the son became member of this society after the acquisition of the land by the society. A notification stipulated that the benefit in it would not be available to the subsequent purchaser of the property from a member. It was held that transfer of share by mother to the son, not by way of succession is transfer *inter vivos* and is not compulsorily registrable therefore such assignment is not a transfer for the purposes of notification and the son, not being a subsequent purchaser is entitled to benefits under notification.

Partition

A partition is not actually a transfer of property, but is analogous to an exchange. Justice Mookerjee, in a case decided by Calcutta High Court,[63] said that partition signifies the surrender of a portion of a joint right in exchange for a similar right from the other co-sharer to co-sharers.[64]

It effects a change in the mode of enjoyment of property, but is not an act of conveying property from one living person to another.[65] It is only renouncement of existing rights in common properties in consideration of getting exclusive right and possession over the specific plots.[66] Partition is only a process of mutual renunciation by which common unspecified rights in larger extents are converted into exclusive right over specific plots.[67] Partition is really a process, in and by which a joint enjoyment is transformed into an enjoyment severally. Each one of the co-sharers had an antecedent title and, therefore, no conveyance is involved in the process, as the conferment of a new title is not necessary.[68] In *Sarin v Poplai*[69] CJ Gajendragadkar has observed that "the true effect of partition is that each coparcener gets a specific property in lieu of his undivided right in respect of the totality of the property of the family". The Supreme Court in that case was considering the provisions of a Rent Control Act, and did not express any opinion on the correctness of certain decisions[70] holding that a partition is a transfer within the meaning of section 53. The correct view, it is submitted, is that a partition is not a transfer, and therefore, strictly not governed by the TP Act, but that many of the provisions of the TP Act may govern partition as embodying rules of justice, equity and good conscience.[71]

In some cases,[72] it has been held that a partition amounts to a transfer of property; in other cases however, it has been held that a partition is not transfer of property.[73] Partition of

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61. *Jose Floriano Cristovam Pinto v Michelle N Pinto Souza*, AIR 2017 Bom 263 : 2017 (6) ABR 245 : 2017 (4) All MR 637.
62. *Saroj Kumari Bandyopadhyay v State of West Bengal*, AIR 2017 Cal 209.
63. *Atrabanessa Bibi v Safutullaah Mia*, (1916) ILR 43 Cal 504, p 509 : 31 IC 189; *Rasa Goundan v Arunachala*, (1923) 44 Mad LJ 513 : 72 IC 978 : AIR 1923 Mad 577; but see *Muthuveerran Chetty v Govindan Chetty*, (1961) ILR Mad 908 : (1961) 2 Mad LJ 470 : AIR 1961 Mad 518. See also *Suhasini Poddar v Sreenath Chakravarty*, (1945) 49 Cal WN 769; *Khirode Sundari v Chunilal*, (1945) 49 Cal WN 779.
64. See also *Gouranga Chandra Roy v Gobinda Ballabh Roy*, AIR 2014 Tri 26.
65. *Indoji Jethaji v Kothapalli*, 54 IC 146.
66. *Sri Aralappa v Jagannath*, AIR 2007 Kar 91 : ILR 2007 Kar 339.
67. *Venkiteswara Prabhu Ravindranatha Prabhu v Surendranath Prabhu, Sudhakara Prabhu*, AIR 1985 Ker 265.
68. *A Vasantiben Prahladjinayak v Somnath Muljibainayak*, (2004) 3 SCC 376 : AIR 2004 SC 1893.
69. *Sarin v Poplai*, [1966] 1 SCR 349 : AIR 1966 SC 432 : [1966] 1 SCJ 199 : [1966] 1 SCA 285.
70. See commentry on section 53 of Transfer of Property Act, 1882.
71. See notes under section 53.
72. *Waman Ram Krishna v Ganpat Mahadeo*, (1935) ILR 60 Bom 34 : 37 Bom LR 925 : 160 IC 242 : AIR 1936 Bom 10; *Sadhu Ram v Pirthi Singh and Co*, 161 IC 861 : AIR 1936 Lah 220; *Kartar Singh v Ramela*, AIR 1950 J & K 18; *Banarsilal v Bhagwan*, AIR 1955 Raj 167; *Raman v Madhavan*, AIR 1959 Ker 235; *Dayabahai v State of Bombay*, (1960) 62 Bom LR 348; *Jagannathpuri Guru v Gocabai*, (1968) 70 Bom LR 749 : AIR 1968 Bom 25.

property does not amount to "transfer" as contemplated by section 5. Doctrine of part performance, therefore, does not apply to partition,[74] but a case of partition is covered by section 109, as embodying a rule of justice, equity and good conscience.[75]

A partition is possible between two co-owners who may not have absolute or equal rights, but are limited owners. A document executed in settlement of disputes between two persons who are entitled to the same properties and who agree to divide the properties amongst themselves is a partition, and not a settlement.[76]

Where a joint family property is subject to mortgage, there is no transfer of ownership and the coparceners, being its lawful owners, are competent to allot the mortgaged property in an oral partition to any of the coparceners, particularly when such oral partition is not going to interfere with the scheme of the mortgage.[77] The coparceners to whom the mortgaged property is allotted, becomes its absolute owner and is entitled to redeem the mortgage. Consequently, where the right to redeem is transferred by that coparcener, the transferee is also entitled to redeem the mortgage.

Partition Act

The definition of transfer in this section is not applicable to the Partition Act, where it simply means a change of ownership.[78]

Document transferring plant and machinery

Whether the transfer of plant and machinery fastened to the earth reported to be in a removable condition, when the transferor had no right to title to the land and the transferee having not acquired any interest in the land by reason of such transfer, could be defined as immovable property, was a question which was posed before the Allahabad High Court. It was held that the document regarding such conveyance is a transfer within the meaning of section 5 of the TP Act.[79]

Razinama and Kabulayet in Collector's books

The effect of a *razinama* and *kabulayet* in the Collector's books has been the subject of conflicting decisions, but the better opinion is that it is not necessarily evidence of an intention to transfer, and that its effect depends upon the circumstances of each case.[80]

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73. *Gyannessa v Mobarakannessa,* (1898) ILR 25 Cal 210; *Satya Kumar v Satya Kripal,* (1909) 10 Cal LJ 503 : 3 IC 247; *Indoji Jethaji v Kothapalli,* 54 IC 146; *Suhasini Poddar v Sreenath Chakravarty,* (1945) 49 Cal WN 769; *Khirode Sundari v Chunilal,* (1945) 49 Cal WN 779; *Kisansing Mohansingh v Vishnu Balkrishna,* (1951) ILR Bom 148 : 52 Bom LR 867 : AIR 1951 Bom 4; *Muthuveeran Chetty v Govindan Chetty,* (1961) ILR Mad 908 : (1961) 2 Mad LJ 470 : AIR 1961 Mad 518, overruling *Rasa Goundan v Arunachala,* (1923) 44 Mad LJ 513 : 72 IC 978 : AIR 1923 Mad 577; *Panchali v Panniyodan Manni,* AIR 1963 Ker 66, overruling *Raman Pillai v Madhavan Pillai,* AIR 1959 Ker 235; *Reddiar P v K Reddi,* (1966) 1 NLJ 333 : AIR 1966 Mad 419; *Ganu Santu v Shankar Tukaram,* (1968) 71 Bom LR 165.
74. *Chanderwati v Lakhmi Chand,* AIR 1988 Del 13 : (1987) 13 DRJ 248.
75. *Mohar Singh v Devi Charan,* AIR 1988 SC 1365 : (1988) 3 SCC 63.
76. *Chief Controlling Revenue Authority v Jagadambal,* AIR 1976 Mad 321 : (1976) 2 Mad LJ 123.
77. *Sita Ram Prasad v Mahadeo Rai,* AIR 1980 Pat 254 : (1981) 29 BLJR 134.
78. *Sohni v Raj Kumar Singh,* (1932) ILR 54 All 840 : 141 IC 118 : AIR 1932 All 678.
79. *Orai Oil Chemicals Pvt Ltd v State of Uttar Pradesh,* AIR 1997 All 92.
80. *Rachappa v Ningappa,* (1925) ILR 49 Bom 847 : 91 IC 349 : AIR 1926 Bom 40; *Chandanmal v Bhaskar,* (1920) 22 Bom LR 140 : 55 IC 619. But see *Venkaji v Gopal,* (1914) ILR 39 Bom 55 : 27 IC 613; *Imam Valod Ibrahim v Bhau Appaji,* (1917) ILR 41 Bom 510 : 40 IC 68; *Narso v Nagava,* (1918) ILR 42 Bom 359 : 45 IC 492.

Entries in revenue records

Entries in the revenue records is neither a proof of title upon the property nor can it be used as a camouflage to defeat the legal right, title or interest of a person, who is the owner of the property in question. Revenue entries neither can confer a title nor can it extinguish the right or title of the owner of the property. Mutation of the property in the revenue record also does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay land revenue in question. Thus, the correct proof of ownership is a registered sale deed in favour of a person. Revenue entries or revenue receipts have nothing to do with the ownership and they cannot be treated as a conclusive evidence of the ownership of the property.[81]

Recitals

Recitals in deeds of mortgage and in petitions to officials do not, of course, amount to a transfer.[82] Where a partner contributed towards the capital of the firm by bringing in shares held by him in a company, then it is a "transfer" within section 45, Income Tax Act, 1961. To the extent to which exclusive interest is reduced to a shared interest, there is a transfer of interest.[83]

Release Deed

If the person executing the release deed holds some right, title or interest in the property, release of that interest would amount to conveyance. However, if the transferor is a *benamidar* releasing the property to the real owner, it is not conveyance.[84]

Dissolution of Partnership

Division of assets following dissolution of partnership firm does not amount to a transfer. Where there is no assigned or definite share in the property of the firm of the partners and shares are assigned on dissolution of the firm, such dissolution and division of shares would not amount to a transfer within the meaning of this section.[85] However, in absence of any prescribed terms and conditions barring transfer, securities concerned (OFCDs) are transferable and hence marketable.[86]

Relinquishment

A relinquishment is not an alienation,[87] unless an intention to transfer is found to exist, as when it is in favour of a person having no interest.[88] A registered instrument styled as a release deed releasing the right, title and interest of the executant in the property in favour of the release for valuable consideration may operate as a conveyance.[89]

Where the person in whose favour the "release" is executed gets rights by virtue of the release, the deed may amount to a transfer. Thus, in a case decided by Madras High Court, by a deed of release, the releasor, after getting a sum of money from the person in whose favour release was

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81. *Shankar Yadav v State of Jharkhand,* AIR 2012 Jhar 21 : (2011) 1 EFLT 795.
82. *Immudipattam Thirugnana v Periya Dorasami,* (1901) ILR 24 Mad 377 : 28 IA 46; *Pankajini Debi v Sudhir Datta,* AIR 1956 Cal 669.
83. *Sunil Siddharthabhai v CIT,* AIR 1986 SC 368 : (1985) 4 SCC 519 : 1985 Supp (3) SCR 102.
84. *Suresh Chand Gupta v Man Mohan Gupta,* AIR 2004 Del 282 : 107 (2003) DLT 160.
85. *Balbir Singh v State of UP,* AIR 2012 All 113.
86. *Sahara India Real Estate Corpn Ltd v SEBI,* (2013) 1 SCC 1.
87. *Provident Investment Co v CIT,* AIR 1951 Bom 95; *Katragadda China Anjaneyulu v KC Ramayya,* AIR 1964 AP 177; *Ramdas v Pralhad,* (1964) 66 Bom LR 499 : AIR 1965 Bom 74.
88. *Kuppuswami Chettiar v Arumugam,* [1967] 1 SCR 275 : AIR 1967 SC 1395 : [1967] 2 SCJ 5; and see *Mammo T v K Ramunni,* AIR 1966 SC 337 : [1966] 1 SCJ 138.
89. *Thayyil Mammo v Ramunniram,* AIR 1966 SC 337; *K V Subba Rao v District Registrar of Assurances, Guntur,* AIR 1986 AP 42, p 45.

executed, transferred his right, title and interest in half share of the suit properties absolutely in favour of the latter. The document could not be construed merely as enlarging the right of the latter, but gave him an absolute right in the half share which belonged to the releasor. Hence, it clearly comes under the definition of "transfer" in section 5, and suit to set aside the document as "fraudulent" will come only under section 53 of the TP Act.[90]

Surrender

A surrender is not a transfer of property as defined in this section.[91] It is the falling of a lesser estate into a greater one.[92]

A deed of surrender *simpliciter* cannot affect any transfer of title.[93]

In the case of surrender by a life tenant in favour of a remainder man, there is no transfer of property. There is merely an effacement or extinguishment of the rights of the former, and an acceleration of the rights of the remainder man. The latter's right are derived from the document executed by the full owner, and when a deed of surrender is executed, full rights accrue to the remainder man in pursuance of the title derived under the settlement, and not from or through the life tenant who makes the surrender.[94]

Will

These words exclude transfers by will, for a will operates from the death of the testator.[95] A deed executed by husband and wife jointly providing that on the death of either of them, the survivor would retain all rights over the property including that of alienation and upon the death of the surviving executants the property would go to their children would be a will (and not a settlement deed) as there is no transfer of a right in *praesenti* on the other executants.[96] Transfer of share or interest in a co-operative society to the nominee of its member operating on his death would also be excluded like transfers by will.[97] Where the beneficiary is not a living person, the expression used is the creation of an interest in an unborn person contemplated under section 13. A Muslim gentleman executed a document styled as "will". By this document, he divided certain properties amongst his daughter and nephew in his life-time and gave possession to the persons named. It was held that it was a conveyance and not a will, even though it described the beneficiaries as "heirs". Not being a registered document, it was invalid.[98]

(8) Living Person

Corporation

The words "living person" include a juristic person such as a corporation company or association of persons or body of individuals, whether incorporated or not, have been included amongst "living person" in this section.[99] A court is not a juristic person.[100]

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90. *Muniappa Pillai v Periasanti,* (1975) 1 Mad LJ 236. See also *Official Assignee, Madras v Tehmina,* AIR 1972 Mad 187 : (1972) 1 Mad LJ 48.
91. *Makkan Lal Saha v Nagendranath Adhikari,* (1933) ILR 60 Cal 379 : 37 Cal WN 119 : AIR 1933 Cal 467.
92. Co Litt, 337 b; see note "surrender" under section 111(e).
93. *Smrathi Devi v Parasuram Pandey,* AIR 1975 Pat 140.
94. *Palaniveli v Ouseph Mathai,* AIR 1973 Mad 309 : (1973) 1 Mad LJ 264.
95. *Jamindar of Bhadrachaan v Venkatdri Appa Rao,* AIR 1922 Mad 457; *Surendra Vikram Singh v Munia Kunwar,* AIR 1944 Oudh 65; *Lala Devi Dass v Panna Lal,* AIR 1959 J & K 62; *N Ramaiah v Nagraj S* AIR, 2001 Kant 395, para 12.
96. *Narayani v Sreedharan,* AIR 2012 Ker 72 : (2011) 4 KLJ 544.
97. For such statutory transfers, see *Kusum Debi Jhinjani v Pushpa Devi,* AIR 1990 Cal 204.
98. *Vaizer v Putti Begam,* AIR 1986 AP 159.
99. *Hindustan Lever v State of Maharashtra,* (2004) 9 SCC 438 : AIR 2004 SC 326.

The second paragraph has been added by the Amendment Act of 1929 in order to make it clear that the words embrace companies and societies, and that the general provisions of TP Act as to transfer do not affect the special provisions of the Companies Act.[101]

An idol

An idol or God, is a juristic person capable of holding property,[102] but it is not a living person.[103] Likewise a temple is also not a living person.[104] An idol not being a living person, a dedication of land to an idol does not fall within the terms of section 122, and need not be made in writing or by a registered instrument under section 123 of TP Act.[105] It has also been said that an idol is only the symbol of the deity, and that it would be contrary to the Hindu religion that a deity should make an acceptance of worldly goods.[106]

Wakf

These decisions must be distinguished from a decision of Allahabad High Court where it was held that a Mahomedan *wakf*, which is a dedication of property to God, is voidable at the option of creditors, if made with intent to defraud creditors, under section 53 of the TP Act, there being no rule of Mahomedan law inconsistent with the provisions of that section.[107]

(9) In Present or in Future

A transfer of property may take place not only in present, but also in the future,[108] but the property must be in existence. The words "in present or in future" qualify the word "conveys", and not the word "property".[109] A transfer of property that is not in existence operates as a contract to be performed in the future which may be specifically enforced as soon as the property comes into existence.[110] In *Rajah Sahib Perhlad v Budhoo,*[111] the Privy Council said:

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100. *Raghubar Singh v Jai Indra Bahadur Singh,* 46 IA 228 : 55 IC 550 : AIR 1919 PC 55; *Mehdi Ali Khan v Chunni Lal,* (1929) 27 All LJ 902 : 119 IC 81 : AIR 1929 All 834; *Syam Sundar v Bajpai,* (1903) ILR 30 Cal 1060.
101. *Essar Steel Ltd v Superintendent of Stamps,* (2010) 51 (1) GLR 744 : (2010) 1 GLH 758; *Amar Jyoti Pictures v Himadri Das,* 2010 SCC OnLine Cal 948; *Shamjibhai Keshavjibhai Kansagra (Patel) v Principal Secretary, Revenue Department,* AIR 2011 Guj 55; *Mardia Chemicals Ltd v UOI,* (2004) 4 SCC 311; *Harish Chandra Hegde v State of Karnataka,* (2004) 9 SCC 780; *Bharat Petroleum Corporation v P Kesavan,* (2004) 9 SCC 772.
102. *Pramatha Nath v Pradyumna,* (1925) ILR 52 Cal 809 : 52 IA 245, p 250 : 67 IC 305 : AIR 1925 PC 139; *Prosunno Kumari v Chand,* (1875) 14 Beng LR 450, p 459 : 2 IA 145; *Jodhi Rai v Basdeo Prasad,* (1911) ILR 33 All 735 : 11 IC 47; *Asharfi Devi v Prem Chand,* AIR 1971 All 457.
103. *Shyamal Ranjan Mukherjee v Nirmal Ranjan Mukherjee,* AIR 2008 (NOC) 568 (All); *Jagran Shakya v Gokul Prasad,* AIR 2008 (NOC) 359 (MP).
104. *Ragendra v C Gounder,* AIR 2007 (NOC) 1325.
105. *Narasimha v Venkatalingum,* (1927) ILR 50 Mad 687 : 103 IC 302 : AIR 1927 Mad 636; *Harihar Prasad v Sri Gurugranth,* 128 IC 791 : AIR 1930 Pat 610; *Ramchandraji Maharaj v Lalji Singh,* (1959) ILR 38 Pat 49 : AIR 1959 AP 305, but see *Shaukat Begam v Sri Thakurji,* 131 IC 442 : AIR 1931 Oudh 14; *Kaleka Singh v Shri Radha Kreshnaji,* (1946) Oudh WN 264 : 225 IC 32; *Ram Kumar and Co v CIT,* AIR 1966 All 100.
106. *Bhupati Nath v Ram Lal,* (1910) ILR 37 Cal 128, pp 153, 155 : 3 IC 642; *Ramalinga v Sivachaidambara,* (1919) ILR 42 Mad 440 : 49 IC 742; *Bhopatrao v Shri Ramchandra,* 96 IC 1004 : AIR 1926 Nag 469.
107. *Ahmad Husain v Kallu,* (1929) 27 All LJ 460, p 462 : 117 IC 97 : AIR 1929 All 277.
108. *Sumsuddin v Abdul Husein,* (1909) ILR 31 Bom 165, p 172.
109. *Jugalkishore v Raw Cotton Co,* [1955] 1 SCR 1369 : AIR 1955 SC 376 : (1955) SC 371 : [1955] SCA 440; Re *Mahomed Hashan,* (1922) 24 Bom LR 861, p 871 : 75 IC 203 : AIR 1923 Bom 107, p 113; *Venkatapathiraja v Subhadrayamma,* 37 IC 563; *Chief Contr RA v Sudarsanam Picture,* (1968) ILR 1 Mad 660 : (1968) 2 Mad LJ 1 : AIR 1968 Mad 319.
110. *Jugalkishore v Raw Cotton Co,* [1955] 1 SCR 1369; *Rajah Sahib Perhlad v Budhoo,* (1869) 12 MIA 275 : 2 Beng LR 111 (PC): *Ranee Bhobosoonduree v Issur Chunder,* (1872) 18 WR 140 (PC); *Mohendra v Kali,* (1903) ILR 30 Cal 265, p 274; *Baldeo v Miller,* (1904) ILR 31 Cal 667.

> But how can there be any transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in future,* and upon the happening of a contingency, of which the purchaser may claim a specific performance, if he comes into court showing that he has himself done all that he was bound to do.

The Supreme Court in *Bharat Nidhi's* case held that as soon as the property comes into existence and is capable of being identified, equity taking as done that which ought to be done fastens upon the property, and the contract to assign thus becomes a complete equitable assignment.[112]

It has been held that a transfer of non-existent or, as it is conveniently called, after-acquired property, provided it is not of the nature contemplated in section 6(a), is perfectly valid and is to be regarded in a court as a contract to transfer after the vendor acquires the title, and will fasten upon the property as soon as the vendor acquires it.[113] While it is true that the law of India does not recognise equitable assignment or equitable estate, it is difficult to say that the right of the transferee in such circumstances is a purely personal right which can only be enforced under section 18(a) of the Specific Relief Act or by a suit for damages, as upon such a transfer or afterwards acquiring the property, an obligation undoubtedly attaches to the property under section 40, and the transfer also operates under section 43 on the interest acquired by the transferor.[114]

The interest of the transferee, however, may not prevail against a bona fide transferee for value.

A mortgage of a future crop has been recognised, but such a mortgage will not affect a transferee without notice.[115]

Transfer of a chance of receiving a gratuitous payment at the discretion of an employer for services being or about to be rendered consists of a possibility, and cannot be transferred.[116]

6. What may be transferred.—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force,—

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred;

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby;

(c) An easement cannot be transferred apart from the dominant heritage;

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111. *Rajah Sahib Perhlad v Budhoo,* 12 WR 6; 2 Beng LR 111.
112. *Holroyd v Marshall,* [1862] 10 HLC 191; *Collyer v Isaacs,* [1881] 19 Ch D 342; *Tailby v Official Receiver,* [1888] 13 App Cas 523; *HV Low and Co v Pulin Beharilal Sinha,* (1933) ILR 59 Cal 1372 : 143 IC 193 : AIR 1933 Cal 154.
113. *Khobhari Singh v Ram Prosad Roy,* (1907) 7 Cal LJ 387; *Lagdir Nanji v Surendra Mohun,* AIR 1938 Cal 606 : 117 IC 920; *Purna Chundra v Barna Kumari,* AIR 1939 Cal 715; *Prem Sukh Gulgulia v Habib Ulla,* (1945) ILR 2 Cal 375 : (1945) 49 Cal WN 371 : AIR 1945 Cal 355; and see *Indroloke Studio Ltd v Santi Debi,* AIR 1960 Cal 609.
114. See also notes, "second para—contractual obligation" under section 40 and "feeding the estoppel" under section 43.
115. *Misri Lal v Mozhar Hossain,* (1886) ILR 13 Cal 262; *Bansidhar v Sant Lal,* (1887) ILR 10 All 133; *Baldeo v Miller,* (1904) ILR 31 Cal 667; *Palanippa v Lakshmanan,* (1893) ILR 16 Mad 429; *RNMK Mutu Kumara Pillay v Veerappa,* 131 IC 509 : AIR 1931 Rang 160.
116. *Soloman v Official Assignee,* 180 IC 399 : AIR 1939 Rang 8.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him;

[117][(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred;]

(e) A mere right to sue [118][***] cannot be transferred;

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable;

(g) Stipends allowed to military, [119][naval], [120][air-force] and civil pensioners of the [121][Government] and political pensions cannot be transferred;

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) [122][for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872)], or (3) to a person legally disqualified to be transferee;

[123][(i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee;]

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117. Ins. by Act 20 of 1929, sec. 6.
118. The words "for compensation for a fraud or for harm illegally caused" omitted by Act 2 of 1900, sec. 3.
119. Ins. by Act 35 of 1934, sec. 2 and Sch.
120. Ins. by Act 10 of 1927, sec. 2 and Sch. I.
121. The word "Government" successively subs. by the A.O. 1937 and the A.O. 1950 to read as above.
122. Subs. by Act 2 of 1900, sec. 3, for "for an illegal purpose".
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(1) Amendments

This section was amended by the amending Act, 1929.

(2) Property of Any Kind

These words indicate that transferability is the general rule, and that the right to property includes the right to transfer the property to another person.[124] The onus of proof is on the person alleging that any kind of property is not transferable.[125] To this rule, the clauses constitute exceptions. Some of the exceptions are similar to those made in section 60 of the Code of Civil Procedure 1908 as to property which cannot be attached, eg a service tenure or a right to future maintenance or a public office or a pension; but decisions under the Code of Civil Procedure 1908 are not always a safe guide,[126] and a private alienation may be made of property the attachment of which is prohibited, eg the tools of artisans.[127] The Rajasthan High Court has held that a gift, being a transfer without consideration, is not hit by section 6(h) which, inter alia, invalidates a transfer which hits section 23, Indian Contract Act, 1872. It has further held that where past cohabitation is only a motive and not a consideration for the transfer, the transfer is not void.[128] It has been held that a property such as coal ash, which is not in existence on the day of the contract, but would be available in due course of time, becomes potential property, and a sale in respect of such a property is established by a contract. The title in such property passes onto the purchaser, although it is held by the seller in the capacity of a trustee.[129]

Property of any kind does not include future property,[130] for a transfer of future property can only operate as a contract which may be specifically performed when the property comes into existence.[131] In a suit for partition, as between the passing of the preliminary and the final decree an assignment of the property is not valid as more

124. *Lal Baijnath v Chandrapal,* (1925) ILR 47 All 55 : 83 IC 204 : AIR 1924 All 795; *Katar Singh v Bishambar Sahai,* (1929) 27 All LJ 1151 : 116 IC 869 : AIR 1929 All 578.
125. *Mohammad Ali v Madarisah,* 102 IC 626 : AIR 1927 Oudh 297.
126. *Brahmadeo v Harjan,* (1898) ILR 25 Cal 778 overruled on a different point in *Nund Kishore v Kanee Ram,* (1902) ILR 29 Cal 355.
127. *Palikandy v Krishnan,* (1917) ILR 40 Mad 302, p 307 : 34 IC 381.
128. *Pyre Mohan v Narayani,* AIR 1982 Raj 43.
129. *Uttar Pradesh State Electricity Board v Ram Berai Prasad,* AIR 1985 All 265, p 270.
130. *Rajah Sahib Perhlad v Budhoo,* (1869) 12 MIA 275 : 2 Beng LR 111 (PC).
131. See note "In present or in future," under section 5.

property can be added and the principle that each shareholder has a right over every inch of the property applies.[132] Where through a settlement deed a large portion of property was settled absolutely in favour of the other while a portion of property by way of life interest was retained by him, an absolute settlement made with respect to the retained property later would be void.[133]

Statutory rights of claimants to compensation which crystallize on assessment and verification of claims are separate rights to property, and cannot vanish or evaporate on the death of the claimant.[134] In a dispute with regard to area, the boundary of the land or the plot number of the instrument/document would be determinative of the issue.[135]

(3) Exceptions Made by the Transfer of Property Act

These are set forth in the clauses to the section.

(4) Exceptions Made by any Other Law

The Supreme Court has held that an embargo upon the owner of the land to transfer the same should not be readily inferred. Right of transfer of land is indisputably incidental to the right of ownership. Such a right can be curtailed or taken away only by reason of a statute.[136] Restrictions are placed by Hindu law on the transfer of coparcenary property, and of property dedicated to religious uses. Mahomedan law imposes restrictions on the transfer of *wakf* property. Various local Acts as well as local customs restrict the transfer of agricultural tenancies. This is also the case with land held on service tenures, such as *watan* land in Bombay, *karnam* land in Madras, and *ghatwal* land in Bengal. Service tenures also fall under the exception in clause (d) of this section.

(5) Clause (a)—*Spes Successionis*

The possibilities referred to in this clause are bare possibilities, and not possibilities coupled with an interest such as contingent remainders and future interest.[137] The present interest of a widow in the property inherited by her from her husband can be transferred along with the incidental right of succeeding to the entire estate of the husband on the death of her co-widow.[138] With reference to a contingent interest, the Judicial Committee said:

> It is something quite different from a mere possibility of a like nature of an heir-apparent succeeding to the estate, or the chance of a relation obtaining a legacy, and also something quite different from a mere right to sue. It is a well ascertained form of property—it certainly has been transferred in this country for generations—in respect of

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132. *Durga Matha Building Constructions Co-op Housing Society Ltd v Sada Yellaiah,* AIR 2010 AP 231 : LNIND 2010 AP 503.
133. *Sri Siddaraju v Sri Gangadhara,* AIR 2012 Kant 143 : LNIND 2012 KANT 57.
134. *UOI v Iqbal Singh,* [1976] 2 SCR 988 : AIR 1976 SC 211 : (1976) 1 SCC 570.
135. *DLF Qutab Envlave Complex Educational Charitable Trust v State of Haryana,* (2003) 5 SCC 622, para 36.
136. *Holy Mother of Aurobindo Ashram of Pondicherry v State of Meghalaya,* AIR 2001 Gau 65; See also *Sheodhyan Singh v Sanichara Kuer,* AIR 1963 SC 1879; *KS Nauji and Co v Jatasankar Dossa,* AIR 1961 SC 1474; *Roy and Co v Nani Bala Dey,* AIR 1979 Cal 50; *Subromoniam Namboripad v Otheeram Variayathu,* AIR 1950 Trav and Coch 19.
137. *Phulwanti Kunwar v Janeshar Das,* (1924) ILR 46 All 575 : 83 IC 782 : AIR 1924 All 625 (contingent interest); *Umes Chunder v Zahoor Fatima,* (1891) ILR 18 Cal 164 : 17 IA 201 (contingent interest); *Ma Yait v Mahomed Ebrahim,* (1927) ILR 5 Rang 145 : 102 IC 690 : AIR 1927 Rang 165 (contingent interest); *Shujaul v Muhammad,* (1927) 25 All LJ 41 (vested remainder); *Lachman v Baldeo,* 21 OC 312 : 48 IC 396 (vested interest); See note "future interest" in property, under section 5.
138. *Karpagathachi v Nagarthinathachi,* [1965] 3 SCR 335 : AIR 1965 SC 1752 : [1965] 2 SCJ 445.

which it is quite possible to raise money and to dispose off it in any way the beneficiary chooses.[139]

ILLUSTRATION

A Hindu, owning separate property dies leaving a widow *B* and a brother *C*. *C* has only a bare chance of succession in case he survives *B*, and this *spes successionis* he cannot transfer. But if *A* during his lifetime makes a settlement of his separate property to his wife for her life and then to his son if he should have one, and in default of a son to *B*, *B* has an interest contingent on *A* having no son, and that interest is transferable. When the rights of an adopted son are curtailed by an agreement giving the widow of the adoptive father the right to enjoy the property during her lifetime, the interest of the son is not a *spes successionis*, but is a vested interest, enjoyment and possession only being postponed.[140]

(6) Transfer by Heir-apparent

An heir-apparent is a person who would be the heir if he survived the *propositus* and if the *propositus* died intestate. Such a possibility is in English law not an interest or even a contingent title. The law was stated *Re Parsons*[141] as follows:

> It is indisputable law that no one can have any estate or interest at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the lifetime of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property.

The chance of a Mahomedan heir succeeding is a mere *spes successionis*, and cannot be the subject of a transfer or a release.[142]

ILLUSTRATION

A has a wife *B* and a daughter *C*. *C* in consideration of ₹1,000 paid to her by *A*, executes a release of her right to share in the inheritance to *A*'s property. *A* dies and *C* claims her one-third share in the inheritance. *B* resists the claim and sets up the release signed by *C*. The release is no defence, for it is a transfer of a *spes successionis*, and *C* is entitled to her one-third share but is bound to bring into account the ₹1,000 received from her father.[143]

Where however, the transfer is not of the right of expectancy of an heir apparent but of the property itself, it cannot be said to be a transfer of a mere chance to succeed. Thus, when a person is not heard of for a long time and is believed to be dead, an agreement to transfer the property, entered into by his brother who is in enjoyment and possession of the property in dispute, is not a transfer of the right of expectancy, but of the property itself and is not hit by clause (a) of section 6.[144]

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139. *Ma Yait Official Assignee*, (1930) ILR 8 Rang 8 : 57 IA 10, p13 : 121 IC 225 : AIR 1930 PC 17. See *Umes Chunder v Zahoor Fatima*, (1894) ILR 18 Cal 164 : 17 IA 201; *Kali Prashad v Ram Golavi*, 167 IC 839 : AIR 1937 Pat 280.
140. *Balwant Singh v Joti Prasad*, (1918) ILR 40 All 692 : 47 IC 599; *Basanta Kumar v Lala Ram*, (1932) ILR 59 Cal 859 : 55 Cal LJ 205 : 138 IC 882 : AIR 1932 Cal 600.
141. *Re Parsons* [1890] 45 Ch D 51, p 55; Re *Mudge* [1914] 1 Ch 115.
142. *Abdool v Goolam*, (1906) ILR 30 Bom 304; *Samsuddin v Abdul Husein*, (1906) ILR 31 Bom 304; *Asa Beevi v Karuppan*, (1918) ILR 41 Mad 365 : 46 IC 35; *Marangami v Nagur Meera*, (1913) 24 Mad LJ 258 : 18 IC 185.
143. *Samsuddin v Abdul Husein*, (1906) ILR 31 Bom 165.
144. *Samir Kumar v Nirmal Chandra*, (1975) 79 Cal WN 934.

(7) Transfer by Hindu Reversioner

By the Hindu law the right of a reversionary heir expectant on the death of a Hindu widow is a *spes successionis*, and its transfer is a nullity and has no effect in law.[145]

In *Amrit Narayan v Goya Singh*[146] the Privy Council said:

> A Hindu reversioner has no right or interest *in praesenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*.

For the same reason, a relinquishment by or on behalf of a reversionary heir of the reversionary right to succeed is invalid.[147] This rule of Hindu law was applied to Hindus independently of the present section by the Privy Council.[148] Since the Amending Act of 1929, the present section applies directly to Hindus.[149] If the reversioner purports to release his interests to the widow, her interest is in no way enlarged and the release cannot take effect as vesting in her the absolute estate in the property left by her husband.[150] Such a release might amount to an acknowledgment that the widow had an absolute right,[151] but the acknowledgement would not be binding on any one who may be the heir when the succession opens out.[152] But if the widow claims a property as her own, and the reversioner alleges it forms part of her husband's estate, and the dispute is bona fide settled between the parties, the settlement is binding on the whole body of reversioners, though the transaction might appear in one of its aspects as a dealing with a *spes successionis*.[153] The reversioner "can relinquish his

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145. *Venkatanarayana v Subbammal,* (1915) ILR 38 Mad 406, p 410 : 29 IC 298 : 42 IA 125, p 128; *Janaki Ammal v Narayanasami,* (1916) ILR 39 Mad 634, p 638 : 37 IC 161 : 43 IA 207, p 209; *Amrit Narayan v Gaya Singh,* (1918) ILR 45 Cal 590 : 44 IC 408 : 45 IA 35; *Harnath Kuar v Indar Bahadur,* (1923) ILR 45 All 179 : 50 1A 69 : 71 IC 629 : AIR 1922 PC 403; *Annada v Gour Mohan,* (1923) ILR 50 Cal 929 : 50 IA 239 : 74 IC 499 : AIR 1923 PC 189, affirming (1921) ILR 48 Cal 536 : 65 IC 27 : AIR 1921 Cal 501; *Jagan Nath v Dibbo,* (1909) ILR 31 All 53 : 1 IC 818; *Nund Kishore v Kanee Ram,* (1902) ILR 29 Cal 355; *Manickam v Ramalinga,* (1906) ILR 29 Mad 120; *Muthuveeru v Vythilinga,* (1909) ILR 32 Mad 206 : 3 IC 476; *Pindiprolu v Pindiprolu,* (1907) ILR 30 Mad 486; *Ranchandra v Kallu,* (1908) ILR 30 All 497; *Bhana v Guman,* (1918) ILR 40 All 384 : 44 IC 629; *Bhagwati v Jagdam,* (1921) 6 Pat LJ 604 : 62 IC 933 : AIR 1921 Pat 260; *Gurbhaj v Lachhman,* (1925) ILR 6 Lah 87 : 88 IC 550 : AIR 1925 Lah 341; *Buta Singh v Jhandu,* (1921) 3 Lah LJ 211 : 61 IC 375 : AIR 1921 Lah 133; *Anandibai v Rajaram,* (1898) ILR 22 Bom 984; *Bhagwan v Mannu,* 15 OC 122 : 13 IC 495; *Dio Chand v Imam Din,* (1917) PLR 135 : 41 IC 347; *Mahadeo Prasad v Mathura,* (1931) All LJ 295 : 132 IC 321 : AIR 1931 All 589; *Karasinga v Narsaila,* AIR 1938 Bom 121 : (1937) ILR Bom 895 : 39 Bom LR 1287 : 174 IC 116; *Shah Nawaz v Ghulam Murtaza,* (1941) ILR 24 Lah 161 : 44 PLR 87 : 201 IC 292 : AIR 1942 Lah 138 (where, however, the transaction was upheld on the ground of its being in settlement of disputed claims); *Wamanrao v Shantabai,* (1953) ILR Nag 413 : AIR 1952 Nag 317; *Subbareddi v Govindareddi,* AIR 1955 AP 49 : (1954) 2 Mad LJ 195 (Andh); *Ratnamala v State,* AIR 1968 Mys 216; *Eperi Adinarayana Patra v Eperi Ramohar Patra,* AIR 1980 Ori 95.
146. *Amrit Narayan v Goya Singh,* (1918) ILR 45 Cal 590 : 45 IA 35 : 44 IC 408.
147. *Amrit Narayan v Gaya Singh,* (1918) ILR 45 Cal 590 : 45 IA 35 : 44 IC 408; *Dhoorjetti v Dhoorjetti,* (1907) ILR 30 Mad 201; *Narasimham v Madhavarayudu,* (1903) 13 Mad LJ 323; *Marangami v Nagur Meera,* (1913) 24 Mad LJ 258 : 18 IC 185; *Annada v Gour Mohan* (1921) ILR 48 Cal 536 : 65 IC 27 : AIR 1921 Cal 501; *Dwarka Prasad v Nasir Ahmed,* 78 IC 850 : AIR 1925 Oudh 16.
148. See *Harnath Kaur v Indar Bahadur,* (1923) ILR 45 All 179 : 50 IA 69 : 71 IC 629 : AIR 1922 PC 403; *Annada v Gour Mohan,* 50 IA 239 : (1923) ILR 50 Cal 929 : 74 IC 499 : AIR 1923 PC 189.
149. *Shevbagavadiranumal v Mupidathi Ammal,* AIR 1942 Mad 720.
150. *Dayaram v Bechardas,* (1922) 24 Bom LR 351 : 67 IC 936 : AIR 1922 Bom 437.
151. *Chetty v Chetty,* (1908) ILR 31 Mad 474; *Bhana v Guman Singh,* (1918) ILR 40 All 384 : 44 IC 629.
152. *Bahadur Singh v Mohar Singh,* (1901) ILR 24 All 94 : 29 IA 1.
153. *Kamaraju v Venkatalakshmipathi,* (1925) 49 Mad LJ 296, p 297 : 88 IC 982 : AIR 1925 Mad 1043.

right to say that the properties in dispute form part of the estate to which he is the reversioner".[154]

It was held by the Supreme Court in *Jumma Masjid v Kadimaniandra Deviah,*[155] that the principle of feeding the estoppel recognised in section 43 of the TP Act would apply to a case where a reversioner purports to transfer properties to which he has only a chance of succeeding if he has represented to the transferee that he was absolutely entitled to the properties, and if he subsequently acquires title to the properties. The court overruled a decision of the Madras High Court in *Official Assignee of Madras v Sampath Naidu,*[156] and held that though section 43 would not apply when the transferee knew the facts, there was no reason why a transferee who was not aware of the true facts and who acted on the fraudulent representation should not have the benefit of the equitable doctrine embodied in section 43.[157]

Agreement by Hindu reversioner to transfer

An agreement by reversionary heir to transfer or to relinquish his right of succession is also void.[158] In *Annada v Gour Mohan,*[159] the Privy Council said that it was impossible for them to admit the common sense of maintaining an enactment which would prevent the purpose of the contract, while permitting the contract to stand as a contract. The Bombay High Court has held that the equitable doctrine which regards that done which ought to be done, is excluded by the express prohibition in this section, and that an agreement by a person not to claim a share of an inheritance when it falls in, is void.[160] In some cases such agreements have (it is submitted erroneously) been held to be valid as agreements to take effect on a contingency.[161] The Allahabad High Court has in a series of cases[162] treated such agreement as valid, but the correctness of these decisions was doubted by CJ Piggott in *Chahlu v Parmal,*[163] and they must be taken as overruled by *Annada v Gour Mohan.*[164] The case of *Chahlu v Parmal*[165] was, however, a peculiar one and called for the application of another doctrine. In that case, there were four separated brothers. *A, B, C* and *D. B* died and *A* took his share and remarried his widow. Then *D* died and *A* agreed

154. Ibid.
155. *Jumma Masjid v Kadimaniandra Deviah,* [1962] 2 SCR 554 (Supp) : AIR 1962 SC 847 : [1962] 2 SCJ 303 : [1962] 2 SCA 422; *Damodaran Kavirajan v TD Rajappan,* AIR 1992 Ker 397, p 401.
156. *Official Assignee of Madras v Sampath Naidu,* (1933) 65 Mad LJ 588 : 145 IC 965 : AIR 1933 Mad 795.
157. See also *Shyam Narain v Mangal Prasad,* (1934) ILR 57 All 474 : (1935) All LJ 13 : 153 IC 163 : AIR 1935 All 244; *Vithabai Dattu Pattar v Malhar Shankar,* (1938) ILR Bom 155 : 40 Bom LR 147 : AIR 1938 Bom 228; *Alamanaya v Murukuti,* (1915) 29 Mad LJ 733 : 29 IC 439; *Bismilla v Manulal Chabildas,* AIR 1931 Nag 51; *Ram Japan v Jagesara Kuer,* 182 IC 829 : AIR 1939 Pat 116.
158. *Annada v Gour Mohan,* (1923) ILR 50 Cal 929 : 50 IA 239 : 74 IC 499 : AIR 1923 PC 189; *Samsuddin v Abdul Husein,* (1906) ILR 31 Bom 165; *Jagannada v Prasada Rao,* (1916) ILR 39 Mad 554 : 29 IC 241; *Dhoorjeti v Dhoorjeti,* (1906) ILR 30 Mad 201; *Thakur Singh v Uttam Kaur* (1929) ILR 10 Lah 613 : 118 IC 449 : AIR 1929 Lah 295; *Bindeshwari Singh v Har Narain,* (1929) ILR 4 Luck 622 : 127 IC 20 : AIR 1929 0udh 185; *Jotilal Shah v Beni Madho,* 188 IC 512 : AIR 1937 Pat 280; *Abdul Kadir v Ahmed Jaraganar,* AIR 1956 Mad 681.
159. *Annada v Gour Mohan,* (1923) ILR 50 Cal 929 : 50 IA 239, p 245 : 74 IC 499 : AIR 1923 PC 189.
160. *Samsuddin v Abdul Husein,* (1906) ILR 31 Bom 165.
161. *Ramnirunjun v Prayag Singh,* (1881) ILR 8 Cal 138; *Gitabai v Balaji,* (1893) ILR 17 Bom 232; *Lalita Prasad v Sarnam Singh,* 149 IC 491 : AIR 1933 Pat 165.
162. *Nasirul Haq v Faiyaz-ul-Rahman,* (1911) ILR 33 All 457 : 9 IC 530; *Kami Chandra v Ali Nabi,* (1911) ILR 33 All 414 : 9 IC 935; *Mohammad Hashmat Ali v Kaniz Fatima,* (1915) 13 All LJ 110 : 27 IC 701.
163. *Chahlu v Parmal,* (1910) ILR 41 All 611 : 51 IC 919.
164. *Annada v Gour Mohan,* (1921) ILR 48 Cal 536 : 65 IC 27 : AIR 1921 Cal 501.
165. *Chahlu v Parmal,* (1919) ILR 41 All 611 : 51 IC 919.

with *C* not to claim *D*'s share after *D*'s widow should die. But when *D*'s widow died he did claim a share and the dispute was settled by a compromise that *A* should keep B's share and that *C* should keep *D*'s share. This was a valid family settlement, and even if *A*'s agreement not to claim *D*'s share was invalid, yet *A* could not claim that share without bringing *B*'s share into account.

Since an agreement to transfer a reversion is void, the court will not allow such an agreement to be embodied in a consent decree.[166] However, if a suit has been filed on an invalid agreement to assign the reversion, it may become the subject of a valid compromise after the reversion has fallen in.[167] Similarly, although an agreement to transfer a reversion is void, yet an alternative promise may constitute a valid substituted contract under section 58 of the Indian Contract Act, 1872. In *Mahadeo Prasad v Mathura,*[168] there was an agreement between the mortgagor and the mortgagee by which the mortgagee agreed not to recover the balance due on his mortgage during the lifetime of a Hindu widow, and at her death to accept in discharge either a share of the mortgagor's reversion in three villages owned by the widow, or a share in another village owned by the mortgagor. This was held to be invalid as to the three villages, but valid as to the other village.

Estoppel of reversioner

Although both the transfer and the agreement to transfer a reversionary interest are void, yet a reversioner may be estopped from claiming the reversion by his conduct if he has consented to an alienation by a widow or other limited heir.[169]

ILLUSTRATIONS

(1) A Hindu widow executed a deed of gift of a part of her husband's property to *D. F,* who was then the nearest reversioner joined in the deed. On the widow's death *F* claimed the property pleading that the gift was invalid. *F* having consented to the gift is estopped from disputing its validity.[170]

(2) Tayava, a Hindu widow, disposed of the greater part of her husband's property by three deeds executed and registered on the same day. The first was a deed of gift to her brother, which was attested by the reversioner. The second was a deed of sale to one Annagowda, and the third was a deed of sale to her son- in-law. All the deeds formed part of the same transaction and were executed with Annagowda's consent. The Privy Council said:

> If some other person than Annagowda had been, at the death of Tayava, the nearest heir to her husband, it might have been open to him to question all or any of the three deeds but Annagowda himself being a party to and benefitting by the transaction evidenced thereby was precluded from questioning any part of it.[171]

This is particularly the case if the reversioner had been a party to a compromise,[172] or after they should be enfranchised in the name of the transferor as an agreement for the transfer of

166. *Ramasami v Ramasami,* (1907) ILR 30 Mad 255; *Bhagwan v Mannu,* 15 OC 122 : 13 IC 495.
167. *Durga Prasad v Narain,* (1929) ILR 4 Luck 181 : 115 IC 294 : AIR 1929 Oudh 63.
168. *Mahadeo Prasad v Mathura,* (1931) All LJ 295 : 132 IC 321 : AIR 1931 All 589.
169. *Bajranji v Manokarnika,* (1907) ILR 30 All 1 : 35 IA 1; *Ramgouda v Bhausaheb,* (1927) ILR 52 Bom 1 : 54 IA 396 : 105 IC 708 : AIR 1927 PC 227; *Basappa v Fakirappa,* (1922) ILR 46 Bom 292 : 64 IC 214 : AIR 1922 Bom 102, explaining *Bai Parvati v Dayabhai,* (1920) ILR 44 Bom 488 : 58 IC 266; *Fateh Singh v Thakur Rukmini,* (1923) ILR 45 All 339 : 72 IC 8 : AIR 1923 All 387.
170. *Basappa v Fakirappa,* (1922) ILR 46 Bom 292 : 64 IC 214 : AIR 1922 Bom 102.
171. *Ramgouda v Bhausaheb,* (1927) ILR 52 Bom 1 : 54 IA 396, p 402 : 105 IC 708 : AIR 1927 PC 227.
172. *Kanhai Lal v Brij Lal,* (1918) ILR 40 All 487 : 45 IA 118 : 47 IC 207; *Barati Lal v Salik Ram,* (1916) ILR 38 All 107 : 31 IC 919; *Bahadur Singh v Ram Bahadur,* (1923) ILR 45 All 277 : 71 IC 405 : AIR 1923 All 204; *Moti Shah v Gandharp Singh,* (1926) ILR 48 All 637 : 96 IC 595 : AIR 1926 All 715; *Raghubir Datt v Narain Datt,* (1930) 28 All LJ 1541 : 126 IC 24 : AIR 1930 All 498; *Jagdam Sahay v Rupnarain,* 84 IC 208 : AIR 1924 Pat 736; *Basangowda v Irgowdatti,* (1923) ILR 47 Bom 594 : 73 IC 196 : AIR 1923 Bom 276.

family settlement,[173] entered into by a widow or other limited heir which involves an alienation of the estate by her and if he has benefited by the transaction. Different considerations prevail, if the renunciation or relinquishment proceeds on a settlement of conflicting claims or bona fide disputes.[174]

ILLUSTRATIONS

(1) A Hindu died leaving as his heirs two daughters. Nevertheless, two separated cousins claimed the inheritance, and the dispute was settled by a compromise under which the property was partitioned and a fourth share was allotted to each cousin and daughter, as absolute owner. On the death of one daughter without issue, the sons of one of the cousins claimed to succeed to her quarter share as reversionary heir. The court held that as they had taken the place of their father and had, ever since his death, enjoyed possession of the share allotted to him, they were estopped from claiming as reversionary heirs.[175]

(2) A Hindu governed by the Benares school of law dies leaving a widow and three daughters two of whom have sons. The widow claimed to be absolutely entitled to certain properties which the daughters said belonged to their father. As there was a doubt about their rights, the members of the family agreed and arranged among themselves that the whole property should be divided among the daughters and their sons, the widow surrendering her share. Each daughter accepted the property allotted to her in severality in lieu of the undivided share in the whole estate which would have devolved upon her on the mother's death and abandoned the right of survivorship on the death of either of her sisters. 38 years later, after the death of the mother and two sisters, the third sister sued as heir of her father to recover a property sold to the defendant by one of the deceased sisters. The Privy Council said that in view of the favour shown by the court to family arrangements and the long period of time which had elapsed since the arrangement was made, the plaintiff could not be allowed to repudiate the arrangement and impeach a sale which had been made upon the faith of it.[176]

Compromises and family arrangements do not operate as transfers of reversionary interest, but as said by the Judicial Committee in *Rani Mewa Kuwar v Rani Hulas Kunwar*[177] and by the Supreme Court in *Sadhu Madho Das v Pandit Mukand Ram,*[178] are based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. A compromise implies an existing dispute, but a family arrangement may be concluded for the avoidance of future disputes.[179] Where a son had entered into an arrangement with his father that he should be given a certain sum in consideration of his being considered to have separated, the agreement was held to be a family arrangement, and not contrary to section 6(a) of TP Act.[180] However, a member of the family who has not joined the family arrangement may challenge the same.[181]

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173. *Hardei v Bhagwan Singh,* (1919) 24 Cal WN 105 : 50 IC 812 (PC); *Pulliah Chetty v Varadharajula,* (1908) ILR 31 Mad 474; *Kanti Chandra v Ali Nabi,* (1911) ILR 33 All 414 : 9 IC 935; *Chahlu v Parmal,* (1919) ILR 41 All 611 : 51 IC 919; *Muthuraman v Ponnuswamy,* (1915) 29 Mad LJ 214 : 29 IC 549; *Mangal Singh v Ghasita,* 116 IC 312 : AIR 1929 Lah 485.
174. *Shah Nawaz v Ghulam Murtaza,* (1942) ILR 24 Lah 161 : 44 Punj LR 87 : 201 IC 292 : AIR 1942 Lah 138.
175. *Bahadur Singh v Ram Bahadur,* (1923) ILR 45 All 227 : 71 IC 405 : AIR 1923 All 204.
176. *Hardei v Bhagwan Singh,* (1919) 24 Cal WN 105 : 50 IC 812.
177. *Rani Mewa Kuwar v Rani Hulas Kunwar,* 1 IA 157, p 166 : 13 Beng LR 312 (PC); *Khunni Lal v Gobind Krishna,* (1911) ILR 33 All 356 : 38 IC 87 : 10 IC 477 (PC); *Hiran Bibi v Sohan Bibi,* (1914) 18 Cal WN 929 : 24 IC 309 (PC); *Chandar v Das Debi Das,* AIR 1951 All 522; *Rai Kumar Singh v Abbhai Kumar Singh,* AIR 1948 Pat 362.
178. *Sadhu Madho Das v Pandit Mukand Ram,* [1955] 2 SCR 22 : AIR 1955 SC 481 : [1955] SCJ 417; *Ram Charan Das v Girjanandini Devi,* [1965] 3 SCR 841 : AIR 1966 SC 323 : [1966] 1 SCJ 61; *Ram Charan v Girjanandini Devi,* AIR 1959 All 473; *Mukteswar Rai v Ramkewal Rai,* AIR 1962 Pat 28.
179. *Pokhar Singh v Dulari Kunwar,* (1930) ILR 52 All 716 : 125 IC 1 : AIR 1930 All 687.
180. *Rajmal v Parabai,* AIR 1954 Bom 153.
181. *Ram Pratap v Indrajit,* AIR 1950 All 320; See also note on "Transfer" under section 5.

(8) Mahomedan Law and Transfer of *Spes Successionis*

The present section does not apply in terms to Mahomedans.[182] The transfer of expectancy is invalid under that law.[183] It has been held that in the case of Mahomedans the transfer of expectancy by a heir presumptive is void ab initio and that no question of an estoppel can, therefore, arise by reason of the heir renouncing her claim before the expectancy opens.[184] This decision though justified on the facts of the case, errors, it is submitted, in stating the principle thus. The equitable estoppel arises in such cases not because the transfer is voidable, but because of the conduct of the transferor who purports to effect a transfer which is contrary to the provisions of law and, therefore, void.[185]

The object of the rule of Muslim law which does not recognise a purpoted transfer of a *spes successionis* as legally valid, is not to "prohibit" anything within the terms of section 23 of the Indian Contract Act, 1872 (which invalidates agreements prohibited or opposed to public policy), but merely to make clear what is, and what is not, a transferable right or interest in property. Its purpose could not be to protect those who receive consideration for such a transfer.

Thus ordinarily there cannot be a transfer of *spes successionis* under Muslim law, but relinquishment of succession rights arising in future is permissible under a family arrangement and under the laws of testamentary succession or by accepting consideration for a future share. It can then operate as estoppel against the expectant heir to claim any share in the estate of the deceased on account of the doctrine of *spes successionis*. A family arrangement binding on the parties would operate as an estoppel by preventing the parties from resiling from the same or trying to revoke it after having taken advantage of such arrangement. The Supreme Court in *Shehammal v Hassan Khan Rawther*[186] held:

(i) That a deed of relinquishment executed by an heir apparent could operate as an estoppel to a claim that may be set up by the executor of such deed after inheritance opens on the death of the owner of the property;

(ii) Upon execution of a deed of relinquishment after having received remuneration for such future share, the expectant heir could be estopped from claiming a share in the inheritance;

(iii) By means of a family settlement, a Muslim can relinquish his right of *spes successionis* when he had still not acquired a right in the property.

The court drew support from the laws of testamentary succession governing Muslims whereby, despite the fact that a Muslim testator is prohibited from making a will of more than one third of his property, he can do so if the heirs give their consent to such bequest. Giving of such consent, the apex court said actually means renouncing their chances of obtaining a share on intestacy. This renunciation/relinquishment of future inheritance is on one hand forbidden under the TP Act and on the other hand accepted as valid under the rules of testamentary succession under Muslim law. Thus having accepted the consideration for having relinquished a future claim or share in the estate

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182. See section 2 above.
183. *Samsuddin v Abdul Husein,* (1906) ILR 31 Bom 165; *Indar Pal Singh v Sarman Singh,* AIR 1950 All 833; *Badhur Singh v Hari Bans Singh,* AIR 1953 All 213; *Baekunthi Singh v Malan Singh,* AIR 1950 Pat 188; *Asa Beeyi v Karuppan,* (1918) ILR 41 Mad 365 : 40 IC 35; *Abdul Hossain v Golam Hossain,* (1905) ILR 30 Bom 304; *Hossain Ali v Naro,* (1889) ILR 11 All 456; *Muranjani v Karupati,* (1912) 24 Mad LJ 258 : 18 IC 185; *Rebati Mohan v Ahmed,* (1909) 9 Cal LJ 50 : 1 IC 590.
184. *Abdul Kafoor v Abdul Razack,* (1958) 2 Mad LJ 492 : AIR 1959 Mad 131; and see *Sulaiman Sahib v Ibrahim Meeral Bivi,* (1953) 1 Mad LJ 388 : AIR 1953 Mad 161.
185. See *Ramgouda v Bhausaheb,* (1927) ILR 52 Bom 1 : 54 IA 396 : 105 IC 708 : AIR 1927 PC 227; also see the discussion under the note "estoppel of reversioner" above.
186. *Shehammal v Hassan Khan Rawther,* AIR 2011 SC 3709.

of the deceased, it would be against public policy if such a claimant be allowed the benefit of doctrine of *spes successionis*. In such cases the principle of estoppel would be attracted. In the instant case the question was relating to the validity of five relinquishment deeds executed by the siblings in favour of one brother who stayed with the father under which they relinquished their shares in the property of their father. The court held that the doctrine of estoppel would operate against them so as to prevent them from receiving an advantage for giving up their rights and yet claiming the same rights subsequently. Being opposed to public policy, the heir expectant would be estopped under the general law from claiming a share in the property of the deceased. Similarly, in *Hameed v Jameela*,[187] a daughter for a consideration relinquished her share of inheritance in the property of her father, but claimed inheritance upon his death. She and her husband had purchased property with the consideration for their relinquishment. The court applied the rules of estoppel and held that she having enjoyed the benefit by her relinquishment cannot claim that she was not bound by the relinquishment. The court clearly said that the receipt of money by an heir apparent in lieu of his/her share in the property of his/her father during his life time would estop the heir apparent from claiming the share of the property of the father upon his demise. Thus, where after relinquishment of her share in her father's property, a Muslim woman bought land with the money that she got in lieu of her relinquishment, and sold the same to *X*, representing to him that she was competent to do so but later refused to perform her part of the contract on the plea that she was not competent to relinquish her inheritance, the court held that she would be estopped from taking the benefit of section 6(a) and the transfer would be valid.[188]

The object

The protection of any party could be the object underlying such a rule—

> The protection of possible transferees, so that they may know what is, and what is not, a legally enforceable transfer.[189]

(9) Transfer of *Spes Successionis* in Punjab

The High Court of Lahore has held that the transfer of an expectancy is valid in Punjab where the TP Act does not apply,[190] and that a declaratory suit with reference to a *spes successionis* is maintainable.[191] The law applicable there, is in substance, the rule of English law.

(10) Chance of a Legacy

The chance of a relation or a friend receiving a legacy is a possibility even more remote than the chance of succession of an heir, and is not transferable.[192]

(11) Other Possibilities of a Like Nature

The usual illustration of a possibility is the case of a fisherman's net. There is no certainty that any fish will be caught, and the fisherman has no interest in the fish until they are caught. An agreement for the sale of *otkarnam* lands is a possibility and is, therefore, void.[193] There is a conflict of decisions as to whether a right to receive future offerings at a temple can

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187. *Hameed v Jameela*, AIR 2010 Ker 44 : (2009) 4 KLT 531.
188. *Jameela Beevi v Bashir*, AIR 2012 Ker 107 : (2012) 2 Kar LJ 273.
189. *Gulam Abbas v Hozi Koyyum Ali*, [1973] 2 SCR 300 : AIR 1973 SC 554 : [1974] 2 SCJ 173.
190. *Naranjan Singh v Dharm Singh*, 129 IC 29 : AIR 1930 Lah 928; *Govind v Chanan Singh*, 147 IC 847 : AIR 1933 Lah 378.
191. *Karim Baksh v Rahiman*, 144 IC 408 : AIR 1933 Lah 555.
192. *Cf Pag Dat v Chote Singh*, (1906) 9 OC 55.
193. *Auryaprabhakara v Gummudu*, (1925) 48 Mad LJ 598 : 88 IC 557 : AIR 1925 Mad 885.

be assigned. Some cases take the view that the chance that future worshippers will give offerings is a mere possibility which cannot be transferred,[194] while others hold that the right to receive offerings is not so uncertain, variable and limited as to pass out of the conception of the law.[195] With reference to the right to receive offerings at the sacred shrine of *Shri Vaishno Devi Ji* (Jammu and Kashmir), it has been held that the right is heritable.

The High Court observed:

> Although the right to receive the offerings from the pilgrims resorting to the shrine depends upon the chance that future pilgrims and worshippers will give offerings, the right to receive the offerings made is a valuable, definite and tangible right and is not merely a possibility of the nature referred to in section 6(a) of the Transfer of Property Act.[196]

Offerings that have actually been made may, of course, be transferred; and the Bombay High Court has held that the priest's share of the *utpat* or net balance of the offerings to an idol may be attached.[197] Future wages of a servant before they are earned are a mere expectancy which cannot be attached or sold.[198] Prior to the completion of a sale, a vendor's interest in the purchase money is only a possibility which cannot be transferred.[199] However, when land which had been acquired under the Land Acquisition Act, was restored by government to one of the owners on his undertaking to transfer their respective shares to the co-owners, the latter had a beneficial interest in the land, and not a mere possibility.[200] As to the words "of a like nature", it has been held that they indicate possibilities of the same kind as the chance of a legacy,[201] or a chance of being paid a gratuity.[202] However, a contract for the sale of a property which is not the vendor's at the time of the contract, but which the vendor thinks of acquiring by purchase later on, is not bad in law.[203] A customary right to scavenge is not a kind of property which can be transferred.[204]

(12) Clause (b)—Transfer of Right of Re-entry

A "mere right of re-entry" refers to the right of re-entry which a transferor reserves to himself, after having parted with the whole estate, for breach of a condition subsequent. This is the right referred to in section 111 (g) which the lessor has against the lessee for breach of an express condition, which provides that on its breach the lessor may re-enter. Such a condition is a condition subsequent defined in section 31 which divests an estate which has already vested. A right of re-entry implies an estate of reversion, and cannot be transferred apart from the estate to which it belongs. The transfer of the reversion, i.e., of the lessor's interest, carries with it the right of re-entry. The transfer of a lessor's interest including a right of re-entry is not a transfer of a *mere* right of re-entry, and is valid.

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194. *Shoilojanund v Peary Charon,* (1902) ILR 29 Cal 470; *Puncha Thakur v Bindeswari,* (1916) ILR 43 Cal 28; *Paragi v Gauri Shanker,* 51 IC 86; *Nitya Gopal v Nani Lal,* (1920) ILR 47 Cal 990 : 56 IC 19.
195. *Ahmaduddin v Illahi Baksh,* (1912) ILR 34 All 465 : 14 IC 587; *Sukh Lal v Bishambhar,* (1917) ILR 39 All 196 : 37 IC 661; *Balmukund v Tular Ram,* (1928) ILR 50 All 394 : 13 IC 242 : AIR 1928 All 21; *Nand Kumar v Ganesh Das,* (1936) ILR 58 All 457 : 159 IC 812 : AIR 1936 All 131; *Zahana Mal v Parmeshri Das,* (1942) Punj LR 403 : 203 IC 348 : AIR 1942 Lah 284; *Subh Ram v Ram Kishan,* (1943) 45 Punj LR 284 : 210 IC 262 : AIR 1943 Lah 265.
196. *Badri Nath v Punam,* AIR 1973 J&K 7.
197. *Digambar v Hari,* (1927) 29 Bom LR 102 : 100 IC 1008 : AIR 1927 Bom 143.
198. *Devi Prasad v Lewis,* (1909) ILR 31 All 304 : 1 IC 186.
199. *Ahmaduddin v Majlis,* (1881) ILR 3 All 12.
200. *Lakshman v Babani,* (1932) 34 Bom LR 366 : 139 IC 642 : AIR 1932 Bom 244.
201. *Pashupati Venkatapathi v Venkata Subhadry-amma,* 47 IC 563.
202. *Solomon v Official Assignee,* 180 IC 399 : AIR 1939 Rang 8.
203. *Premsukh v Habib Ullah,* (1945) ILR 2 Cal 375 : 49 Cal WN 371 : AIR 1945 Cal 355.
204. *Radya v Kaivraya,* AIR 1951 Bom 120.

The expression "mere right of re-entry", therefore, means a right of re-entry apart from any interest in the property. If not accompanied by an interest in property, it is a personal license and not transferable. This is illustrated by the case of Re *Davis & Co, ex-parte Rawlings.*[205] In that case, goods were delivered under a hire purchase agreement which gave the bailor a right to enter the premises where the goods were kept, and take possession in default of payment of any installment. The bailor assigned his rights under the agreement by way of security to his creditor; it was held that the creditor could not enforce the right of re-entry as it was only a personal license which was not assignable.

(13) Clause (c)—Transfer of Easement

An easement is defined in section 4 of the Easements Act 5 of 1882 as "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own". An easement includes a profit *a prendre,* i.e., a right to enjoy a profit out of the land of another.[206] An easement cannot be detached from the dominant heritage, but passes with it as a legal incident to the property transferred. This is enacted in section 8 of TP Act, and in section 19 of the Indian Easements Act, 1882. The present section in effect enacts that there cannot be an easement in gross.[207] A thing in gross exists in its own right, and not as an appendage to another thing. An easement cannot be in gross, for it must be a right over one piece of land for the benefit of another piece of land and, therefore, cannot be transferred without the land that has the benefit of it. Right of way which may be enjoyed irrespective of a dominant heritage as sometimes called easement in gross, but this is an incorrect use of the term.[208]

In India there are various rights which resemble easements, but are really not easements. They are customary rights saved by section 2(b) of the Indian Easements Act, 1882,[209] such as a *kamaki* right to collect leaves for manure and to pasture cattle;[210] a right to use the land of another person for a *holi* festival;[211] or for a bathing *ghat,*[212] or for a burial ground,[213] or for the celebration of the *mohurrum,*[214] or of the *ram lila.*[215] Such rights are independent of any dominant heritage.[216]

The section refers to the transfer of an existing easement, and not to the grant of an easement. The grant of an easement is not a transfer of property;[217] and the provisions of the TP Act have no application to the creation of easements.[218] An easement may be released in

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205. Re *Davis & Co, ex-parte Rawlings,* [1889] 22 QBD 193.
206. *Chundee Churn v Shib Chunder,* (1888) ILR 5 Cal 945; *Sundrabai v Jayawant,* (1899) ILR 23 Bom 397; also see Indian Easements Act, 1882, section 4, illustration (d).
207. *Sital Chandra v Delanney,* (1916) 20 Cal WN 1158 : 34 IC 450.
208. *Municipal Board of Benares v Behari Lal,* (1926) ILR 48 All 560, p 564 : 95 IC 1030 : AIR 1926 All 538; *Rangeley Midland Rly Co* [1868] 3 Ch App 306.
209. *Municipal Board of Cawnpore v Lallu,* (1898) ILR 20 All 200.
210. *Matilda Fernandez v Pinto,* 15 IC 278.
211. *Ashraf v Jayannath,* (1884) ILR 6 All 497.
212. *Shah Mohammad v Kashi,* (1885) ILR 7 All 199.
213. *Mohidin v Shivlingappa,* (1899) ILR 23 Bom 666; *Ramrao v Rustumkhan,* (1902) ILR 26 Bom 198; *Ram Singh v Ali Baksh,* 95 IC 458.
214. *Kuar Sen v Mammon,* (1895) ILR 17 All 87.
215. *Ramdas v Damodhar,* 72 IC 218 : AIR 1923 Pat 346; *Channu Datta v Swami Gyannandji,* AIR 1926 All 130.
216. See Indian Easements Act, 1882, section 18 and illustrations.
217. *Bhagwan Sahai v Narsingh Sahai,* (1909) ILR 31 All 612 : 3 IC 615; *Konadayya v Veeranna,* 92 IC 672 : AIR 1926 Mad 543; *Satyanarayana v Lakshmayya,* (1929) 57 Mad LJ 46 : 115 IC 146 : AIR 1929 Mad 79.
218. *Sital Chandra v Delanney,* (1916) 20 Cal WN 1158 : 34 IC 450.

favour of the owner of the servient tenement, but such a release effects not a transfer, but an extinction of the easement.[219] The imposition, acquisition and transfer of easements, is governed by the provisions of chapter II of the Indian Easements Act, 1882 (sections 8–18).

(14) Clause (d)—Restricted Interests

An interest restricted in enjoyment to the owner personally is by its very nature not transferable, unless the restriction is void under section 10. A transfer of such property would defeat the object of the restriction. For instance, the object of a right of pre-emption is to prevent the introduction to strangers as co-sharers, and the sale of such a right to an outsider would defeat that object. A grant for *parwarish* is restricted in enjoyment to the grantee, and cannot be alienated.[220] In the case of a religious office J Macpherson said:

> Such a sale would practically destroy the endowment, or have the effect of defeating the whole object of its creation. There would be no guarantee that the service would be properly kept up; for the purchaser whoever he might be—even if a Mahomedan or a Christian—would have the right of performing the worship of this Hindu idol.[221]

Again, with reference to the sale by *urallers* or trustees of a Hindu temple, the Privy Council said that where the founder of a religious endowment may be supposed to have established a corporation with the distinct object of securing the due performance of the worship, and the due administration of the property, by the instrumentality and at the discretion of its members, they have no power to transfer their right.[222] For this reason, a religious office is not a transferable property.[223] The office of shebait of a temple,[224] or *mahani* of a *math*,[225] or *mutwalli* of a *wakf*,[226] cannot be transferred. A *vritti* is not saleable property;[227] nor the right of village *joshi* to perform religious ceremonies at the house of his *yajman*;[228] nor the *birt maha brahmani* or right to officiate at funeral ceremonies;[229] nor *birt khakrobi* rights.[230] The life interest holders having a mere right of residence cannot transfer such restricted interest.[231]

A paid or turn of worship, and the *pujari's* right to receive offerings, or as a co-sharer,[232] are *res extra commercium*, and cannot be alienated,[233] though by custom they may be

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219. *Kristodhone v Nandarani*, (1908) ILR 35 Cal 889.
220. *Mahomed Shabbar v Harnath*, 105 IC 196 : AIR 1927 Oudh 436; *Lachhmeshwar v Moti Rani*, AIR 1939 PC 157 : (1939) All LJ 473 : 41 Bom LR 1068 : 43 Cal WN 729 : 181 IC 359.
221. *Juggernath v Kishen*, (1867) 7 WR 266.
222. *Rajah Vurmah v Ravi Vurmah*, (1878) ILR 1 Mad 235 : 4 IC 76.
223. *Narasimma v Anantha*, (1881) ILR 4 Mad 391; *Kuppa v Dorasami*, (1883) ILR 6 Mad 76; *Keyake v Yadatil*, (1858) 3 Mad HC 380; *Subbarayudu v Kotayya*, (1892) ILR 15 Mad 359; *Durga Bibi v Chanchal*, (1882) ILR 4 All 81; *Ram Varma v Roman Nayar*, (1882) ILR 5 Mad 89; *Rup Narain v Junko*, (1879) 3 Cal LR 112; *Srimati Mallika v Ratanmani*, (1897) 1 Cal WN 493; *Gnanasambunda v Velu*, (1900) ILR 23 Mad 271 : 27 IA 69; *Rajaram v Ganesh*, (1899) ILR 23 Bom 131.
224. *Juggernath v Kishen*, (1867) 7 WR 266; *Dubo Misser v Srinibas*, (1870) 14 WR 409; *Gobinda v Debendra*, (1907) 12 Cal WN 98; *Nagendra v Rabindra*, (1926) ILR 53 Cal 132 : 94 IC 212 : AIR 1926 Cal 490.
225. *Prayad Das v Mohunth Kriparam*, (1908) 8 Cal LJ 499.
226. *Wahid Ali v Ashraff*, (1881) ILR 8 Cal 732; *Sarkum v Rahaman*, (1897) ILR 24 Cal 83; *Munshi Shahed Baksh v Golam Nabi*, (1918) 22 Cal WN 996 : 47 IC 117; *Haji Ali Muhammad v Anjunman-i-Islamia*, (1931) ILR 12 Lah 590 : 135 IC 56 : AIR 1931 Lah 379.
227. *Manjunath v Shankar*, (1914) ILR 39 Bom 26 : 28 IC 130; *Govind v Ramkrishna*, (1888) ILR 12 Bom 366; *Ganesh v Shankar*, (1886) ILR 10 Bom 395.
228. *Waman v Balaji*, (1890) ILR 14 Bom 167.
229. *Durga Prasad v Shambhu*, (1919) ILR 41 All 656 : 51 IC 539; *Jhummun v Dinoonath*, (1870) 16 WR 171, *contra, Sukh Lal v Bishambar*, (1917) ILR 39 All 196 : 37 IC 661.
230. *Dhandu v Girdhari Lal*, (1961) All LJ 565 : AIR 1961 All 518.
231. *Sriman Prabahan Mitra v Madhuri Mitra*, AIR 1985 Cal 368, p 378.
232. *Dani Ram v Jamuna Das*, 2010(1) ALJ 706; AIR 2010 (NOC) 524 (All).

transferable to another *Brahmin.*[234] A person gets no right to perform pooja on the basis of a sale deed but he would have a right to share the offerings nevertheless.[235] The sale of *vajman vahis* or pilgrim visitor's books is not invalid, but the sale carries with it no right to act as guide to the pilgrims.[236] It has been held by the Patna High Court in *Zobair Ahmad v Jainandan,*[237] following a decision of the Privy Council,[238] and earlier decisions of the same High Court,[239] that the right of a Mahomedan widow to retain possession of her husband's property in lieu of her dower debt is personal to her, and is a restricted interest within the meaning of section 6(d). The court refused to follow certain other decisions[240] to the contrary on the ground that those decisions were no longer good law in view of the decisions of the Privy Council. However, where the transferor was the absolute owner of the property gifted and it was not restricted in its enjoyment to herself, the Supreme Court held that section 6(d) was not attracted.[241]

It is not correct to say that whatever right the deceased may have had to obtain a lease survived and vested in the heirs after his death. It may be that the heirs and legal representatives, if they are continuing the business or industry of the deceased and have the required qualifications, obtain priority over an earlier applicant on account of special reasons for this preference. But, in each case, they have to apply afresh and set out their own qualifications.[242]

(15) Custom

It has been held in several cases that the inalienable character of a religious office may be affected by custom, and alienation to members of the founder's family or of the priestly family has sometimes been permitted.[243] Chief Justice Rankin in *Panchanan v Surendra Nath*[244] said that some of the cases on this point[245] ought not to be followed; and pointed out that the Privy Council in *Rajah Vurmah v Ravi Vwmah*[246] said that a custom sanctioning the sale of a trusteeship for the pecuniary advantage of the trustees would be bad in law.

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233. *Puncha Thakur v Bindeshri,* (1916) ILR 43 Cal 28 : 28 IC 675; *Nirya Gopal v Nani Lal,* (1920) ILR 47 Cal 990 : 56 IC 19.
234. *Mahamaya Debi v Haridas Haldar,* (1915) ILR 42 Cal 455 : 27 IC 400; *Jagdeo Singh v Ram Saran Pande,* (1927) ILR 6 Pat 245 : 97 IC 332 : AIR 1927 Pat 7; *Bharati Majumder v Biswanath Mukherjee,* AIR 1985 Cal 42 (NOC).
235. *Dani Ram v Jamuna Das,* AIR 2010 (NOC) 524 (All) : 2010 1 AWC 22 All : 2009 (77) ALR 708.
236. *Gopinath v Jandhu,* (1907) 4 All LJ 712.
237. *Zobair Ahmad v Jainandan,* (1960) ILR 39 Pat 1 : AIR 1960 Pat 147.
238. 52 IA 145 : (1925) ILR 47 All 250 : 86 IC 579 : AIR 1925 PC 63.
239. *Sheikh Mohammad Zobair v Bibi Sahidan,* (1941) ILR 20 Pat 798 : AIR 1942 Pat 210; *Ram Prasad Singh v Bibi Khodaijatul,* 213 IC 306 : AIR 1944 Pat 163; *Abdul Samad v Alimuddin,* (1943) ILR 22 Pat 750 : AIR 1944 Pat 174.
240. *Abdul Rahman v Wali Mahommad,* AIR 1923 Pat 267; *Bibi Makbulunnissa v Bibi Umatunnissa,* AIR 1923 Pat 33; *Beeju Bee v Moorthuja Sahib,* (1920) ILR 43 Mad 214 : AIR 1920 Mad 666.
241. *K Balakrishnan v K Kamalam,* (2004) 1 SCC 581 : AIR 2004 SC 1257.
242. *MP State Mining Corporation Ltd v Sanjeev Bhaskar,* 2013 (12) SCC 326 : 2013 (3) CGLJ 525 : 2013 (8) SCALE 706.
243. *Sitarambhat v Sitaram,* (1870) 6 Bom HCR 250; *Mancharam v Pranshankar,* (1882) ILR 6 Bom 298; *Rangasami v Ranga,* (1893) ILR 16 Mad 146; *Baroda Charan Dutt v Hemlata,* (1908) 13 Cal WN 242 : 3 IC 560; *Khetter Chunder v Hari Das,* (1890) ILR 17 Cal 557; *Mahamaya Debi v Haridas,* (1915) ILR 42 Cal 455 : 27 IC 400; *Raghunath v Purnanand,*(1923) ILR 47 Bom 529 : 72 IC 312 : AIR 1923 Bom 358.
244. *Panchanan v Surendra Nath,* (1930) 50 Cal LJ 382 : 126 IC 36 : AIR 1930 Cal 180.
245. *Mancharam v Pranshankar,* (1882) ILR 6 Bom 298; *Narayana v Ranga,* (1891) ILR 15 Mad 183.
246. *Rajah Vurmah v Ravi Vwmah,* (1878) ILR 1 Mad 235 : 4 IA 76; see *Ramaswamy v Venkata,* (1869) 9 MIA 348.

The cases cited in this paragraph refer to Hindu religious offices, and were decided before the amending Act of 1929. Now that this chapter of the TP Act supersedes the Hindu law, it is open to question whether a customary right of transfer can be recognised, if it conflicts with section 6(d). Possibly where the interest in the enjoyment of the office is by custom restricted not to the incumbent personally, but to the members of his family, a transfer to a member of the family may not be in contravention of this sub-section.

(16) Service Tenures

In service tenures the interest in the land is the remuneration for the personal service to be rendered. It is, therefore, a necessary incident of such tenures that they should be incapable of alienation. Thus, *ghatwal* tenures in Bengal, created to provide a local military and police force, are inalienable,[247] and cannot be sold in execution of a decree against the *ghatwal,*[248] but if the performance of military service is abolished, as in the case of *palyan* land in Madras, the alienations would be valid.[249] A *chowkidar* in Bengal who holds *chakran* lands cannot alienate them beyond the term of his office.[250] A *watandar* in Bombay cannot alienate *watan* land beyond his lifetime to a person who is not a member of the *watan* family.[251] The prohibition against alienation in the Watan Act is not absolute, for section 5 allows alienation with the sanction of the Collector, and a *watandar* may be estopped from impreaching his alienation.[252] *Karnam* lands in Madras cannot be alienated by the holder of the office to the prejudice of his successor.[253] *Inam* lands or the performance of *swastivachakam* service in a temple cannot be alienated.[254] However, a right to money charged upon land with the object that religious ceremonies should be performed may be transferred, for if the performance of ceremonies is not a condition precedent to payment, it does not constitute a religious office.[255] *Muafi* lands, i.e., granted with a remission of revenue to certain *Brahmins* and their descendants on condition that they should give their blessings to the Maharaja of Nepal are transferable.[256]

Land held on service tenure may lose its character of inalienability. In *Radha Bai v Anantrav,*[257] J West said:

> When an estate is freed from its connection with a public office, the reason arising from that connection for the preservation of the estate intact and unencumbered, necessarily fails.

Similarly, in *Bhagwal Baksh Ray v Sheo Prosad Sahu,*[258] it was said that:

> On principle, it may well be maintained that when service can no longer be enforced and the tenure consequently ceases to be a service tenure, the land can be alienated.

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247. *Hurlal Singh v Jorawun Singh,* (1837) 6 SDA 169 (Cal); *Bally Dobey v Genei Deo,* (1882) ILR 9 Cal 388; *Narain v Badi Roy,* (1902) ILR 29 Cal 227; *Narayan Singh v Niranjan Chakravarti,* (1924) ILR 3 Pat 183 : 51 IA 37 : 79 IC 825 : AIR 1924 PC 5; *Purna Chandra v Soudamini,* (1918) 28 Cal LJ 283 : 48 IC 335.
248. *Nilmoni Singh v Bakranath Singh,* (1883) ILR 9 Cal 187 : 9 IA 104; *Joykishen Mookerjee v Collector of East Burdwan,* (1866) 10 MIA 16 : 1 WR 26 (PC); *Udoy Kumari v Hari Ram,* (1901) ILR 28 Cal 483, p 485.
249. *Appayasami Naicker v Midnapore Zamindari Co,* 48 IA 100 : 60 IC 953 : AIR 1922 PC 154.
250. *Ram Kumar v Ram Newaj,* (1904) ILR 31 Cal 1021.
251. *Jagjivandas v Imad Ali,* (1882) ILR 6 Bom 211; *Radhabai v Anantrav,* (1885) ILR 9 Bom 198.
252. *Narayan v Kalgaunda,* (1890) ILR 14 Bom 404; *Jayram v Narayan,* (1903) 5 Bom LR 652 (mortgage of *khoti* land).
253. *Papaya v Ramana,* (1883) ILR 7 Mad 85; *Venkatarayadu v Venkataramayya,* (1892) ILR 15 Mad 284; *Seshaiya v Gaouramma,* (1870) 4 Mad HC 336.
254. *Anjaneyalu v Shri Venugopala,* (1922) ILR 45 Mad 620 : 70 IC 466 : AIR 1922 Mad 197.
255. *Savitri v Holebasappa,* (1932) 34 Bom LR 198 : 137 IC 600 : AIR 1932 Bom 257.
256. *Pt Harikishan v Ratan Singh,* 151 IC 562 : AIR 1934 All 973.
257. *Radha Bai v Anantrav,* (1885) ILR 9 Bom 198, p 213.
258. *Bhagwal Baksh Ray v Sheo Prosad Sahu,* (1913) 18 Cal WN 297, p 309 : 21 IC 481.

Accordingly, a *ghatwal* tenure loses its character of inalienability when the services have been commuted by a money payment,[259] or the tenure on military service has been abolished.[260]

Resumption of service tenure

A service tenure may be (1) a grant of an office for which the land is the remuneration; or (2) a grant of land burdened with a condition of service.

In case (1) the land is prima facie resumable, but in case (2) the land is not resumable, unless a condition of resumption is expressed in the terms of the grant or implied from the circumstances under which it was made. The onus is on the grantor to prove such a condition.[261] However, once the tenure has been established, it is not terminated by obsolescence and desuetude, but it is "necessary to find something done or omitted to be done on the part of the government, as the grantors, which would have the legal effect of a surrender and regrant of the lands on new terms, or, at any rate, of a release of the right to appoint the *ghatwal* and call for the performance of the services"[262]

(17) Right of Pre-emption Not Transferable

The right of pre-emption, has been defined as a right in the event of a sale to purchase the property upon agreed terms.[263] It can only be exercised as to immovable property. It is a purely personal right, which cannot be transferred to a stranger. The object of the right is to prevent the introduction of strangers as co-sharers, and the right is enforced on the assumption that the introduction of strangers causes inconvenience to the pre-emptive co-sharers. It is a transient right in its very inception and nature, and being a personal privilege cannot be transferred to anyone except the owner of the property affected thereby.[264] Where a pre-emptor in anticipation of his success in a pre-emption suit transfers the "pre-emptional" property, he is not entitled to enforce his right of pre-emption.[265] However, a plaintiff who has obtained a decree for pre-emption may mortgage his rights under the decree in order to put himself in funds to pay the purchase money for the pre-empted property.[266] The right of pre-emption under Muslim law is an enforceable right.[267] This law is applied as between Mahomedans as a matter of "justice, equity and good conscience" by all the courts in India, except the erstwhile Madras Presidency where the courts declined to apply it on the ground that it places a restriction on the liberty of transfer.[268] Right of pre-emption has received statutory recognition in Punjab by the Punjab Laws Act, 1872, and in Oudh by the Oudh Laws Act, 1876. The right also exists by custom among Hindus in Bihar,[269] and certain parts of Gujarat.

The right of pre-emption is sometimes given by contract or covenant. Where a purchaser gave a right of pre-emption to one of his vendors if he could raise the price before a certain

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259. *Bansidhar Sharaff v Thakur Ashutosh Deo,* (1925) ILR 4 Pat 272 : 86 IC 163 : AIR 1925 Pat 346.
260. *Appayasami Naicker v Midnapore Zamindari Co,* (1921) ILR 44 Mad 575 : 48 IA 100 : 60 IC 953 : AIR 1922 PC 154.
261. *Forbes v Meer Mahomed Tuquee,* (1870) 13 MIA 438 : 14 WR 28 (PC); *Lakhamgouda v Baswantrao,* (1931) 33 Bom LR 974 : 132 IC 736 : AIR 1931 PC 157.
262. *Narayan Singh v Niranjan Chakravarti,* (1923) ILR 3 Pat 183 : 51 IA 37 : 79 IC 825 : AIR 1924 PC 5; *Rani Senabati Kumar v Raja Katyanand,* (1935) ILR 14 Pat 70 : 157 IC 433 : AIR 1935 Pat 306.
263. *Jasudin v Sakharam,* (1912) ILR 36 Bom 139, p 143 : 12 IC 693.
264. Ibid; *Ram Sahai v Gaya,* (1885) ILR 7 All 107, p 111.
265. *Rajjo v Lalman,* (1883) ILR 5 All 180, p 183.
266. *Bela Bibi v Akbar Ali,* (1902) ILR 24 All 119; *Ram Sahai v Gaya,* (1885) ILR 7 All 107.
267. *Zamir v Daulat Ram,* (1883) ILR 5 All 110, p 113.
268. *Ibrahim v Muni Mir,* (1870) 6 Mad HC 26.
269. *Fakir v Emmambuksh,* 1863 Beng LR 35 (Supp); *Juda Lal v Janki Koer,* (1908) ILR 35 Cal 575, on app (1912) ILR 39 Cal 915 : 39 IA 101.

day without the help of others, the right was held to be incapable of assignment.[270] Where a statute providing for a right of pre-emption lays down that it accrues only when transfer of the property takes place and such transfer is not complete except through a registered deed, a suit filed before the sale deed is executed is premature as the right of pre-emption under the statute did not accrue till the transfer became effective through a registered deed.[271]

(18) Contract

The benefit of a contract can be assigned as an actionable claim. This is, however, subject to two exceptions in the case of an executory contract, (1) when the contract is one which had been induced by personal qualifications or considerations as to the parties to it; and (2) when the benefit is coupled with an obligation which the assignor is bound to discharge.[272]

ILLUSTRATIONS

(1) Where *R* agreed with *M* to grow indigo for him taking the seeds from *M*'s factory and cultivating it according to *M*'s instructions, it was held that the contract was entered into with reference to the personal position and qualifications of *M*, and that he could not assign it.[273] In such a case, the enjoyment of the benefit of the contract is restricted to the party personally and cannot be transferred.

(2) In a similar case,[274] *A* agreed to manufacture salt for *B*, and the terms of the contract allowed *B* credit for payment, and a discretion as to the quantity of salt to be demanded, and it was held that *B* could not assign the contract.

(19) Clause (dd)—Transfer of Right to Maintenance

This clause was added by the amending Act of 1929. Prior to the amendment there was a conflict of opinion on whether a right of future maintenance when it was fixed by a decree was transferable? The Madras High Court held that it was,[275] but the Calcutta High Court ruled that it was not.[276] The amendment supersedes the decisions of Madras High Court. Section 60 of the Code of Civil Procedure 1908 also exempts a right of future maintenance from attachment.[277]

The effect of this clause is that the assignment of a decree for maintenance would be valid as to maintenance already accrued due, but not as to future maintenance.

The words 'in whatsoever manner arising, secured or determined' are very comprehensive; and it is submitted that they overrule cases in which when the right has been created by a deed of transfer, it was held that the question whether the right was alienable depends upon the intention of the parties as expressed in the deed.[278]

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270. *Uthandi v Raghavachari,* (1906) ILR 29 Mad 307.
271. *Radhakishan L Toshniwal v Shridhar,* AIR 1960 SC 1368; *Rabia Khatoon v State of Bihar,* AIR 2003 Pat 109.
272. *Jaffar Meher Ali v Budge-Budge Jute Mills Co,* (1900) ILR 33 Cal 702, on app (1907) ILR 34 Cal 289; *Nathu v Hansraj,* (1907) 9 Bom LR 114.
273. *Toomey v Rama Sahai,* (1890) ILR 17 Cal 115, p 121.
274. *Namasivaya Gurukkul v Kadir Ammal,* (1894) ILR 17 Mad 168; also see "Assignment of contracts" under section 130.
275. *Ranee Annapurni v Swaminatha,* (1911) ILR 34 Mad 7 : 6 IC 439; *Thimmanayanim v Venkatappa,* 109 IC 872 : AIR 1928 Mad 713.
276. *Asad Ali v Haidar Ali,* (1910) ILR 38 Cal 13 : 6 IC 826; *Dhanapala Chettiar v Krishna Chettiar,* (1955) ILR Mad 1122 : (1955) 1 Mad LJ 72 : AIR 1955 Mad 165.
277. *Haridas v Baroda Kishore,* (1900) ILR 27 Cal 38; *Asad Ali v Haidar Ali,* (1910) ILR 38 Cal 13; *Palikandy v Krishnan,* (1917) ILR 40 Mad 302 : 34 IC 381.
278. *Subraya v Krishna,* (1923) ILR 46 Mad 659 : 73 IC 584 : AIR 1924 Mad 22; *Altaf Begam v Brij Narain,* (1929) ILR 51 All 612 : 116 IC 855 : AIR 1929 All 281; *Tara Sundari v Saroda Charan,* (1910) 12 Cal LJ 146 : 7 IC 80; *Balkrishna v Paij Singh,* (1930) ILR 52 All 705 : 125 IC 468 : AIR 1930 All 593.

The right of a Hindu widow to maintenance is a personal right and from its nature incapable of assignment;[279] but arrears of maintenance can be attached and sold like any other debt.[280] The interest of a Hindu widow in land which has been allotted to her for her maintenance is not property which can be attached.[281] However, if land is assigned to a Hindu widow in lieu of maintenance, the transfer of such land is not a transfer of a right of maintenance, and is valid during the widow's lifetime.[282] When villages were allotted to a person, under a compromise, for his maintenance and without power of transfer during his brother's lifetime, the Privy Council held that his interest was a right of future maintenance and could not be attached,[283] but a receiver was allowed to be appointed to realise the rents and pay what was sufficient for the maintenance of the judgment-debtor, and the balance to his creditors. Where, however, a Mahomedan widow retains possession of property in lieu of her dower debt, she cannot transfer the property even during her lifetime. A hereditary grant of an allowance of paddy out of the *melwaram* of land is not a right to future maintenance.[284] Grants out of the revenue of an impartible estate for the maintenance of cadets of the family are alienable with a reversion to the grantor on the death of the last male heir.[285]

A vested life interest under a will in a definite fund or income of a property is transferable.[286] An annuity granted by will is not a right to future maintenance, and may be attached or sold.[287] There is, however, a difference between a maintenance allowance and an annuity.[288] An annuity granted by way of maintenance by deed which creates a charge on land, has been held to be alienable;[289] but in view of the words 'in whatsoever manner arising, secured or determined' it is doubtful if this decision is still good law. Thus, in *Bibi Haliman v Bibi Umadalunmssa,*[290] the Patna High Court came to the conclusion that a right of this nature though made a charge on immovable property, could not be transferred. When a settlor creates a trust of his property, and reserves an allowance for himself, the allowance is not maintenance within this clause.[291]

(20) Clause (e)—Transfer of a Mere Right to Sue

Prior to the amending Act 2 of 1900 this clause was—"a mere right to sue/or compensation for a fraud or for harm illegally caused cannot be transferred". The amending Act of 1900 widened the clause by omitting the words other than "a mere right to sue", and

279. *Narbadabai v Mahadeo,* (1880) ILR 5 Bom 99, p 104; *Nanak Chand v Kishan Chand,* (1900) PLR 209; *Tara Sundari v Saroda Charan,* (1910) 12 Cal LJ 146 : 7 IC 80; *Palikandi v Krishnan,* (1917) ILR 40 Mad 302; *Ashfaq Mahomed Khan v Nazir Bana,* (1942) Oudh WN 359 : 20 IC 100 : AIR 1942 Oudh 410.
280. *Kasheeshure v Greesh Chunder,* (1866) 6 WR 64 (Misc).
281. *Diwali v Apaji,* (1886) ILR 10 Bom 342; see also *Bansidhar v Gulab Kaur,* (1894) ILR 16 All 443 and *Gulab Kuar v Bansidhar,* (1893) ILR 15 All 371, on app (1894) ILR 16 All 443 (where the question was left open).
282. *Dhup Nath v Ram Charitra,* (1932) ILR 54 All 366 : 143 IC 65 : AIR 1932 All 662; *Kamala Chunder v Sushila Bala Dassee,* AIR 1938 Cal 405; *Krishnayya v Raghavulu,* (1956) ILR AP 510 : AIR 1958 AP 658.
283. *Rajindra v Sundara Bibi,* (1925) ILR 47 All 385 : 52 IA 262 : 87 IC 295 : AIR 1925 PC 176, on app from *Sundar Bibi v Raj Indar,* (1921) ILR 43 All 617 : 63 IC 181 : AIR 1921 All 120.
284. *Vaidyanatha v Eggia,* (1907) ILR 30 Mad 279.
285. *Durgadut v Rameshwar,* (1909) ILR 36 Cal 943 : 36 IA 176 : 4 IC 2; *Rameswar v Jibender,* (1902) ILR 32 Cal 683; *Rama Chandra v Mudeshwar,* (1903) ILR 33 Cal 1158, p 1161.
286. *Khemchand v Hemandas,* 167 IC 40 : AIR 1937 Sau 306.
287. *Gopal Lal Seal v FJ Marsden,* (1905) 10 Cal WN 1102; *Shariff Ahmed v H Hunter,* 167 IC 52 : AIR 1937 Oudh 420.
288. *Annirudha v Official Receiver,* AIR 1942 Cal 241 : (1942) ILR 1 Cal 427 : 74 Cal LJ 528 : 201 IC 568.
289. *Rajat Kamini v Satyaniranjan,* (1919) 23 Cal WN 824 : 53 IC 587.
290. *Bibi Haliman v Bibi Umadalunmssa,* 181 IC 39 : AIR 1939 Pat 506.
291. *Raja of Rammad v Subramaniam Chettiar,* (1928) ILR 52 Mad 465 : 116 IC 827 : AIR 1928 Mad 201.

at the same time restricted the definition of actionable claim (which formerly embraced all claims which a civil court recognised as affording grounds for relief) to debts and beneficial interests in movable property not in possession. The effect of this amendment was to make clear the distinction between property and a right to sue. As before the amendment, a right to sue for damages for breach of contract would have been an actionable claim although such right was not property and not attachable as such. Again the former definition was inadequate, for it was limited to rights of suit for damages for tort. Such rights are undoubtedly not assignable; but there are other rights to sue arising out of contract which also cannot be assigned.[292]

In England, what were called bare or naked rights of litigation were regarded not assignable at common law as they savoured of champerty and maintenance. At equity, however, each such transaction was considered on its merits, and if it was found to be tainted with champerty or maintenance it would be struck down.[293] However, equity would not "emulate the hysteria of the common law in smelling out maintenance where no maintenance was".[294] It was held that the basis of section 6(e) is this rule of English Law.[295] The Supreme Court, in *UOI v Sri Sara Mills Ltd*,[296] has held that:

> Section 6(e) of the Transfer of Property Act states that a mere right to sue cannot be transferred. A bare right of action might be claims to damages for breach of contract or claims to damages for tort. An assignment of a mere right to litigation is bad. An assignment of property is valid even although that property may be incapable of being received without litigation. The reason behind the rule is that a bare right of action for damages is not assignable because, the law will not recognise any transaction which may savour of maintenance of champerty. It is only when there is an interest in the subject-matter that a transaction can be saved from the imputation of maintenance. That interest must exist apart from the assignment and to that extent must be independent of it.

A Full Bench of the Andhra Pradesh High Court[297] has, in similar words, indicated the true scope of the clause:

> The basis of the exception being that (a) transaction savouring of maintenance or champerty should not be recognised, it follows that a transaction not open to the charge would be upheld. Therefore, soon an exception to the rule of a bare right of action being assignable came to be recognised. This exception provides that a right of action may be assigned if it be incidental or subsidiary to a conveyance of property. From the aforesaid historical background it is clear how section 6(e) of the Transfer of Property Act which provides that a mere right to sue cannot be transferred is associated with the exception of the bare right of action not being assignable. It is equally clear that the provision being aimed against transactions which according to English law would amount to champerty and maintenance, whenever a transaction would be free of such charge, it would be valid.

It should also be remembered that the specific rules of English law against champerty and maintenance have not been adopted in India, and English decisions on what is a naked right of action are not always a safe guide in determining cases arising under this clause.[298]

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292. *Abu Muhammad v SC Chunder*, (1909) ILR 36 Cal 345 : 1 IC 827; *Khetra Mohan Das v Biswa Nath Bora*, (1924) ILR 51 Cal 972 : 82 IC 411 : AIR 1924 Cal 1047.
293. *Prosser v Edmonds*, [1835] 1 Y & C 481; *Hill v Boyle*, [1867] 4 Eq 260. Cases bearing on this extension of the doctrine of champerty are cited in the judgment of J Mc Cardie in *County Hotel and Wine Co v London and North Western Railway*, [1918] 2 KB 251, p 258.
294. Hanbury, *Modern Equity*, 8th Edn, p 73.
295. *Jai Narayan v Kishun Dutta*, (1924) ILR 3 Pat 575 : 78 IC 105 : AIR 1924 Pat 551.
296. AIR 1973 SC 281, para 14; See also *McDowell and Co Ltd v District Registrar Vishakhapatnam*, AIR 2000 AP 374.
297. *Gangaraju v Gopala*, AIR 1957 AP 190, p 193.
298. See note (24) below.

A right to sue is personal to the party aggrieved, and there can be no assignment of a right to sue for damages for tort or for breach of contract.[299] Where an advocate assigned his right to petitioner to sue the defendant and claim compensation for defamation, it was held that right to sue for damages concerning defamation cannot be transferred by one person in favour of another and a pauper application filed at the instance of this other person would not be maintainable.[300]

Where there is no right vested in the plaintiff of user, permissive or otherwise, merely confirming the right to institute an action cannot be recognized by Court as it "savours of maintenance of champerty" and section 6(e) of the Transfer of Property Act, 1882 bars transfer of a mere right to sue.[301] Similarly, a mere right to sue is not an interest which vests in the receiver in insolvency,[302] or which can be attached. However, where a property is transferred along with a right to recover damages or compensation in respect of that property, the assignment of the right is valid, and is not hit by this clause.[303] Similarly, when a company which is a plaintiff in a pending suit is amalgamated with another company, the right of the amalgamated company to be substituted as plaintiff is not hit by this clause.[304] The insurer having paid the loss to the insured is entitled to be subrogated. This would mean that the insurer should get any amount that the insured is entitled from the carrier by way of damages for its negligence.[305]

A claim for compensation for use and occupation against a tenant holding over has been held to be one sounding in damages and, therefore, not transferable.[306] The Supreme Court has held that where the testator executed a will which sought to convey to the legatee "the right to plead the said case" and "the right to all debts and credits as may be decided by the courts", the testator not only sought to transfer the mere right to represent her case in the pending litigation to the legatee, but had also given the legatee her interest in the subject-matter of the litigation and hence, permissible in law.[307]

Where a minor transfers the property unauthorisedly sold by his guardian, the minor does not transfer a mere right to sue.[308] Considering the question whether a transferee from a minor after he attained majority, can file a suit to set aside the alienation made by the minor's guardian, the Supreme Court held that the right transferred by the minor after he

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299. *Abu Mahomed v SC Chunder,* (1909) ILR 36 Cal 345 : 1 IC 827; *Hirachand v Nemchand,* (1923) ILR 47 Bom 719 : 73 IC 465 : AIR 1923 Bom 403; *Varahaswami v Ramchandra,* (1915) ILR 38 Mad 138 : 18 IC 520; *Jewan Ram v Ratanchand,* (1922) 26 Cal WN 285 : 70 IC 498 : AIR 1921 Cal 795; *Nazir Hassan v Matinuzzaman,* (1925) 11 Oudh LJ 672 : AIR 1925 Cal 299; *Punjaram v Harisao,* 153 IC 447 : AIR 1934 Nag 268; *Mohan Lal v Mati Lal,* 157 IC 587 : AIR 1935 Nag 135; *Manmohan v Bidhu Bhusan,* (1939) 69 Cal LJ 188 : 43 Cal WN 295 : 185 IC 5 : AIR 1939 Cal 460; *Rajamanickam Chetty v Abdul Hakim,* (1941) 1 Mad LJ 22 : 53 Mad LW 64 : (1941) Mad WN 37 : AIR 1941 Mad 389.
300. *Sundar v Ramdass,* AIR 2013 Mad 133 : 2013 1 MLJ 399 : LNIND 2012 BMM 1074.
301. *Ansul Industries v Vineet Kumar,* (2010) 118 DRJ 400 (DB) : (2010) 171 DLT 147 (DB).
302. *Miller v Budh Singh,* (1891) ILR 18 Cal 43; *Chandmall v Ranee Soondery,* (1895) ILR 22 Cal 259; *Liladhar v Nago,* 141 IC 479 : AIR 1933 Nag 6; also see Code of Civil Procedure 1908, section 60(1)(c).
303. *Murlidhar Agarwalla v Rupendra Methere,* AIR 1953 Cal 321 : 56 Cal WN 260; *Radha Govinda v K Dharmaband Colliery Co,* AIR 1963 Pat 160; *Bharat Prasad v Paras Singh,* AIR 1964 All 15.
304. *New Central Jute Mills Co Ltd v Rivers Steam Navigation Co,* AIR 1959 Cal 352; *Merchants Bank Ltd v Dharmsambarthani,* (1966) ILR 1 Mad 182 : (1965) 2 Mad LJ 443 : AIR 1966 Mad 26.
305. *Hindustan Corporation (Hyd) Pvt Ltd v United India Gen Insu Co Ltd,* AIR 1997 AP 347.
306. *Govindaswami v Ramasami,* (1916) 30 Mad LJ 492 : 34 IC 6; *Bhupati Bhusan Dey v Hafijuddin Ahmed,* AIR 1984 Gau 63 (NOC).
307. *Kedar Lal v Babu Lal Vyas,* (2003) 9 SCC 624.
308. *Palanappa v Malappa,* AIR 1951 Mad 817 : (1951) 1 Mad LJ 265 approved by the Supreme Court in *Amrithan Kudumbah v Sarnam Kudumban,* (1991) 3 SCC 20, p 26; AIR 1991 SC 1256, p 1260.

attained majority was an interest in property which was capable of enforcement at the instance of the purchaser in the same way in which it was at the instance of the ex-minor prior to transfer in view of section 8(3) of the Hindu Minority and Guardianship Act, 1956. Such a provision, intended specially for the protection of the interests of the minor, must be read in harmony and consistency with the general provisions contained in section 6 of the TP Act.[309] In the instant case, on the facts, the transfer of the property made by the guardian was a voidable transaction and it was, therefore, open to the minor to challenge it and seek recovery of possession. Such a right of minor is a right or interest in property which he himself or "any person claiming under him" as defined in section 8(3) of the Guardianship Act may enforce by instituting a suit. "Any person claiming under him" must necessarily include a purchaser.[310] On the other hand, if a manager of a joint hindu family sells joint family property without necessity, it has been held that a coparcener has still an interest in the property which he can sell without suing to set aside the manager's sale, and that the coparcener's sale is a transfer of property with an incidental right of suit.[311]

A person may have a right to sue by virtue of ownership of property transferred to him. A right to obtain the reconveyance of property is a right to property and may be transferred.[312]

(21) Transfer of Mesne Profits, Rents etc

A right to mesne profits is a mere right to sue which cannot be transferred and so a bare right to sue for mesne profits cannot be assigned, as mesne profits are unliquidated damages, and not a debt.[313] A transfer of a mining lease along with an assignment of a contract of indemnity pertaining to the premises demised, is not hit by this clause.[314] So also an attachment of profits which had not become due was held to be an attachment of a mere right to sue which could not be the subject-matter of sale,[315] but if a sale of land is accompanied with an assignment of mesne profits already accrued due, the assignment is valid,[316] but not otherwise.[317] This distinction was not noticed in a case decided by Madras High Court,[318] but it was pointed out in clear terms in a later case.[319] So also a transfer of land with rents already accrued due is valid.[320] The Patna High Court has held that a transferee of land and of mesne profits already accrued due, cannot maintain a suit for the mesne profits as such profits are damages, and not a debt.[321] It is submitted that this is erroneous and ignores effect of the word "mere" which limits the prohibition to transferees which purport

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309. *Amrithan Kudumbah v Sarnam Kudumban,* (1991) 3 SCC 20, p 26 : AIR 1991 SC 1256, p 1260. See *JK Cotton Spinning and Weaving Mills Co Ltd v State of Uttar Pradesh,* [1961] 3 SCR 185, p 194 : AIR 1961 SC 1170, p 1174; *Ashoka Marketing Ltd v Punjab National Bank,* (1990) 4 SCC 406 : (1990) 4 SCC 406.
310. *Amirtham Kudumbah v Sarnam Kudumban,* (1991) 44 DLT 357.
311. *Hanmantappa v Dundappa,* (1934) 36 Bom LR 474 : 151 IC 1043 : AIR 1934 Rang 234.
312. *Andalammal v Alamelu Ammal,* AIR 1962 Mad 378.
313. *Durga Chunder v Koilas Chunder,* (1897) 2 Cal WN 43; *Shyam Chand Koondoo v The Land Mortgage Bank of India,* (1882) ILR 9 Cal 695; *Chandrasekaralingam v Naghabhushanam,* (1927) 53 Mad LJ 342 : 104 IC 409 : AIR 1927 Mad 817.
314. *Radha Govinda v K Dharmaband Colliery Co,* AIR 1963 Pat 160.
315. *Jagannath v Jamnaballabh,* (1940) ILR Nag 37 : 181 IC 533 : AIR 1939 Nag 97.
316. *Monmatha Nath v Matilal Mitra,* (1929) 33 Cal WN 614 : 122 IC 220 : AIR 1929 Cal 719; *Ganga Din v Piyare,* 113 IC 767 : AIR 1929 All 63; *Shankarappa v Khattombi,* (1932) ILR 56 Bom 403 : 34 Bom LR 991 : 141 IC 488 : AIR 1932 Bom 478; *Susai Lazar Villanarayya v Ramaswami Naidu,* 145 IC 228 : AIR 1933 Mad 710; *Gangaraju v Gopala,* (1957) ILR AP 215 : AIR 1957 AP 190; *Ucchab v Brundaban,* AIR 1969 Ori 142.
317. *Thoma v Govind Aachu,* AIR 1951 Tr and Coch 180.
318. *Seetamma v Venkatramanayya,* (1915) ILR 38 Mad 308 : 21 IC 387.
319. *Vendatarama v Ramasami,* (1920) ILR 44 Mad 539 : 62 IC 305 : AIR 1921 Mad 56.
320. *Suryanarayana v Venkayya,* (1922) Mad WN 822 : 70 IC 38 : AIR 1923 Mad 177.
321. *Jai Narayan v Kishun Dutta,* (1924) ILR 3 Pat 575 : 78 IC 705 : AIR 1924 Mad 551.

to transfer nothing, but the right to sue.[322] The chief court of Oudh has held that the transferee of a debt may sue to recover the debt, but not for interest before the assignment claimed by way of damages under section 73 of the Indian Contract Act, 1872.[323]

(22) Mere Right to Sue Distinguished from Actionable Claim

An actionable claim is property, and the assignee has a right to sue to enforce the claim.[324] *B* cannot sue for a debt due to *A*, nor can *A* assign to *B* the right to sue for the debt due to *A*. But if *A* assigns the debt to *B*, then *B* may sue to recover it as a debt due to himself. A right of contribution is not a mere right to sue, but is an actionable claim which may be assigned.[325] The assignment of differences on cross contracts has been held to be valid as an assignment of a debt or an actionable claim, and not of a mere right to sue.[326] In an actionable claim, a letter of subrogation, not being an assignment of a mere right to sue is valid and enforceable.[327]

However, a debt or actionable claim must be distinguished from a right to sue for damages. After a breach of contract for the sale of goods, nothing is left but a right to sue for damages which cannot be transferred.[328] But before breach, the benefit of an executory contract for the sale of goods may generally be transferred, and the buyer has the right to sue for the goods.[329]

The right to the profits of a village actually accrued due at the date of the transfer, is a debt which may be assigned.[330] If a certain sum of money is due from a person, that sum of money is recoverable on assignment even though a calculation may be necessary to determine the exact amount,[331] and the right to recover a definite amount in the hands of an agent may be assigned.[332] So also a right to a sum of money found due on taking an account is assignable.[333] As to whether the right to recover such money as may be found due on taking an account from an agent can be assigned, the cases are conflicting. In some cases it has been held that such an assignment is not of a mere right to sue, but of money belonging to the principal which is in the agent's hands, and that it is a debt although the amount remains to be ascertained.[334] In

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322. *Jagannath Marwari v Kalidas,* (1929) ILR 8 Pat 776, p 781 : 120 IC 626 : AIR 1929 Pat 245.
323. *Indar v Raghubir Singh,* (1930) ILR 5 Luck 547 : 125 IC 174 : AIR 1930 Oudh 88; *Baijnath v Parmeshwari Dayal,* (1934) ILR 10 Luck 26 : 149 IC 529 : AIR 1934 Oudh 240; also see section 8 below.
324. *Rudra Perkash v Krishna,* (1887) ILR 14 Cal 241.
325. *Ramaswami Aiyar v Deivasigamani,* (1922) 43 Mad LJ 129 : 68 IC 957 : AIR 1922 Mad 397.
326. *Nagappa v Badridas,* (1930) 32 Bom LR 894 : 127 IC 410 : AIR 1930 Bom 409.
327. *Economic Transport Organization, Delhi v Charan Spinning Mills P Ltd,* AIR 2010 SC (Supp) 720 : 2010 (2) SCALE 427 : (2010) 4 SCC 114.
328. *Janglimal v Pioneer Flour Mills,* (1914) PR 106 : 27 IC 115; *Yadavendra v Srinivasa,* (1924) ILR 47 Mad 698 : 80 IC 5 : AIR 1925 Mad 62; *Gopala v Ramaswami,* (1911) 21 Mad LJ 153 : 6 IC 290; *Shahrukh v Sheo Prasad,* 41 IC 435; *Nakhela v Kokaya,* 69 IC 238 : AIR 1923 Nag 67; *Gerimal v Raghunath,* 66 IC 873 : AIR 1921 Sau 59; *Mati Lal v Radhe Lal,* (1933) All LJ 1009 : (1933) ILR 55 All 814; 147 IC 529 : AIR 1933 All 642; *Powri v Shiva Paika,* 156 IC 487 : AIR 1935 Nag 2.
329. *Jaffer Meher Ali v Budge-Budge Jute Mills Co,* (1906) ILR 33 Cal 702, on app (1907) ILR 34 Cal 289; *Nathu v Hansraj,* (1907) 9 Bom LR 114.
330. *Bharat Singh v Bindacharan,* 47 IC 634; *Girdhari v Ahmad Mirza Beg,* 60 IC 690; *Ram Charan Das v Nazeeran,* (1935) All LJ 348 : 158 IC 4 : AIR 1935 All 461.
331. *Vatakkathala Thottungal Chakkiu Son Mathu v Achu,* (1934) ILR 57 Mad 1074 : 67 Mad LJ 158 : 151 IC 353 : AIR 1934 Mad 461.
332. *Venkata Gurunadha v Kesava Ramiah,* (1926) 50 Mad LJ 54 : 92 IC 973 : AIR 1926 Mad 417; *Ramaswami v Abdul Kuddus,* 97 IC 548 : AIR 1926 Mad 978 (right to recover licensee fees).
333. *Khwaja Ajyodin v Jaywant Madhav,* (1953) ILR Nag 764 : AIR 1953 Nag 335.
334. *Ramiah v Rukmani,* (1913) 24 Mad LJ 313 : 18 IC 138; *Madho Das v Ramji Patak,* (1894) ILR 16 All 286; *Rajeswar Saha v Sheikh Yadali,* (1933) 57 Cal LJ 46 : 145 IC 123 : AIR 1933 Cal 461; *Mathu v Achu,* (1934) ILR 47 Mad 1074 : (1934) 67 Mad LJ 158 : 151 IC 353 : AIR 1934 Mad 461; *Shaikh Mahomed v Bathunumal Beair,* AIR 1949 Mad 458.

others, it has been held that the assignment is a mere right to sue the agent for failure to pay.[335] The distinction between a transfer of a mere right to sue and a transfer of an actionable claim is well illustrated by the Privy Council case quoted in illustration (1) below.

ILLUSTRATIONS

(1) *A*'s lessee had covenanted to pay the government assessment or in default to be liable to *A* in damages. *A* sold the reversion to *B* and also assigned to *B* his right to recover from the lessee certain installments of assessment which he had paid owing to the lessee's default. The High Court held the assignment to be void as an assignment of a mere right to sue. But the Privy Council held that the lessee's failure to pay did not give rise to a claim for damages within the meaning of the clause in the lease, but a claim for reimbursement of the precise sum *A* had paid to meet the obligation. It was therefore valid as an assignment of an actionable claim.[336]

(2) *A* agrees to sell to *D* a certain quantity of gunny bags deliverable on a future day. There are no circumstances of a personal character in the contract. Before the due date *B* assigns his beneficial interest in the contract to *C*. Thereafter, *A* commits a breach of the contract. This is not an assignment of a mere right to sue but of an actionable claim and is valid. *C* is entitled to sue for damages for not delivering the gunny bags.[337]

Other instances of transfers valid as transfers of an actionable claim are the transfer of the benefit of a contract to reconvey land;[338] the transfer by a dispossessed mortgagee of his right to recover his mortgage money;[339] a partner's unascertained interest in a dissolved partnership;[340] a transfer of a right to recover back the price paid on failure of the vendor to deliver possession;[341] an assignment to the insurer who has paid a claim for short delivery of goods during carriage of all rights of the consignor against the carrier.[342] In a case of High Court of Bombay,[343] a partner *A* released his share in the partnership to his partners and then assigned his share to *B*. *A* alleged that the release to his partners had been obtained by fraud. The court held that what was assigned to *B* was *A*'s right to sue to set aside the release on the ground of fraud, and that such a right could not be assigned. A right to the income of property payable to a beneficiary under a settlement may be assigned. It is not a mere right of suit even though further inquiry is necessary to determine the amount.[344]

(23) Transfer of Decree

A decree is neither an actionable claim, nor a mere right of suit. When a claim has merged in a judgment and has been decreed, it is no longer a right to sue, and is assignable as a

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335. *Khetra Mohan v Biswa Nath Bora,* (1924) ILR 51 Cal 972 : 82 IC 411 : AIR 1924 Cal 1047; *Kalusa v Madhorao,* 96 IC 339 : AIR 1926 Nag 357; *Ghisulal v Gambhirmal,* (1938) ILR 62 Cal 510 : 39 Cal WN 646 : 164 IC 111 : AIR 1938 Cal 377.
336. *Manmatha Nath v Hedait Ali,* (1932) ILR 11 Pat 266 : 59 IA 41 : 135 IC 635; AIR 1932 PC 32 : 36 Cal WN 281 : 55 Cal LJ 152 : 62 Mad LJ 287 : 1932 All LJ 341 : 34 Bom LR 489.
337. *Jaffer Meher Ali v Budge Budge Jute Mills,* (1906) ILR 33 Cal 702; *KB Hirachand v Nemchand,* (1923) ILR 47 Bom 719 : 73 IC 465 : AIR 1923 Bom 403, where the transfer was after breach of the contract.
338. *Sakalaguna Nayudu v Chinna Munnuswami.* (1928) ILR 51 Mad 533 : 55 IA 243 : 109 IC 765 : AIR 1928 PC 174; *Narasingerji v Panuganti.* (1921) Mad WN 519 : AIR 1921 Nag 498 : on app (1924) ILR 47 Mad 729 : 51 IA 305 : 82 IC 993 : AIR 1924 PC 226; *Akhtar Beg v Haq Newaz,* 78 IC 87 : AIR 1924 Lah 709; *Venkateshwara v Raman,* 33 IC 696.
339. *Murat Singh v Pheku Singh,* (1928) ILR 7 Pat 584 : 110 IC 526 : AIR 1928 Pat 587; *Shrinath v Kanhaiyalal,* 75 IC 817 : AIR 1924 Nag 145.
340. *Thawerdas v Seth Vishindas,* 79 IC 384 : AIR 1925 Sau 72. Proposition set out in the text was approved in *Gujarat Water Supply and Sewerage Board v S H Shivanani,* AIR 1991 Guj 170, p 173.
341. *Damodar v Allabux,* AIR 1943 Nag 332 : (1943) ILR Nag 762 : (1943) NLJ 508 : 210 IC 625.
342. *UOI v Alliance Insurance Co,* AIR 1964 Cal 31; *Hindustan Corpn (Hyd) Pvt Ltd v United India Fire Gen Insu Co Ltd,* AIR 1997 AP 347.
343. *Dhanaji v Gulabchand,* (1925) 27 Bom LR 409 : 87 IC 812 : AIR 1925 Bom 347.
344. *Ma Yait v Mahomed Ebrahim,* (1927) ILR 5 Rang 145 : 102 IC 670 : AIR 1927 Rang 165.

decree although the original cause of action was not assignable. Thus, a decree for mesne profits may be validly assigned.[345] Similarly, an order passed by Railways Claims Tribunal has all the incidents of a civil court and is enforceable.[346] Even an eviction decree/order may be an asset and the continuation of existence may lie with the transferee landlord company.[347]

(24) Transfer of a Mere Right to Sue and Public Policy

The assignment of a right to sue is as much opposed to public policy as is gambling in litigation. Gambling in litigation is forbidden as opposed to public policy, and when such agreements are extortionate or oppressive,[348] they are not enforced, though compensation for legitimate expenses may properly be awarded.[349] In the undernoted case,[350] the Privy Council condemned the practice of the official assignee selling land which was in possession of a person who claimed to have purchased from the insolvent, as being in substance if not in form nothing more than the sale of a right to litigate. On the other hand, if the transaction is made bona fide with the object of assisting a claim believed to be just, a present transfer by a person who is not in possession, and who has not yet established title thereto is not invalid.[351] Both in England,[352] and in India,[353] a bona fide transfer of the fruits of an action is not illegal, for such an assignment is an assignment of future property.

(25) Insurance

It is provided in the Marine Insurance Act, 1963 that this clause is not to affect sections 17, 52, 53 and 79 of that Act. Those sections provide for assignment of marine insurance policies, rights of subrogation, etc.

(26) Clause (f)—Transfer of Public Office

A public office is analogous to the case in clause (d), for a public office is held for qualities personal to the incumbent. A public servant is defined in the Indian Penal Code 1860 and a public officer in the Code of Civil Procedure 1908, but there is no definition in TP Act. In *Henley v Lyme Corporation,*[354] it was said that "every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer". A lien connotes a civil right of the government servant to hold post to which he is appointed substantively i.e., in accordance with law and cannot be transferred.[355]

It is opposed to public policy that a public officer should transfer the salary of his office, for the salary is given for the purpose of upholding its dignity and the proper performance of its duties.[356] In *Grenfell v The Dean and Conors of Windsor,*[357] MR Lord Langdale said:

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345. *Venkatarama v Ramasami,* (1921) ILR 44 Mad 539 : 62 IC 305 : AIR 1921 Mad 56; *Hari Prasad v Kodo Marya,* (1917) 1 Pat LJ 427 : 37 IC 998; *Prasanno Kumar v Ashutosh,* (1913) 18 Cal WN 450 : 20 IC 685; For execution of a decree by transferee; see Code of Civil Procedure 1908, O 21, rules 16, 17.
346. *Krishan Kumar v UOI,* AIR 2011 Ker 167.
347. *Speedline Agencies v T Stanes & Co Ltd,* (2010) 6 SCC 257 : 2010 (5)SCALE 670 : LNIND 2010 SC 513.
348. *Fischer v Kamala Naicker,* (1860) 8 Mad IA 170; *Ram Coomar Condoo v Chunder Canto Mookerji,* 4 IA 23 : (1876–77) ILR 2 Cal 233.
349. *Kunwar Ram Lal v Nil Kanth,* (1893) ILR 20 Cal 843 : 20 IA 112; *Raja Mokum Singh v Raja Rup Singh,* (1893) ILR 15 All 352 : 20 IA 127.
350. *Chockalingam Chetty v Seethal Acha,* (1928) ILR 6 Rang 29 : 55 IA 7 : 107 IC 237 : AIR 1927 PC 252.
351. *Achal Ram v Kazim Husain,* (1905) ILR 27 All 271 : 32 IA 113; *Bhagwat Dayal Singh v Debi Dayal Sahu,* (1907) ILR 35 Cal 420 : 35 IA 48; *Ramanamma v Viranna,* (1931) 61 Mad LJ 94 : 131 IC 401 : AIR 1931 PC 100.
352. *Glegg v Bromley,* [1912] 3 KB 474 : [1911-3] All ER Rep 1138.
353. *Vatsavaya v Poosapati,* 52 IA 1 : 47 Mad LJ 93 : 80 IC 807 : AIR 1924 PC 162.
354. *Henley v Lyme Corporation,* [1828] 5 Bing 91, p 107.
355. *State of MP v Sandhya Tomar,* (2013) 11 SCC 357 : 2012 (12)SCALE 561 : LNIND 2012 SC 835.
356. *Liverpool Corporation v Wright,* [1859] 28 LJ (Ch) 868.

> There are various cases in which public duties are concerned, in which it may be against public policy that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested, not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them.

The percentage a *khot* receives for collecting assessment is not salary.[358]

Cases in India have arisen generally with reference to religious and village offices.[359] An assignment of a gratuity payable to the legal representative of a public officer is not prohibited.[360] If there is a doubt as to who is the proper incumbent, a compromise of the dispute is not contrary to public policy.[361] A railway servant cannot agree to the attachment of a part of his salary.[362] It has, however, been held that a transfer of the turn of worship and the right to recover offerings is valid, though such office may be held to be a public office.[363] It has been held by the Madras High Court,[364] that an agreement by which a person agreed to pay a certain proportion of his income to his brother in consideration for his having been maintained and educated by the latter was not hit by this clause merely because that person subsequently became a government servant; the amount agreed to be paid could be paid from his savings or any other source, and the court held that it did not amount to the transfer of a public office.

(27) Clause (g)—Transfer of Pensions

A pension is a periodical payment of money by the government.[365] It is non-transferable,[366] and civil and military pensions are also exempt from attachment under section 60(g) of the Code of Civil Procedure 1908. There are similar provisions in The Pensions Act, 1871. In *Secretary of State v Khemchand Jeychand*,[367] J Melville said that the ordinary and well-known meaning of a pension was "a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite, or office, but on account of past services or particular merits or as compensation to dethroned princes, their families, and dependants". An allowance granted for

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357. *Grenfell v The Dean and Conors of Windsor,* [1840] 2 Beav 544, p 549; *Davis v Duke of Marlborough,* [1818] 1 Swan 74.
358. *Ravji v Sayajirav,* (1889) ILR 13 Bom 673.
359. *Archaka* of a temple—*Venkatrayar v Srinivasa,* (1872) 7 Mad HC 32; *paricharaka* of a temple—*Narasimma v Anantha,* (1881) ILR 4 Mad 391; *dharmakarta* of a temple —*Subbarayudyu v Kottaya,* (1892) ILR 15 Mad 389; *karaima* in a temple—*Keyake v Yadatil,* (1868) 3 Mad HC 380; *miras* in a temple—*Ramaswami v Ranga,* (1893) ILR 16 Mad 146; *shebait—Nagendra v Rabindra,* (1926) ILR 53 Cal 132 : 94 IC 212 : AIR 1926 Cal 490; *Girijanand v Sailajanand,* (1896) ILR 23 Cal 645; *shebati—Gobinda v Debendra,* (1907) 12 Cal WN 98; *Juggernath v Kishen,* (1867) 7 WR 266; *Dubo Misser v Srinivas,* (1870) 14 WR 409; *muttawalli—Wahid Ali v Ashraff,* (1881) ILR 8 Cal 732; *Sarkum v Rahaman,* (1897) ILR 24 Cal 83; *Munshi Shahed Baksh v Golam Nabi,* (1918) 22 Cal WN 996 : 47 IC 117; *Haji Ali Mahomed v Anjuman-i-Islamia,* (1931) ILR 12 Lah 590 : 135 IC 56 : AIR 1931 Lah 379; *mohunt—Pryad Das v Mohunt Kriparam,* (1908) 8 Cal LJ 499; *vriti—Rajaram v Ganesh,* (1899) ILR 23 Bom 131; village *joshi —Waman v Balaji,* (1890) ILR 14 Bom 167; *ghatwal—Narain v Badi Roy,* (1902) ILR 29 Cal 227; *karnam—Kumari Pillai v Orr,* (1897) ILR 20 Mad 145; *chowkidar—Ramkumar v Ram Newaj,* (1904) ILR 31 Cal 1021.
360. *Arbuthnot v Norton,* (1846) 3 Mad IA 435.
361. *Girijanand v Sailajanand,* (1896) ILR 23 Cal 645, p 669.
362. *MSM Railway v Rupchand,* (1950) ILR Bom 185 : 51 Bom LR 1024 : AIR 1950 Bom 155.
363. *Hanmmappa v Hanmantappa,* (1947) ILR Bom 789 : 49 Bom LR 867 : AIR 1948 Bom 233; *Seshacharyulu v Venkatacharyulu,* AIR 1957 AP 876. As to attachment of salary of public officers, see Code of Civil Procedure, section 60(i).
364. *Ananthayya v Subba Rao,* (1960) ILR Mad 87 : (1960) 1 Mad LJ 164 : AIR 1960 Mad 188.
365. *Lachmi Narain v Mukund,* (1904) ILR 26 All 617, p 621; *Nawab Bahadur of Murshidabad v Kamani Industrial Bank,* (1931) 29 All LJ 495 : 58 IA 215, p 220 : 132 IC 727 : AIR 1931 PC 160.
366. *Saundariya Bai Choudhary v UOI,* AIR 2008 MP 227 : (2008) 3 MPHT 315 : (2008) 4 MPJR 116 : (2008) 2 MPLJ 321.
367. *Secretary of State v Khemchand Jeychand,* (1880) ILR 4 Bom 432, p 436.

other considerations is not within the prohibition and can be assigned.[368] A bonus or a reward[369] or a grant of land or of land revenue even though in lieu of pension[370] or a Jagir[371] or an allowance made in lieu of a presumed grant of lands is not a pension.[372] and is, therefore, transferable though the Lahore High Court held that a pension may take the form of an assignment of land revenue.[373]

A pension which the Government of India has by treaty with another sovereign power guaranteed to pay, a political pension in its strictest sense;[374] and so is an allowance paid to a political prisoner, although the allowance is collected by the Government of India from a foreign state.[375] Other instances of political pensions are allowances granted to the "Candyan pensioners" of Ceylon;[376] to the members of the Mysore family;[377] and to descendants of the Nawab of the Carnatic,[378] but a *toda giras hak* which is an allowance paid to *girassias* for police services is not a political pension.[379]

A pension retains its character as long as it is unpaid and in the hands of government, but as soon as it is paid to the pensioner or his legal representative or agent it can be attached or transferred.[380]

The prohibition does not apply to private pensions, and pensions granted to railway servants can be attached and sold.[381]

This clause does not apply to pensions payable by a foreign state when remitted to a pensioner in India.[382] What is provided by clause (g) of section 6 is that stipends allowed to military, naval, air-force and civil pensioners of government and political pensioners, cannot be transferred. What is made non-transferable is, therefore, stipend paid to civil pensioners, and not to pension of civil pensioners.[383]

(28) Clause (h)

Previous clauses have defined the kinds of property that cannot be transferred, but the scope of this clause is difficult to define. Sub-clause (1) seems to state the self-evident proposition that what cannot be transferred is not transferable. Sub-clause (3) states the equally self-evident proposition that there cannot be a transfer without a transferee. Sub-clause (2) states that:

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368. *Subraya v Velayudu,* (1907) ILR 30 Mad 153; *Bhoopal Rai v Shiam Sunder Lal,* (1929) 27 All LJ 724 : 124 IC 534; AIR 1929 All 781.
369. *Khasim v Carlier,* (1882) ILR 5 Mad 272.
370. *Lachmi Narain v Mukund,* (1904) ILR 26 All 617 (a *zamindari* grant in reward for past services); *Balkrishna v Govind,* (1902) All WN 161 (a grant of share of revenue in compensation for enhanced assessment); *Amna Bibi v Najm-un-nissa,* (1909) ILR 31 All 382 : 2 IC 100 (grant of land in lieu of pension); *Balvant v Secretary of State,* (1905) ILR 29 Bom 480 (*inam* land); *Kumara Tirumalai v Bangaru,* (1898) ILR 21 Mad 310 (*inam* land); *Ganpat Rao v Anant Rao,* (1910) ILR 32 All 148 : 5 IC 689 (PC) (grant of the soil); *Subraya v Velayudu,* (1907) ILR 30 Mad 153 (grant of the soil).
371. *Duni Chand v Gurmuck Singh,* 128 IC 487 : AIR 1930 Lah 816.
372. *Shah Muhammad Habibul v Abdul,* (1926) 24 All LJ 630 : 95 IC 208 : AIR 1926 All 521; *Subraya v Velayudu,* (1907) ILR 30 Mad 153; *Jiban Krishna v Sripati,* (1903) 8 Cal WN 665.
373. *Atma Ram v Kehar Singh,* (1930) 31 Punj LR 812 : 132 IC 12 : AIR 1930 Lah 904 following *Karar Hasan v Mustafa Hassan,* (1914) PR 86 : 26 IC 743; *Bhoopal Rai v Shiam Sundar Lal,* (1929) 27 All LJ 724.
374. *Bishambhar Nath v Imdad Ali,* (1891) ILR 18 Cal 216 : 17 IA 181.
375. *Satraji Dongerchand v Madho Singh,* (1927) ILR 50 Mad 711 : 103 IC 339 : AIR 1927 Mad 604.
376. *Muthusami v Prince Alagia,* (1903) ILR 26 Mad 423.
377. *Mahomed v Mahomed,* (1867) 7 WR 169.
378. *Mahomed v Commandur,* (1869) 4 Mad HC 277.
379. *Secretary of State v Khemchand Jeychand,* (1880) ILR 4 Bom 432.
380. *Valia v Anujani,* (1903) ILR 26 Mad 69; *Lallu v Mahomed,* (1877) PR 87.
381. *Bhoyrub v Madhub Chunder,* (1880) 6 Cal LR 19 (when railways were not state-owned).
382. See *Bishambhar Nath v Imdad Ali,* (1891) ILR 18 Cal 216 : 17 IA 181.
383. *Suraj Devi v Sita Devi,* AIR 1996 Raj 6.

No transfer can be made for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act.

These words mean that the law does not recognise such a transfer. In other words, when such a transfer is made, the courts will give no assistance either to the transferor to revoke it, or to the transferee to enforce it. It has been held that section 23 of the Indian Contract Act, 1872 does not prohibit enforcement of a valid portion of the transfer of property or debt, if it is severable from the invalid portion. Thus, where a part of the mortgage debt was invalid because it was hit by sub-section (2) of section 54-A of the Companies Act, 1913 read with section 23 of the Indian Contract Act, 1872, it was held that the invalid portion of the consideration of the mortgage was severable, and the plaintiff-corporation was not entitled to recover the same.[384] If the contract of tenancy is hit by section 23 of the Indian Contract Act, 1872, the "lease" resulting from such a contract will be void in view of section 6(h) of the TP Act.[385] Similarly, a promoter can charge cost of open parking space and stilt parking space in proportion to carpet area from each flat purchaser but cannot sell the same at all.[386]

(29) Sub-clause (1) of clause (h)—Opposed to the Nature of the Interest

Res communes which belongs to nobody, such as light, air and water of rivers of the sea would be things which, from their very nature, cannot be transferred. Things dedicated to public or religious uses are classed as *res extra commercium* which cannot be bought or sold.[387] Regalia, heirlooms, and debutter property[388] are, therefore, inalienable. A transfer of a service *inam* has been held to be void as opposed to the nature of the interest affected, and also as opposed to public policy.[389] Similarly, *shebaitship* is not property which is capable of being disposed off.[390] The test is whether the service-holder has placed himself beyond the reach of his income, whether by a sale or a mortgage or by a lease under which he receives no periodical payments. So a lease of such property yielding an annual rent would be valid, though such a lease for a premium may be void.[391] An alienation of standing crops on such land is, therefore, valid.[392] Most of the cases referred to under cll (d) and (dd) would fall under this sub-clause.

(30) Sub-clause (2) of clause (h)—Consideration

These are the words used in section 23 of the Indian Contract Act, 1872. They are disjunctive, as "object" means purpose or design. An assignment for a money consideration to defeat the provisions of the Insolvency Act is for a valid consideration, but it is for an unlawful object.[393] On the other hand, a transfer of property to a sex worker for future cohabitation is a transfer for a consideration which is unlawful as it is immoral.[394] A distinction must, however, be made between the consideration for a transfer, and its motive;

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384. *Life Insurance Corporation of India v Devendrappa Bujjappa Kadabi,* AIR 1987 Kant 129, p 136.
385. *Nutan Kumar v II Addl District Judge, Banda* AIR 1994 All 298.
386. *Nahalchand Laloochand Pvt Ltd v Panchali Cooperative Housing Society,* (2010) 9 SCC 536 : AIR 2010 SC 3607 : 2010 (8)SCALE 710 : LNIND 2010 SC 819.
387. *Raja Varma Valia v Kettayath,* (1875) 7 Mad HC 210, p 219 : on app 4 IA 76.
388. *Konwar Doorganath v Ramchunder,* (1877) ILR 2 Cal 341 : 4 IA 52; *Narayan v Chintaman,* (1881) ILR 5 Bom 393; *Shama v Abdul,* (1898) 3 Cal WN 158.
389. *Anjaneyalu v Sri Venugopala,* (1922) ILR 45 Mad 620 : 70 IC 466 : AIR 1922 Mad 197.
390. *Angurbala v Devabrata,* AIR 1949 Cal 278.
391. *Suryanarayana v Venkata Suryanarayana,* AIR 1958 AP 286.
392. *Chevendra Venkata Kutumba Rao v Govardhanram,* AIR 1957 AP 349.
393. *Jaffer Meher Ali v Budge-Budge Jute Mills Co,* (1906) ILR 33 Cal 702, p 709 : 34 Cal WN 89; Re *Kripendra Kumar Bose,* (1929) ILR 56 Cal 1074 : 121 IC 745 : AIR 1930 Cal 171.
394. *Deivanayaga v Muthu Reddi,* (1921) ILR 44 Mad 329 : 59 IC 1003 : AIR 1921 Mad 326; *Ghumna v Ramchandra,* (1925) ILR 47 All 619 : 88 IC 411 : AIR 1925 All 437.

in *Nagaratnamba v Ramayya,*[395] the Supreme Court held that a transfer motivated by the fact that the transferor and transferee had cohabited was without consideration, and was, therefore, a gift. Such a transfer is not hit by section 6(h). The Supreme Court approved *Belo v Parbati*[396] in which a mortgage said to be in consideration of past cohabitation was held not to be hit by section 6(h), but observed that strictly speaking, past cohabitation was only the motive. However, it would be otherwise when the transfer was in the form of a gift and illicit cohabitation was the motive, and not an object or consideration.[397]

Where object or consideration partly lawful and partly unlawful

The TP Act contains no provision corresponding to section 24 of the Indian Contract Act, 1872, with reference to a transfer which is partly lawful and partly unlawful. A transfer of occupancy land is (except in certain circumstances) void under the Agra Tenancy Act 2 of 1901, but a transfer of lands comprising both *zamindari* land and inalienable occupancy land has been held to be valid as to the *zamindari* land.[398] The cases decided by Allahabad High Court are not consistent, and are cited in the judgment of J Mukerji in *Dip Narain Singh v Nageshar.*[399]

Where possession delivered under an unlawful transfer

Transfers for an unlawful object or consideration are void, but if possession has been given in pursuance of a transfer that is void for this reason, the general rule is *in pari delicio polior est condition possidentis,* and the transferor cannot recover the property he has professed to transfer.[400] In such a case, the court would not act, but would say "let the estate lie where it falls".[401] Where, however, the transferee sues to obtain possession, the court will allow the defendant, i.e., the transferor, to set up the plea of fraud; in such case, considerations of public policy demand that the issue be agitated. If the court finds fraud established, the court will let the property stay where it lies. Adopting any other course would have the effect of acting upon an instrument which is void ab initio.[402] Section 6(h) does not annul this rule of law, but only lays down that the court will not enforce a transfer which will have the effect of carrying out an unlawful object.[403] To this general rule that the court will not interfere, there are three exceptions which are enumerated in section 84 of the Indian Trusts Act, 1882 which is as follows:

> Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of

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395. *Nagaratnamba v Ramayya,* [1968] 1 SCR 43 : AIR 1968 SC 253 : [1968] 1 SCJ 648; *Sardambal v AM Natesa Mudaliar,* (1972) 1 Mad LJ 244.
396. *Belo v Parbati,* (1940) ILR All 371; *Godfrey v Parbati,* (1938) ILR 17 Pat 308.
397. *Istak Kamu v Ranchod Zipru,* (1947) ILR Bom 208 : 48 Bom LR 775 : AIR 1947 Bom 198; criticised in *Nagaratnamba v Ramayya,* [1968] 1 SCR 43 : AIR 1968 SC 253.
398. *Bajranji Lal v Ghura Rai,* (1916) ILR 38 All 232 : 32 IC 913; *Rajendra Prasad v Ram Jatan Rai,* (1917) ILR 39 All 539 : 39 IC 785: *Dip Narain Singh v Nageshar,* (1930) ILR 52 All 388 : 122 IC 872 : AIR 1930 All 1.
399. *Dip Narain Singh v Nageshar,* (1930) ILR 52 All 388. See also *Life Insurance Corporation of India v Devendrappa Brijjappa Kadali,* AIR 1987 Kant 129, p 134.
400. *Ayerst v Jenkins,* [1873] 16 Eq 375; *Gobardhan v Ritu Roy,* (1896) ILR 23 Cal 962; *Banka Behari v Rajkumar,* (1900) ILR 27 Cal 231; *Govinda Kuar v Lala Kishen Prasad,* (1901) ILR 28 Cal 370; *Sidlingappa v Hirasa,* (1908) ILR 31 Bom 405; *Raghupati v Nrishingha,* (1922) 36 Cal LJ 491 : 71 IC 1 : AIR 1923 Cal 90; *Vilayat Husain v Misran,* (1923) ILR 45 All 396 : 72 IC 92 : AIR 1923 All 504; *Sabava v Yamenappa,* (1933) 35 Bom LR 345 : 149 IC 464 : AIR 1933 Bom 209; *Lacha Reddi v Venkamma,* AIR 1956 AP 225; *Sardambai v AM Natesa Mudaliar,* (1972) 1 Mad LJ 244. But see *Pranballav Saha v Tulshi Bala,* (1958) 63 Cal WN 258 : AIR 1958 Cal 713.
401. *Muckleston v Brown,* [1801] 6 Ves 52, p 69; *Gascoigne v Gascoigne,* [1918] 1 KB 223.
402. *Immani Appa Rao v Gollappali Ramalingamurthi,* [1962] 3 SCR 739 : AIR 1962 SC 370; *Kanthammal v Venkatakrishna,* (1968) 1 Mad LJ 1 : AIR 1968 Mad 362.
403. *Deivanayaga v Muthu Reddi,* (1921) ILR 44 Mad 329 : 59 IC 1003 : AIR 1921 Mad 326; *Vilayat Husain v Misran,* (1923) ILR 45 All 396 : 72 IC 92 : AIR 1923 All 504.

permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

In the first case mentioned in section 84 of Indian Trusts Act, 1882, there is a *locus paenitentiae* until the fraud is carried out, and the transferor may sue to recover his property.[404] The second case is where the transferor is not as guilty as the transferee. In the analogous case of contract, section 27(l)(h) of the Specific Relief Act, 1963 allows a contract to be rescinded if the defendant is more to blame than the plaintiff. The third case is where permitting the transferee to retain the property would defeat the provisions of any law, eg a transfer which would have the effect of withdrawing the property from the transferor's creditors, and so defeating the law of insolvency.[405] An exhaustive examination of the case law on this point by J Tekchand will be found in a case decided by Lahore High Court,[406] where a possessory mortgage which contravened the provisions of the Punjab Land Alienation Act, 1900, because the mortgagee was a non-agriculturist, was executed *benami* in favour of an agriculturist. The *benamidar* sued to recover possession, but his suit was dismissed, and the court held that the mortgagors were entitled to show the real nature of the transaction, and differed from a dictum of Sir Lawrence Jenkins that "a deed cannot be avoided on the ground of fraud by a party to the fraud".[407]

Where transfer is ultra vires

Contracts which are *ultra vires* are not necessarily illegal.[408] A contract which is *ultra vires* of a company is void not because it is illegal, but because the company has no power to enter into it.[409] A company may be entitled to recover money lent notwithstanding that the loan was *ultra vires*. In *Turner v Bank of Bombay,*[410] the bank was held to be entitled to recover on an equitable mortgage despite the prohibition in section 37 of the Presidency Banks Act, and in *Ahmed Sail v Bank of Mysore,*[411] a bank was held entitled to enforce a mortgage although its memorandum of association prohibited loans on mortgage.

(31) Section 23 of Contract Act

Under section 23 of the Indian Contract Act, 1872, a consideration or object is unlawful if (l) it is forbidden by law; or (2) is of such nature that it defeats the provisions of any law; or (3) is fraudulent; or (4) involves or implies injury to the person or property of another; (5) or the courts regard it as immoral or (6) opposed to public policy. The following are instances of transfers invalid under these heads:

Transfers of granted lands in contravention of the terms of the grant or in breach of any law; rule or regulation covering such grant will clearly be voidable. Legislature may provide that transfer of such granted lands will be void and not merely voidable, eg section 4(1) of

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404. *Kedar Nath Motani v Prahlad Rai,* [1960] 1 SCR 861 : AIR 1960 SC 213 : [1960] SCJ 1072; *Sham Lall Mitra v Amarendro Nath,* (1896) ILR 23 Cal 460; *Govinda Kuar v Lala Kishen Prasad,* (1901) ILR 28 Cal 370; *Judu Nath v Rup Lal,* (1906) ILR 33 Cal 967; *Munisami v Subbaraya,* (1908) ILR 31 Mad 97; *Raghupati v Nrishingha,* (1922) 36 Cal LJ 491 : AIR 1923 Cal 90 *Bai Devmani v Ravishankar,* (1929) ILR 53 Bom 321 : 116 IC 236 : AIR 1929 Bom 147.
405. *Jaffer Meher Ali v Budge-Budge Jute Mills Co,* (1904) ILR 33 Cal 702 : 34 Cal WN 289.
406. *Qadir Bukhsh v Hakam,* 139 IC 17 : AIR 1932 Lah 503.
407. *Sidlingappa v Hirasa,* (1907) ILR 31 Bom 405, p 411. For a general survey of the law on this point see Hamson, *Illegal Contracts and Limited Interests* (1949) 10 Camb LJ 249; Gooderson, *Turpitude and Title in England and India* (1958) Camb LJ 199; Higgins, *Transfer of Property under Illegal Transactions* (1962) 25 Mad LR 149. And see *Sajan Singh v Sardan Ali,* (1960) ILR Cal 167 : [1960] 1 All ER 269; *Amar Singh v Kulubya,* [1964] AC 142 : [1963] 3 All ER 499.
408. Re *Coltman, Coltman v Coltman,* [1881] 19 Ch D 64.
409. *Ashbury Rly Carriage and Iron Co v Riche,* [1875] 7 HL 653.
410. *Turner v Bank of Bombay,* (1901) ILR 25 Bom 52.
411. *Ahmed Sail v Bank of Mysore,* (1930) ILR 53 Mad 771 : 126 IC 612 : AIR 1930 Mad 512.

Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978.[412]

(1) Forbidden by law

A sub-lease of a farm for the retail sale of opium is void, as the sale of opium without a licence by the Collector is forbidden by the Opium Act.[413] Transfers of occupancy land have been held to be void as being forbidden by section 9 of the North-Western Provinces Act, 1878,[414] or by section 20 of the Agra Tenancy Act, 1901.[415]

Forbidden by law does not refer to prohibition by agreement, or decree of court.[416]

(2) Defeat the provisions of any law

The following are such transfers:

A collusive assignment to a relation in expectation of insolvency to defeat the provisions of the Insolvency Act;[417] a lease granted by a mortgage under a mortgage forbidden by the Agra Tenancy Act, as the recognition of the lease would defeat the provisions of the Act;[418] a lease granted with the object of defeating the provisions of the Calcutta Rent Act;[419] a transfer by an insolvent to a creditor on condition of his not opposing his final discharge;[420] a sale-deed by an accused person to his pleader by way of indemnity for a bail bond executed by the pleader, for the indemnity renders the bail illusory.[421]

ILLUSTRATION

A owes money to *B* and executes a *hathchitta* in favour of *B* promising to repay the debt. *B* in expectation of being adjudged insolvent assigns the *hathchitta* to his relation *C* in order to prevent the debt vesting in the Official Assignee. *B* is adjudged insolvent but the adjudication is subsequently annulled. Nevertheless, as the Assignment was made for an illegal purpose it is void and *C* cannot recover the debt.[422]

(3) Fraudulent

A transfer to an agent in consideration of the agent granting a lease of land without the knowledge of his principal would be a fraud on the principal and void.[423]

(4) Injury to person or property

A payment to a Hindu father in consideration of his giving his son in adoption is void, for the adoption is liable to be set aside and the son would lose his status in both families.[424]

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412. *Manchegowda v State of Karnataka,* (1984) 3 SCC 301, p 308; *Harish Chandra Hegde v State of Karnataka,* (2004) 9 SCC 780 : 2003 Supp (6) SCR 1111.
413. *Raghunath v Nathu,* (1895) ILR 19 Bom 626.
414. *Durga v Jhinguri,* (1885) ILR 7 All 511; *Jhinguri v Durga,* (1885) ILR 7 All 878.
415. *Har Prasad v Sheo Gobind,* (1922) ILR 44 All 486 : 67 IC 793 : AIR 1922 All 134; *Dayaram v Thakuri,* (1924) ILR 46 All 622 : 83 IC 21 : AIR 1924 All 668. But see the criticism of these cases in *Dip Narain Singh v Nageshar,* (1930) ILR 52 All 338 : 122 IC 872 : AIR 1930 All 1.
416. *Wazir Mahomed v Har Prasad,* (1912) 15 OC 67 : 13 IC 613.
417. *Jaffer Meher Ali v Budge Budge Jute Mills,* (1906) ILR 33 Cal 702 : on app (1907) ILR 34 Cal 289.
418. *Ram Sarup v Kishen Lal,* (1907) ILR 29 All 327.
419. *Saleh Abraham v Manekji,* (1923) ILR 50 Cal 491 : 75 IC 521 : AIR 1924 Cal 57.
420. *Naoroji v Kazi Sidick Mirza,* (1896) ILR 20 Bom 636.
421. *Laxmanlal v Mulshankar,* (1908) ILR 32 Bom 449.
422. *Chimni Ram v Shibendra,* (1912) 16 Cal LJ 162 : 14 IC 519.
423. See Indian Contract Act, 1872, illustration (g) to section 23.
424. *Narayan v Gopalrao,* (1922) ILR 46 Bom 908 : 67 IC 850 : AIR 1922 Bom 382; *Eshan Kishore v Haris Chandra,* (1874) 13 Beng LR 42.

(5) Immoral

A lease of a house for its use as a brothel is void as the purpose is immoral;[425] but not if the lessor was not aware of the intended use.[426] A transfer of immovable property to a woman in consideration of future illicit intercourse is void;[427] but if the immoral purpose has been carried out the transfer cannot be set aside.[428] On the same principle, a bequest in a will conditional on the continuance of immoral relations is void.[429] A distinction must be made between the motive for a transaction and its purpose;[430] a transfer motivated by the transferor and transferee having cohabited in the past is without consideration and is, therefore, a gift, and is not illegal.[431]

(6) Public policy

A corrupt payment such as a bribe paid to an official is an instance of a transfer void as opposed to public policy.[432] Similarly, it is contrary to public policy to stifle a prosecution.[433] In a case of Calcutta High Court,[434] the relations of a prisoner executed a mortgage in favour of the prisoner's employer for a large part of the employer's money which the prisoner had misappropriated, in consideration of the employer agreeing not to object to the prosecution being withdrawn by the commissioner of police. The court held that the mortgage was valid, but it is clear from the judgment that the mortgage would have been invalid, if the consideration had been that the employer should himself withdraw the prosecution. The Lahore High Court has held that the purchase by *apulwara* of land within his circle would create an interest in conflict with his duty, and would be void as contrary to public policy.[435] The judgments of the Allahabad High Court on the same point have been conflicting.[436] A transfer of land, granted revenue, free upon a condition that the grantees and their descendants should give blessings to the Maharaja of Nepal, is not contrary to public policy.[437] Payments to a father or guardian in consideration of a daughter or ward being given in marriage have been held to be opposed to public policy.[438] It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No court can invent a new head of public policy; it has been said in the House of Lords that "public policy is always an unsafe and treacherous ground for legal decision".

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425. *Gaureenath v Madhomanee,* (1872) 18 WR 445; *Ghoga Lal v Pujari,* (1909) ILR 31 All 58 : 1 IC 52. But see *Pranballav Saha v Tulshi Bala,* (1958) 63 Cal WN 258 : AIR 1958 Cal 713.
426. *Sultan v Nanu,* (1877) ILR Rang 22; *Putimal v Bhagan,* AIR 1898 Rang 2.
427. *Muthukannu v Shunmugaveli,* (1905) ILR 28 Mad 413; *Ghumna v Ramchandra,* (1925) ILR 47 All 619 : 81 IC 411 : AIR 1925 All 437; *Brahmaya Lingam v Kanakamma,* (1924) 47 Mad LJ 652 : 82 IC 14 : AIR 1924 Mad 849; *Sabava v Yamanappa,* (1933) 35 Bom LR 345 : AIR 1933 Bom 209; *Istak Kamu v Ranchod Zipru,* (1946) 48 Bom LR 775 : AIR 1947 Bom 198.
428. *Lachmi v Wilayati,* (1880) ILR 2 All 433, on app *Ram Sarup v Bela,* (1884) ILR 6 All 313 : 11 IA 44; *Deivanayaga v Muthu Reddi,* (1921) ILR 44 Mad 329 : 59 IC 1003 : AIR 1921 Mad 326: *Sabava v Yamanappa,* (1933) 35 Bom LR 345 : 149 IC 464 : AIR 1933 Bom 209.
429. *Tayaramma v Sitaramasami Naidu,* (1900) ILR 23 Mad 613.
430. *Nagaratnamba v Ramayya,* [1968] 1 SCR 43 : AIR 1968 SC 253 : [1968] 1 SCJ 648.
431. See commentary above, under note (30) "Sub-clause (2) of clause h".
432. *Protina v Dookhia,* (1872) 18 WR 450; *Gogan v Janokee,* (1873) 20 WR 235.
433. Indian Contract Act, 1872, section 23, illustration (b).
434. *Dwijendra Nath v Gopiram,* (1926) ILR 53 Cal 51 : 89 IC 200 : AIR 1926 Cal 59.
435. *Abdul Rahaman v Ghulam Mahommad,* (1927) ILR 7 Lah 463 : 98 IC 673 : AIR 1927 Lah 18.
436. *Shiam Lal v Chhaki,* (1900) ILR 22 All 2207; *Sheo Narain v Mata Prasad,* (1904) ILR 27 All 73 overruled by *Bhagwan Dei v Murari Lal,* (1917) ILR 39 All 51 : 36 IC 259; *Kamala Devi v Gur Dayal,* (1917) ILR 39 All 58 : 36 IC 319.
437. *Pt Harikishan v Ratan Singh,* 151 IC 562 : AIR 1934 All 973.
438. *Dholides v Fulchand,* (1898) ILR 22 Bom 658; *Dulari v Vallabhadas,* (1889) ILR 13 Bom 126; *Venkata v Lakshmi,* (1909) ILR 32 Mad 185 : 3 IC 554; *Baldeo v Jumna,* (1901) ILR 23 All 495. But see *Bakshi Das v Nadu Das,* (1905) 1 Cal LJ 261; *Jogeshwar v Punch Kauri,* (1870) 14 WR 154; *Ranee Lallun Monee v Nobin Mohan,* (1875) 25 WR 32.

(32) Sub-clause (3)—Disqualified to be a Transferee

A transfer is defined in section 5 as an act by which one person transfers property to another. It is, therefore, necessary that the transferor should be competent to transfer as enacted in section 7; and that the transferee should be competent to be transferee as enacted in this section. Any living person is competent to be a transferee, provided he is not subject to a legal disqualification. Such a disqualification is enacted in section 136 which forbids a judge, legal practitioner or officer connected with a court from purchasing an actionable claim. Similarly, O 21, rule 73 of the Code of Civil Procedure 1908, forbids any officer or person having any duty to perform in connection with any sale from acquiring an interest in the property sold.

Minor as transferee

A minor is in English law disqualified to be a transferee of a legal estate in land, but not of an equitable interest in and or other property;[439] but in India although a minor's contract is void,[440] yet a minor is not disqualified to be a transferee[441] and a minor may be a purchaser,[442] or a mortgagee.[443] However, neither the guardian of a minor, nor his manager is competent to bind the minor or his estate by a contract for the purchase of immovable property.[444] A lease to a minor is void, as a lease imports a covenant by the minor to pay rent and other reciprocal obligations.[445] This was so decided before the amending Act 20 of 1929, and the present section 107 makes it clear that a lease to a minor must be void because it must be executed both by the lessor and the lessee.

Executive instructions requiring an official certificate of approval to a transfer do not render a person, who does not hold such certificate, legally disqualified to be a transferee.[446] A Buddhist monk is not disqualified to be a transferee.[447]

(33) Clause (i)—Untransferable Right of Occupancy

This clause was added by the amending Act 3 of 1885, and is identical with the proviso to section 108(j) exempting certain holdings from the general rule that leaseholds are transferable. In this section, it is also an exception to the general rule that property is transferable.

Some occupancy rights are inalienable either by custom or by local laws such as the North-Western Provinces Rent Act, 1878, or the Agra Tenancy Act, 1901.[448] In *Motichand v Ikram Ullah*,[449] the Privy Council said that the policy of the Tenancy Act, was to preserve

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439. Law of Property Act, 1925, section 19.
440. *Mohori Bibee v Dhurmodas Ghose*, (1903) ILR 30 Cal 539 : 30 IA 114.
441. *Munni Kunwar v Madan Gopal*, (1916) ILR 38 All 62 : 31 IC 792; *Raghava v Srinivasa*, (1917) ILR 40 Mad 308 : 36 IC 921 overruling *Navakotti v Logalinga*, (1910) ILR 33 Mad 312 : 4 IC 383.
442. *Ulfat Rai v Gauri Shanker*, (1911) ILR 33 All 657 : 11 IC 20; *Narain Das v Dhania*, (1916) ILR 38 All 154 : 35 IC 23; *Munni Kunwar v Madan Gopal*, (1916) ILR 38 All 62; *Munia v Perumal*, (1915) ILR 37 Mad 390 : 26 IC 195; *Subba Reddy v Gurava Reddy*, 120 IC 77 : AIR 1930 Mad 425.
443. *Raghava v Srinivasa*, (1917) ILR 40 Mad 308 : 36 IC 921; *Madhab Koeri v Baikuntha*, (1919) 4 Pat LJ 682 : 52 IC 338; *Thakar Das v Pulti*, (1924) ILR 5 Lah 317 : 82 IC 96 : AIR 1924 Lah 611; *Zafar Ahsan v Zubaida Khatun*, (1929) 27 All LJ 1114 : 121 IC 398 : AIR 1929 All 604.
444. *Mir Sarwarjan v Fakhruddin Mahomed*, 39 IA 1 : (1912) ILR 39 Cal 232 : 13 IC 331.
445. *Pramila Bali Das v Jogeshar*, (1918) 3 Pat LJ 518 : 46 IC 670; and see *Jaykant v Durgashankar*, (1969) 11 Guj LR 178 : AIR 1970 Guj 106.
446. *Maung Ye v M A S Firm*, (1928) ILR 6 Rang 423 : 111 IC 105 : AIR 1928 Rang 136.
447. *U Pyinnya v Maung Law*, (1929) ILR 7 Rang 677 : 121 IC 705 : AIR 1929 Rang 354 overruling *U Teza v E Ma Gwye*, (1927) ILR 5 Rang 626 : 106 IC 201 : AIR 1928 Rang 3.
448. *Banmali v Bisheshar*, (1907) ILR 29 All 129; *Kedar Nath v Naipal*, (1912) ILR 34 All 155 : 12 IC 922 (*mandadari* tenure); *Shanti Prasad v Bachchi Devi*, AIR 1948 Oudh 349.
449. *Motichand v Ikram Ullah*, (1916) ILR 39 All 173 : 44 IA 54 : 39 IC 454.

proprietary rights from being transferred otherwise than by gift or by exchange between co-sharers, and that the Act was not to be defeated by ingenious devices or arrangements such as an arrangement to relinquish. Under that Act and under the Oudh Rent Act, 1886, a proprietor, whose proprietary rights are transferred to an outsider, is entitled to retain possession of his *sir* or home farm lands at a reduced statutory rent as an exproprietary tenant. In the undernoted case,[450] a proprietor was held to be entitled to this exproprietary tenancy although the rents of the *sir* lands had been assigned for payment of a maintenance allowance, and although the effect of the exproprietary tenancy was to reduce the amount of that allowance. The rent paid by the cultivators was received by the exproprietary tenant and the person entitled to the maintenance allowance, received only the reduced statutory rent from the exproprietary tenant. A mortgage of an occupancy holding is void under section 20 of the Agra Tenancy Act, and the mortgage is not entitled even to sue for a money decree on the basis of a personal convenant in the mortgage.[451]

Under the law as it stood before the TP Act, tenancies whether of homestead lands or of agricultural lands in Bengal were not transferable in the absence of a custom to the contrary, or of an express contract to that effect.[452] Section 2 of the Bengal Tenancy Act (Bengal Act 8 of 1885) enacts that every permanent tenure is (subject to the provisions of the Act) capable of being transferred. Tenures created after the TP Act and before the passing of the Bengal Tenancy Act are transferable.[453] Non-permanent tenures created before the passing of the TP Act are not transferable.[454] By section 26B of the Bengal Tenancy Act as amended by Bengal Act 4 of 1928, the holding of an occupancy *ryot* in Bengal is, subject to the provisions of the Act, capable of being transferred like other immovable property. The landlord is entitled to evict as a trespasser a mortgagee of a holding that is not transferable, if the tenant has abandoned his holding.[455] Under section 87 of the Bengal Tenancy Act, a landlord is entitled to re-enter when a *ryot* abandons his holding. If a tenant of a non-transferable holding executes a usufructuary mortgage of his holding and leaves the village, the holding is abandoned and the landlord is entitled to treat the mortgagee as a trespasser.[456] If a co-sharer landlord purchases a non-transferable holding and takes possession, the transaction is an abandonment of the holding, and the purchasing landlord is a trespasser as to the shares of the other landlord.[457] This is also the case when the purchase is made by a stranger who afterwards acquires a share in the landlord's right.[458] A tenant with a right of occupancy under section 36 of the Oudh Rent Act, 1886, or a statutory tenant under section 5 of the said Act has a non-transferable right of occupancy which he can relinquish by the procedure of section 50 of the Act.

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450. *Akbar Husain v Husain Jahan Begum,* 155 IC 40 : AIR 1935 Oudh 309.
451. *Har Prasad v Sheo Gobind,* (1922) ILR 44 All 486 : 67 IC 793 : AIR 1922 All 134; *Mukund Lal v Sunita,* 132 IC 422 : AIR 1931 All 461; *Muzaffar v Madad Ali,* 132 IC 543 : AIR 1931 Oudh 309.
452. *Hanuman Prasad v Deo Charan,* (1908) 7 Cal LJ 309; *Ananda Mohan v Gobinda Chandra,* (1916) 20 Cal WN 322 : 33 IC 565; *Sulin Mohan v Raj Krishna,* (1921) 25 Cal WN 420 : 60 IC 826 : AIR 1921 Cal 582; *Sarada Kanta v Nabin Chandra,* (1927) ILR 54 Cal 333 : 97 IC 817 : AIR 1927 Cal 39 dissenting from *Beni Madhab v Jai Krishna,* (1870) 12 WR 495 : 7 Beng LR 152; *Safar Ali v Abdul Rashid,* (1924) 39 Cal LJ 585 : 84 IC 28 : AIR 1924 Cal 1012; *Madhu Sudan v Kamini,* (1905) ILR 32 Cal 1023; *Nabu Mondal v Cholim Mullik,* (1898) ILR 25 Cal 896; *Kamal Mayee Dasi v Nibaran Chandra Pramanik,* (1932) 36 Cal WN 149 : 138 IC 72 : AIR 1932 Cal 431.
453. *Bhagban Das v Bisweswar,* (1927) 44 Cal LJ 434 : 100 IC 302 : AIR 1927 Cal 220.
454. *Hiramoti v Annoda Prasad,* (1908) 7 Cal LJ 553; *Kailash Chandra Pal v Hari Mohan Das,* (1909) 13 Cal WN 541 : 1 IC 362.
455. *Rasik Lal v Bidumuki,* (1906) ILR 33 Cal 1094.
456. *Bhairavendra Narain Roy v Rajendra Narain Roy,* (1924) ILR 50 Cal 457 : 74 IC 193 : AIR 1924 Cal 45.
457. *Sarat Chandra Saha v Bepin Behary Chakerbutty,* (1933) 37 Cal WN 256 : 149 IC 1014 : AIR 1933 Cal 687.
458. *Amarnath Singh v Har Prasad Singh,* (1932) ILR 7 Luck 425 : 136 IC 333 : AIR 1932 Oudh 79; *Jang Bahadur v Rai Raja,* (1907) 7 OC 235.

Transfers of agricultural lands have been restricted or prohibited by Tenancy and other agrarian legislation.[459]

7. Persons competent to transfer.—Every person competent to contract and entitled to transferable property, or authorized to dispose off transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

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(1) Competent to Transfer

Under section 6(h)(3), any person is competent to be a transferee, unless legally disqualified. This section deals with the competency of a transferor. The transferor must be—

(1) competent to contract; and

(2) have title to the property, or authority to transfer it if not his own.

(2) Competent to Contract

This is the same condition as is enacted by section 7 of the Indian Trusts Act, 1882 for the creation of a trust. Section 11 of the Indian Contract Act, 1872 defines capacity to contract as follows:

> Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

The power to transfer must depend upon the power to contract, for without an antecedent contract to give and take, there can be no transfer at all.

(3) Minor as a Transferor

The transferor must have attained the age of majority according to the law to which he is subject. As the conditions of validity of a mortgage must entail both parties, mortgagor and mortgagee must be competent to enter into a contract therefore, a minor, being incompetent to contract cannot be a mortgagor or mortgagee.[460] The essence of *nemo dat quod non habet* is the transactional exigibility i.e. the binding effect of prior property rights of subsequent transferee irrespective of notice or knowledge of prior property rights on part of subsequent transferees.[461] The Privy Council have held that a contract by a minor is void.[462] A transfer by

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459. For instance, Bombay Tenancy and Agricultural Lands Act.
460. *Mathai Mathai v Joseph Mary,* (2015) 5 SCC 622 : AIR 2014 SC 2277 : 2014 (6) SCALE 41 : 2014 (6) SCJ 715.
461. *Harshad Govardhan Sondagar v International Assets Reconstruction Company limited,* (2014) 6 SCC 1. See also *Shree Ram Urban Infrastructure Ltd v Court Receiver, High Court of Bombay* (2015) 5 SCC 539 : AIR 2014 SC 2286 : 2014 (6) SCALE 613 : 2014 (5) BomCR 41, 50. wherein it was held that a receiver appointed must act to safeguard the interest of trustees to preserve the suit property. [Contined from page 105].

a minor, therefore, is also void.[463] Prior to the decision of the Privy Council, it was generally assumed that a minor's contract was voidable, and could be ratified. These decisions are now obsolete, and as the contract is void there can be no question of ratification. There are many conflicting decisions as to whether a minor can be estopped by a false representation that he is of age. Before the Privy Council decision that a minor is incapable of contracting, Ameer Ali J said that the rule of estoppel was not applicable, as it would have the effect of enlarging the minor's power to contract.[464] This is supported by a dictum of the Privy Council in *Mahomed Syedol Arifjin v Yeoh,*[465] that the doctrine of estoppel is only applicable to persons who are *sui juris,* and by the English cases of *Leslie Ltd v Sheill*[466] and *Levine v Brougham.*[467] A Full Bench of the Lahore High Court has after a review of the case law come to the same conclusion.[468] In *Sadiq Ali Khan v Jai Kishore,*[469] the Privy Council observed that a deed executed by a minor was a nullity and incapable of founding a plea of estoppel, and following this decision, a Full Bench of the Bombay High Court has overruled its previous decisions to the contrary.[470] The principle underlying the decision of the Privy Council is that there can be no estoppel against a statute.

Although a minor is not competent to be a transferor, yet a transfer to a minor is valid.[471]

(4) Lunatic as a Transferor

Under section 12 of the Indian Contract Act, 1872, a person is of sound mind for the purpose of making a contract if he is capable of understanding it, and of forming a rational judgment as to its effect upon his interests.[472] A contract made by a lunatic is void under section 11 of the Indian Contract Act, 1872, and so also, a transfer by him of his property is void.[473] A lunatic is competent to contract during a lucid interval, and a transfer by a lunatic during a lucid interval would be valid here as in England.[474] However, a person adjudged a lunatic would be incapable of making a transfer even during a lucid interval.[475] The unsoundness of mind may be established by proving such conduct as was not in keeping with the character of the person concerned, but such that it could not be explained on any reasonable basis. Burden to prove or establish at least on a balance of probability the transferor's action in executing transfer deed in favour of transferee was the outcome of an unsound mind, is on the person alleging so. However, unrebutted evidence of an unnatural and inexplicable animosity as well as unnatural and inexplicable fixation on selling of all his properties probabilises that the sale was effected by the transferor when he was incapable of rational behaviour. The onus then shifts to the transferee to adduce

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462. *Mohori Bibee v Dhurmodas Ghose,* (1903) ILR 30 Cal 539 : 30 IA 114.
463. *Raja Balwant Singh v Rao Maharaj Singh,* (1912) ILR 34 All 296 : 39 IA 109 : 14 IC 629 (a mortgage); *Govinda Kurup v Chowakkaram,* (1931) 59 Mad LJ 941 : 129 IC 449 : AIR 1931 Mad 147 (lease); *Indian Cotton Co v Raghunath,* (1931) 33 Bom LR 111 : 130 IC 598 : AIR 1931 Bom 178 (a lease).
464. *Brohmo v Dharmo,* (1898) ILR 26 Cal 381.
465. *Mahomed Syedol Arifjin v Yeoh,* 43 IA 256 : 19 Bom LR 157 : 39 IC 401 : AIR 1916 PC 242.
466. *Leslie Ltd v Sheill,* [1914] 3 KB 607 : [1914-5] All ER Rep 511.
467. *Levine v Brougham,* [1909] 25 TLR 265 : 53 Sol J 243.
468. *Khan Gul v Lakha Singh,* (1928) ILR 9 Lah 701 : 111 IC 175 : AIR 1928 Lah 609.
469. *Sadiq Ali Khan v Jai Kishore,* (1928) 30 Bom LR 1346 : 109 IC 387 : AIR 1928 PC 152; *Balangowda v Bhimangowda,* (1929) 31 Bom LR 340 : 118 IC 698 : AIR 1929 Bom 201.
470. *Gadigeppa v Balangowda,* (1931) ILR 55 Bom 741 : 135 IC 161 : AIR 1931 Bom 561.
471. See note "Disqualified to be a transferee" under section 6(h).
472. *Sona Bala Bora v Jyotirindra Bhattacharjee,* (2005) 4 SCC 501, para 20.
473. *Amina Bibi v Saiyid Yusuf,* (1922) ILR 44 All 748 : 70 IC 968 : AIR 1922 All 449 (lease).
474. *Selby v Jackson,* [1843] 6 Beav 192.
475. Re *Walker* [1905] 1 Ch 160; Re *Marshall, Marshall v Whately,* [1920] 1 Ch 284 : [1920] All ER Rep 190. As to transfer of the property of a person who has been adjudged a lunatic, see the Indian Lunacy Act, 1912, sections 47–51, and section 53.

evidence either to show that the ostensibly irrational conduct of the transferee had a rational explanation, or that the conveyance was executed by the transferor in a lucid interval.[476]

Where the vendors did not have a complete title over suit property and the agreement was not executed by all co-sharers of the partly owned property, the same cannot be enforced by the vendee.[477] However, if property is transferred for a consideration in good faith without misrepresentation of fraud and transferee had taken reasonable steps to ascertain title of transferor, then such transfer would not be void.[478] Where before a mortgage is created in respect of immovable property, and borrower had already leased out the same in favour of a lessee either as the owner or as a person competent or authorised to transfer the immovable property, the lessee will have the right to enjoy the leased property in accordance with terms and conditions of lease irrespective of whether a subsequent mortgagee has knowledge of such a lease or not.[479]

Disqualified to contract

A statutory disqualification to contract imports, as in the case of a minor, inability to transfer. Such a disqualification ensues when the owner's property is under the management of the Court of Wards,[480] or of an officer appointed under Encumbered Estates Act.[481] A judgment debtor whose property is being sold in execution by the Collector is also incompetent to alienate.[482]

Authority to dispose off property

If the transferor has no title to the property, he must have authority to transfer it.[483] Also, a person holding limited estate is not competent to transfer.[484] As instances of authority to transfer the property of another, the following may be cited—an agent acting under a power of attorney; the donee of a power of appointment; the guardian of a minor duly authorised by the court in that behalf; the manager of a Hindu family in case of necessity or for the benefit of the family; the committee or manager of a lunatic; a receiver when empowered by the court; an executor or administrator having authority to dispose off the property of the deceased regulated by section 307 of the Indian Succession Act, 1925.

In all these cases, the authority is defined and limited by personal and statutory laws which are outside the scope of TP Act. The extent of the power of transfer depends upon the interest of the transferor or the limitation upon his authority. However, whether the power of transfer is limited or absolute, all transfers are subject to the general rules enacted in this chapter.

An agent, who merely manages property, has no authority to transfer it.[485] It has been held in *Shakuntala Devi v State of Jharkhand,*[486] that despite the statutory prohibition to execute a

476. *Sona Bala Bora v Jyotirindra Bhattacharjee,* (2005) 4 SCC 501, pras 21, 25.
477. *Pemmada Prabhakar v Youngmen's Vyasa Association,* (2015) 5 SCC 355 : 2014 (9) SCALE 545 : 2016 (1) MPLJ 1 : 2014 (7) SCJ 467.
478. *V Chandrashekharan v Administrative Officer,* (2012) 12 SCC 133 : AIR 1999 SC 436 : 2012 (9) SCALE 142 : LNIND 2012 SC 552.
479. *Harshad Govardhan Sondagar v International Assets Reconstruction Company limited,* (2014) 6 SCC 1 : 2014 (4) SCALE 484 : 2015 (3) SCJ 641.
480. *Jivan Lal v Gokul Das,* (1904) 17 CPLR 13.
481. *Radha Bai v Kamod,* (1908) ILR 30 All 38; *Gregson v Udoy Aditya Deb,* (1889) ILR 17 Cal 223 : 16 IA 221.
482. Civil Procedure Code 1908, sch III, para 11; *Gourishankar v Chinnumaya,* (1918) ILR 46 Cal 183 : 48 IC 312 : 45 IA 219 overruling *Magniram v Bakubai,* (1912) ILR 36 Bom 510 : 16 IC 570; *Surju Prasad v Ramsaran,* (1931) 29 All LJ 400 : 132 IC 568 : AIR 1931 All 541.
483. *Chitu v Charan Singh,* 77 IC 705 : AIR 1923 All 563.
484. *Muninanjappa v P Manual,* (2001) 5 SCC 363 : AIR 2001 SC 1754.
485. *Balai C Mondal v Indurekha Debi,* AIR 1973 SC 782 : (1973) 1 SCC 284.

sale deed, the registrar has no authority to refuse registration on the ground that the vendor had no title to the property. He is under a duty to only see whether the document is duly stamped or not. A vendor cannot transfer a title or right better than what he had over that piece of land.[487] Similarly, if a court of competent jurisdiction has declared a gift deed to be valid, a party cannot be said to be lawfully in possession of land or be a deemed tenant.[488]

Person not authorised to dispose off minor's property

Where the de facto guardian of the minor's property sells it, the sale is invalid, and will be hit by section 11 of the Hindu Minority and Guardianship Act. Even subsequent ratification by the natural guardian does not validate it.[489]

8. Operation of transfer.—Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the movable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities thereof (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

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486. *Shakuntala Devi v State of Jharkhand*,AIR 2010 Jhar 56.
487. *UOI v Kamla Verma*, (2010) 13 SCC 511 : 2010 (8) SCALE 443 : LNIND 2010 SC 755.
488. *Bhimappa ChannappaKapali v Bhimappa SatyappaKamagouda*, (2012) 13 SCC 759 : ILR 2002 Kant 3055, 2003 (2) Kant LJ 148.
489. *K Kamama v Appana*, AIR 1973 AP 20.

(1) Transfer Passes All Interest of Transferor

Transfer of property passes forthwith to the transferee all the interests, which the transferor is capable of passing in the property and the legal incidents thereof.[490] Conveyancing in India has never been obscured by the technicalities of English law, and the rule that a conveyance is presumed to be a transfer of all the interest that the transferor is capable of passing, though not fully established in England till 1926, was recognised in India even before the passing of the TP Act. In a case to which the TP Act was not applicable, the Privy Council said that the rule before the TP Act was that words of grant were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument in order to gather the intention.[491] Again in *Syed Ashgar v Syed Mahomed*,[492] Lord Lindley said with reference to the construction of a conveyance:

> The deed of 1883 contains no words of exception or reservation, and is simple in point of language to pass all Syed Haider Reza's interest in the Zamindary, including the land on which the bazar was situated. His interest in the houses on that land, the profit and the rents derived from them, would pass by the deed in the absence of words showing an intention to retain them.

Therefore, where an owner of a grove sells the grove by declaring that he was selling it with every right that he possessed therein, it follows that his right to the land is also conveyed to the vendor, unless it is especially reserved by him.[493] Similarly, where *A* transfers land on which there are trees or a well, if nothing to the contrary is specified, the trees or well would pass along with the land to the buyer.[494] Even if the actual possession of the property is not with the transferor, symbolic and de jure possession can be transferred for completing a grant.[495]

The section is a rule of construction which avoids speculation as to the particular interest which was in the mind of the transferor. If he holds under two titles, eg by purchase and by inheritance, or as part owner and as executor, it will be presumed that both the interests have passed.[496] If the grantor has used unqualified words of conveyance, he cannot afterwards claim to have any rights in the property.[497] A *zamindar* mortgaged a *taluka* in some villages of which he had a *sarabarakari* interest subordinate to his *zamindari* right. The deed made no reference to the subordinate interest and in the absence of an express reservation, the mortgage was held to include the *sarabarakari* interest also.[498] This section is not intended to lay down any rule as to what words are necessary to effect a transfer of any particular kind of property. What property is actually conveyed by a particular kind of deed depends on its own terms.[499] Where, on a construction of a document transferring title to hold a property, it is clear that the intention of the parties was to transfer a parcel of land within well-defined boundaries, any erroneous statement of survey number or omission to state it should be

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490. *Nadupari Narayana v Ijjada Narayana*, AIR 2002 AP 387 : (2002) 3 ALT 681.
491. *Kalidas v Kanhayalal*, (1884) ILR 11 Cal 121, p 131 : 11 IA 218, p 228; *UOI v Millenium, Mumbai Broadcasting Ltd*, AIR 2006 SC 2751 : (2006) 10 SCC 510 : 2006 Supp (2) SCR 587; *Ramchandra v Kalyan Singh*, AIR 2006 All 184 : (2006) 1 RD 720; *Bishwanath Pratap Singh v Rajendra Prasad*, AIR 2006 SC 2965 : (2006) 4 SCC 432; *Harbans Singh v Takamani Devi*, AIR 1990 Pat 26.
492. *Syed Ashgar v Syed Mahomed*, 30 IA 71, 75 : (1903) ILR 30 Cal 556; *Leon Gan Kyu v Maung Gyi*, 142 IC 12 : AIR 1933 Rang 24; *Sheoraj v Gangu Prasad Rai*, AIR 1941 Oudh 395.
493. *Mahamed Hasham v Bhekari Lal*, AIR 1953 All 705 : (1953) All LJ 391.
494. *Arkkani v Subramniam*, AIR 2007 (NOC) 2118 (Mad).
495. *Rajkumar Rajinder Singh v State of Himachal Pradesh*, (1990) 4 SCC 320, p 336 : AIR 1990 SC 1833.
496. See note (2) below.
497. *Tarachand v Lakshman*, (1876) ILR 1 Bom 91, p 94.
498. *Raja Gour Chandra v Raja Makunda*, (1904) 9 Cal WN 710.
499. *Jyoti Prasad Singh v Seddon*, (1940) ILR 19 Pat 433 : 192 IC 17 : AIR 1940 Pat 516; *Bisheshwar Singh v Achhaibar Din*, AIR 1941 Oudh 507. But see *Umrao Singh v Kacheru Singh*, AIR 1939 All 415; and *Decota Din v Gur Prasad*, (1955) ILR 1 All 718 : 53 All LJ 157 : AIR 1955 All 292.

rejected as false demonstration.[500] However, wherever there is any misdescription of the property, the real intention of the party has to be gathered from the surrounding circumstances as well as the sale deed. Though it is not an inexorable principle of law, but ordinarily, it is said that depending upon the facts and circumstances of each case, whenever there is a conflict in the description of the property in a sale deed or any other instrument so far as plot number, *khata* number and boundaries are concerned, generally speaking, the boundaries are to prevail. Similar opinion was expressed by the Supreme Court in *Sheodhyan Singh v Sanichara Kuer,*[501] wherein it was held that whenever there is any misdescription ordinarily, the description as per the boundaries may be preferred to represent the correct intentions of the parties.[502] Where there is a grant of a mining lease and a map is annexed to the grant showing an area lesser than what is stated in the grant, the terms of the grant must prevail over the map.[503]

With regard to operation of transfer of property, the term of exemption provided in the special law shall apply if clear and unambiguous.[504] A registered settlement deed cannot be subsequently cancelled by executing a cancellation deed. The deed can be cancelled only by the court upon proof that it was executed through fraud, undue influence mistake or any other ground accepted by the court and not by the settler unilaterally.[505] In *Vitthal Maharu Patil v Fakira Bhavsing Patil,*[506] a registered sale deed was executed in favour of the transferee and possession was handed over to him. After around a gap of 12 years, the transferor alleged that along with the sale deed a deed of reconveyance was also executed in his favor. It was held that the claim would be negated in absence of any endorsement of reconveyance or a registered sale receipt.

With reference to section 8, it has been held that where there is a purported deed of adoption which fails as such deed, it can be treated as a will, if such an intention can be ascertained from the deed.[507] Rajasthan High Court has held that where a person has purchased the plot of land from a private citizen who was the owner of the land and by such purchase of land, all the rights of the former owner have been transferred to the purchaser, the purchaser would be entitled to all the rights referred in section 8 and section 55(6)(a). Therefore, no conversion charges can be demanded by the government if the purchaser wants to change the use of land.[508]

If the purchaser of land within a scheme area constructed a building thereon knowing well about the execution of scheme, he cannot demand shifting or diversion of transmission line at a belated stage. In *Orissa Power Transmission Corporation Ltd v Asia School of Management Trust,*[509] after 14 ½ years of publication of Scheme, a parcel of land within scheme area was purchased from its owner by the Trust. It was held that the Trust which constructed building thereon knowing well about execution of scheme by erecting towers in area including the land, cannot demand shifting/diversion of transmission line at a belated stage.

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500. *Chumar v Narayanan Nair,* AIR 1986 Ker 236.
501. *Sheodhyan Singh v Sanichara Kuer,* AIR 1963 SC 1879 : [1962] 2 SCR 753.
502. *Babaji Dehuri v Biranchi Ananta,* AIR 1996 Ori 183.
503. *Narain Prasand Singh v State of Bihar,* AIR 1983 Pat 244, p 245, para 4.
504. *Delhi Development Authority v Jitender Pal Bhardwaj,* AIR 2010 SC 497 : 2009 (13) SCALE 391 : LNINDORD 2009 SC 103.
505. *V Ethiraj v S Sridevi,* AIR 2014 Kant 58 : 2014 (1) Kant LJ 273 : LNIND 2013 KANT 370.
506. *Vitthal Maharu Patil v Fakira Bhavsing Patil,* AIR 2011 (NOC) 292 (Bom) : 2011 (5) Bom CR 864 : 2011 (3) MhLJ 910.
507. *Mohd Shafri v Talai Ram,* AIR 1985 P & H 121.
508. *Municipal Corporation, Jodhpur v Rajendra Bhandhari,* AIR 2001 Raj 9.
509. *Orissa Power Transmission Corporation Ltd v Asia School of Management Trust,* 2013 (8) SCC 738 : JT 2013 (11) SC 25 : 2013 (4) RCR (Civil) 61 : 2013 (10) SCALE 96.

(2) Where Transferor is Both Part Owner and Executor

An executor has the right to sell the property of the testator in due course of administration. If an executor is also one of the beneficiaries, and he sells the property of the testator together with "all the estate, right, title and interest" of the vendor, the deed conveys the whole title vested in the executor, and not merely his beneficial interest, though he does not purport to convey in his capacity as executor.[510] If the executant had an absolute title, then, it has to be inferred that the executant conveyed his absolute title to the person in whose favour the document was executed.[511]

(3) Hindu Law

The Hindu law is the same, for under that law an absolute estate may be conveyed without the words of limitation formerly used in English law to convey an estate of inheritance; and whether the gift passes an absolute or a limited estate, depends upon the terms of the grant.[512] However, if the donee is a female relation who takes a limited estate in property inherited, the Privy Council in *Mahomed Shumsool v Shewukram*[513] held that the court is entitled to assume, where the property given is immovable, that the donor intended her to take a limited estate only, and in such cases it has been said that the principle of section 8 is not of much practical utility.[514] However, of course, an absolute estate may be conferred upon a woman by express words indicating full proprietary rights.[515] The use of the word *malik* imports an absolute heritable and alienable estate,[516] unless the context indicates a different meaning.[517] It was supposed at one time by some of the courts in India that, under the Hindu law, in case of immovable property given or devised by a husband to his wife, the wife had no power to alienate, unless the power of alienation was conferred upon her in express terms. However, it has been held by decisions of the Privy Council that the proposition was not sound, and that if words of sufficient amplitude were used conferring the absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended.[518]

In the case of a transfer for consideration to a wife by a Hindu, the Privy Council applied section 8 even before the amendment of section 2, and held that the donee took an absolute

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510. *Bijroj Napani v Para Sundari,* (1915) ILR 42 Cal 56 : 41 IA 189 : 24 IC 296; *Gangabai v Sonabai,* (1916) ILR 40 Bom 69 : 28 IC 544; *Mithibai v Meherbai,* (1922) ILR 46 Bom 162 : 64 IC 397 : AIR 1922 Bom 179 (a will); *Fazal Ahmad v Har Prasad,* (1929) 27 All LJ 620 : 116 IC 1 : AIR 1929 All 465.
511. *Kutcherlakota Viyajlakshmi v Radinet Rajaratnamba,* AIR 1991 AP 50, p 52.
512. *Ram Narain v Peary,* (1883) ILR 9 Cal 830.
513. *Mahomed Shumsool v Shewukram,* 2 IA 7 : 14 Beng LR 226 : 22 WR 409.
514. *Sheoraji v Ram Sawari Devi,* (1934) All LJ 1013 : 152 IC 387 : AIR 1935 All 43.
515. *Hitendra Singh v Maharaja of Darbhanga,* (1928) ILR 7 Pat 500 : 55 IA 197 : 109 IC 858 : AIR 1928 PC 112 (to hold the property from generation to generation); *Wazir Devi v Ram Chand,* (1920) ILR 1 Lah 415 : 58 IC 988 (*kulliktiyar wa milkiat*); *Thakur Jagmohan v Sheoraj,* (1928) ILR 3 Luck 19 : 106 IC 593 : AIR 1928 Oudh 49 (owner with power of transfer).
516. *Lalit Mohun v Chukkun Lal,* (1897) ILR 24 Cal 834 : 24 IA 76, p 88; *Surajmani v Rabina,* (1908) ILR 30 All 84 : 35 IA 17; *Naulaki v Jai Kishan,* (1918) ILR 40 All 575 : 46 IC 905; *Bhaidas v Bai Gulab,* (1922) ILR 46 Bom 153 : 49 IA 1 : 65 IC 974 : AIR 1922 PC 193; *Jagmohan Singh v Sri Nath,* 57 IA 291 : 128 IC 270 : AIR 1930 PC 253; *Saraju Bala v Jyotirmoyee,* (1931) 35 Cal WN 903 : 58 IA 270 : 134 IC 648 : AIR 1931 PC 179.
517. *Mahomed Shamsool v Shewukram,* (1875) 14 Beng LR 226 : 2 IA 7 : 22 WR 409; *Motilal v Advocate General of Bombay,* (1911) ILR 35 Bom 279 : 11 IC 547; *Mithibai v Meherbai,* (1922) ILR 46 Bom 162 : 64 IC 397 : AIR 1922 Bom 179; *Ashurfi Singh v Biseswar,* (1922) ILR 1 Pat 295 : 65 IC 977 : AIR 1922 Pat 362.
518. *Shalig Ram v Charanjit,* 57 IA 282 : 128 IC 265 : AIR 1930 PC 239; *Jagmohan Singh v Sri Nath,* 57 IA 291 : 128 IC 270 : AIR 1930 PC 253.

estate.[519] A person executed a settlement deed, transferring certain properties in favour of *P* and directed that the property shall be enjoyed by *P* and after her lifetime, by *S*. *S* and his widow *G* sued for possession of the properties settled in favour of *P*. It was held, that subject to the life interest of *P*, *S* (the husband of *G)* had been given absolute estate. The document did not show that *P* was given absolute interest. *S*, during his lifetime, acquired a vested right in the properties, which could not be defeated by his death before he obtained possession.[520] Even in a family settlement, a restraint on alienation of the property is void. Sections 10 to 14 of the TP Act (and the corresponding provisions of the Indian Succession Act) are statutory recognitions of the principles, that to impose total restraint on transfer or to impose restrictions which keep the property out of circulation forever, offends public policy, irrespective of whether such conditions are imposed by a deed or transfer, a will, or a simple contract. A contract against public policy is void. Therefore, such restrictive clauses in a family settlement are inoperative.[521] Even though the document may use the word "surrender" and even though it may be styled as a "release" yet, if it transfers all the right, title and interests of the person executing it in favour of person accepting it, then it is a sale, if executed for consideration.[522]

Where trust deeds conferring similar interest on grandsons in respect of properties of creators of trusts, were executed respectively by a male member and female member of a Hindu family, it was held that the principles of Hindu law governing the devolution of property in case of property passing from father to his son and grandsons, cannot be invoked in such a case.

In the above case, the trust deeds (i) gave properties of the executants of the deeds to grandsons in equal shares on the happening of a particular event; (ii) conferred, on the trustees, a right to exercise an absolute and uncontrolled discretion (on the death of a beneficiary before the happening of the event) to apply the beneficiary's share towards the maintenance of his widow and his male issue, and to accumulate the surplus to the account of the said beneficiary for distribution; and (iii) also provided, that if, before the time of division and distribution of properties, a beneficiary died, leaving only a widow, the widow would get a half of the share belonging to the deceased beneficiaries, and the heirs of other deceased beneficiaries. It was held that the above conditions were sufficient, in themselves, to lead to the conclusion that it was never intended that the properties should pass to the beneficiaries, to be held by them for their respective Hindu undivided families. On the plain terms of the trust deed, the properties were intended to devolve, on the beneficiaries in their individual capacity.[523] A settlement deed is not defined under the TP Act. It is disposition of the property either for the purpose of settling disputes among the family, or for religious purposes, or in consideration of marriage.[524]

(4) Court Sales

The section does not apply to court sales, for such sales effect a transfer by the operation of law.[525] The principle of the section was, however, applied in a case decided by Madras High Court[526] where a debt for unpaid purchase money on a sale of land was attached and

519. *Hitendra Singh v Maharaja of Darbhanga,* (1928) ILR 7 Pat 500.
520. *A Srinivasa Pai v Saraswati Ammal,* AIR 1985 SC 1359 : (1985) 4 SCC 85.
521. *Fatima Sorjini Suresh v K Saraswati Amma,* AIR 1986 Ker 56.
522. *Subbiah Naidu v Govindraj,* AIR 1985 Mad 57 (NOC).
523. *CIT, Madhya Pradesh v Maharaja Bahadur Singh,* AIR 1987 SC 518 : (1986) 4 SCC 512.
524. *G Narasimhulu Chetti v S Pandurangaiah Chetti,* AIR 1996 AP 24 : (1995) 3 ALT 193.
525. See *Penumetsa Subbaraju v Veegasena Seetharamaraju,* (1916) ILR 39 Mad 283 : 28 IC 232; *Nandlal v Sunder,* AIR 1944 All 17; *Krishna Mohan v Bal Krishna Chaturvedi,* AIR 2001 All 334 : (2001) 3 AWC 2080; Transfer of Property Act, 1882, section 2 (d).
526. *Sambasiva v Venkatarama,* (1926) 51 Mad LJ 95, p 98 : 95 IC 447 : AIR 1926 Mad 903.

sold, and the auction purchaser was held entitled to the charge which the vendor had under section 55(4)(b) on the property in the hands of the buyer. The court, after observing that the present section did not apply to court sales, said:

The effect of applying section 8 is to strengthen the sale certificate by transferring the lien along with it.

It is difficult to follow this line of reasoning, and these dicta have been treated as obiter in a later case,[527] wherein J Madhavan Nair said that section 8 could not override the provisions of the Registration Act, 1908. It is submitted that section 8 cannot apply to court sales. What is sold at a court sale is the right, title and interest of the judgment debtor, and the extent of that interest is a mixed question of fact and law to be decided according to the circumstances of each particular case, and depends upon what the court intended to sell, and the purchaser intended to buy.[528] Thus, a court sale of a judgment debtor's interest in property which has been leased, passes rents accrued due at the time of sale, not because rents are incidental to the land, but because the rents were part of the judgment debtor's interest.[529] Similarly, an execution sale of a *zamindari* estate will pass buildings in the *zamindari* area which are appurtenant to the estate[530] and were, therefore, included in the sale, but not indigo factories which though in the estate are not appurtenant thereto.[531]

Revenue sales under the Bengal Land Revenue Sales Act, 1859 stand on a different footing, for the interest of the defaulting proprietor in the land is forfeited or determined, and what is sold is the interest of the government subject to the payment of assessment.[532] Accordingly, if he has erected a building on the land, the right to the building would not pass, and he would be entitled to remove the materials, unless the purchaser elected to pay compensation for the building.[533] This is in accordance with the general rule laid down in the case of *Thakoor Chunder v Ramdhone.*[534]

(5) Different Intention

The general presumption is in favour of a transfer of all the interests of the transferor. *A* mortgages a mango tree standing on his land to *B*. *A* then sells the land to *C*, and the sale-deed makes no mention of the mortgage. It cannot be inferred that *A*'s interest in the tree did not pass with the sale to *C*.[535]

The presumption of a transfer of all the interest can be rebutted by express words or by necessary implication. The words "lease" and "mortgage" of themselves express an intention of transferring an interest less than the transferor is capable of passing. The words "*mokarari* lease with all rights" express the intention to pass all rights which can be passed by way of lease, but short of an absolute title and the lessee would take permanent lease, but not with subsoil rights in the minerals, for the essential characteristic of a lease is that the corpus does

527. *Ranganatha v Rajagopala,* 142 IC 730 : AIR 1933 Mad 181 affirmed in *Rajagopala v Ranganatha,* 152 IC 375 : AIR 1934 Mad 615.
528. *Abdul Aziz v Appayasami,* (1904) ILR 27 Mad 131 : 31 IA 1.
529. *Ma Hawa Bi v Sein Ko,* (1927) ILR 5 Rang 808 : 109 IC 151 : AIR 1928 Rang 67.
530. *Abu Hasan v Ramzan Ali,* (1882) ILR 4 All 381; *Deokinandan v Aghorenath,* AIR 1945 Rang 400.
531. *Durga Singh v Bisheshar Dayal,* (1902) ILR 24 All 218.
532. *Maharaja Surjya Kanta Acharjya v Sarat Chandra Roy,* (1914) 18 Cal WN 1281 : 25 IC 309 (PC).
533. *Jatindra Nath Roy Chowdhury v Narayan Das Khettry,* (1925) ILR 52 Cal 862 : 90 IC 901 : AIR 1926 Cal 97.
534. *Thakoor Chunder v Ramdhone.* (1868) 6 WR 228; See note under section 3 "English and Indian law of fixtures".
535. *Pandurang v Bhimrav,* (1898) ILR 22 Bom 610, and see *Deota Din v Gur Prasad,* (1955) ILR 1 All 718 : 53 All LJ 157 : AIR 1955 All 292.

not disappear and minerals must be expressly denominated so as thus to permit the idea of partial consumption of the subject leased.[536]

In interpretation of agreements, redundant and inapplicable clauses should be ignored in standardized forms adopted by insurance companies, statutory corporations and banks.[537] In construing the terms of the contract of insurance, the words expressed by the parties must be given paramount importance.[538]

The words of the document describing the property must be given due weight. Thus, where it is stated in the deed of settlement that the widow conveyed the property which had passed to her under her husband's will, and the will was invalid, being one executed by a Hindu who had a son living at the time, it cannot be argued that she conveyed also her interest in the property as heir of the son. The recitals showed that the intention was not to transfer all the interest which she was capable of passing, but only the interest acquired under her husband's will. Thus, the deed showed a "different intention" within the meaning of section 8.[539]

Again, the circumstances of the case may be such as to disclose an intention to restrict the transfer to an interest under one title only. Thus, in *Har Prasad v Fazal Ahmed,*[540] a Mahomedan sold two villages to his mother, and left a substantial part of the purchase money with her to be spent in charity. On his death, the mother spent some money in charity and then settled the villages in *wakf,* subject to a charge for the amount actually paid plus the amount spent in charity. The sale was set aside as being merely a cloak for a gift in fraud of the heirs. The *wakf* fell with the sale, but it was contended that as the mother was entitled to a third share of the villages as heir to her son, the *wakf* was operative as to that third share. However, the Privy Council held that the reservation of a charge for what she had paid and spent, showed that the mother had no intention of settling anything of her own or anything except what she thought had been entrusted to her by her son.

An intention to reserve a right may be implied not only from the terms of the deed, but also from the object of the grant. Thus a gift of certain *talukas* "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily and may provide for your own support by having the property under your authority and control" was held to confer a life-estate, the Privy Council observing that "the indefinite words of the gift must be limited by the purpose of the gift".[541] In a *kharposh* gift which is only a grant for life, an intention to reserve mineral rights is implied.[542] Where the proviso in a lease deed is void as it is unauthorised and the effect of declaring the proviso void will be to leave the rest of the deed whole and intact, the lease without the proviso is valid.[543] The different intention may be also to transfer an interest greater than the transferor possesses at the time, and if the property is sold free from encumbrances, the vendor is bound to discharge encumbrances then existing on the property.

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536. *Girdhari Singh v Megh Lal Pandey,* (1918) ILR 45 Cal 87 : 44 IA 246 : 42 IC 651 (PC).
537. *Shanti Budhiya Vesta Patel v Nirmala Jayprakash Tiwari,* (2010) 5 SCC 104 : AIR 2010 SC 2132 : 2010 (4)SCALE 182 : LNIND 2010 SC 379.
538. *Suraj Mal Ram Niwas Oil Mills P Ltd v United India Insurance Co Ltd,* AIR 2010 SC (Supp) 23(2) : 2010 (10) SCALE 640 : (2010) 10 SCC 567.
539. *K Subbaiah v A Rangaiah,* AIR 1972 AP 246.
540. *Har Prasad v Fazal Ahmed,*60 IA 116 : 37 Cal WN 490 : 64 Mad LJ 514 : (1933) All LJ 331 : 35 BLR 496 : 142 IC 217 : AIR 1933 PC 83.
541. *Kalidas Mullick v Kanhya Lal,* (1884) ILR 11 Cal 121 : 11 IA 218, p 228 (PC).
542. *Tituram v Cohen,* (1906) ILR 33 Cal 203 : 32 IA 185 (PC).
543. *Kannpura Development Co v Kamakshya Narain Singh,* [1956] SCR 325 : AIR 1956 SC 446 : [1956] SCJ 511.

(6) Legal Incidents

The second clause refers to land and defines what is included in its "legal incidents". An incident is defined in *Wharton's Law Lexicon* as "a thing necessarily depending upon, appertaining to, or following another that is more worthy—as rent is incidental to a reversion". The provisions as to legal incidents in the second, third, and fourth paras of this section correspond to section 6 of the Conveyancing and the Law of Property Act, 1881,[544] where a more detailed list is given. The list in this section is not exhaustive as is shown by the use of the word "includes".

The following are the legal incidents which pass upon the transfer of property to which they relate:

> The benefit of a covenant which runs with the land under section 55(2); or section 65; or section 108(c); a right under section 55(3) to possession of title deeds;[545] and a right of pre-emption.[546]

(7) Construction of Deeds

A document has to be construed as a whole. Real intention of the parties has to be gathered, not merely from what *ex facie* is stated as the description of the property in the schedule, but from the totality of the recitals in the document. Description of the property in the schedule to the document could not be given any overriding importance over the actual area specified in the document as the extent of the land determined upon measurement.[547] The construction of a document as regards the legal effects will only arise where the document is an instrument of title, or is a contract, or is the direct foundation of legal rights. Where the nature and character of the document are clear, and the only question or dispute is whether the real contract is between the parties is something different from that contained in the document, no question of the construction of the document is involved. There can be no doubt that where the language is plain and unambiguous, the same is to be adhered to.[548] The construction of a document depends upon the language of the recitals, but not upon its form or nomenclature. The intention of the executant is to be gathered from the words used in the document. To find out whether a document is settlement, gift or a will, the nature of a document has to be examined whether it transferred any interest in property in *praesenti*, or after the death of the executant. A sale deed that is totally silent on any aspect of reconveyance and pursuant to sale possession was delivered to the buyer, the transfer would amount to a sale and the seller would not be entitled to any reconveyance.[549] A mere delivery of possession cannot amount to transfer of interest in the property.

(8) Easements Annexed Thereto

An "easement" is defined in section 4 of the Indian Easements Act, 1882.[550] The phrase "easements annexed thereto" refers to those easements which at and prior to the transfer were existing easements. It does not refer to an easement which first came into existence as a consequence of transfer.

Under section 19 of the Indian Easements Act, 1882, an easement existing at the date of the transfer passes with the dominant heritage to the transferee. A purchaser of a house acquires a right of way which the vendor has.[551] The illustration to section 19 of the Easements

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544. Now replaced by section 62, Law of Property Act, 1925.
545. *Bhavani v Devrao,* (1887) ILR 11 Bom 485.
546. *Bhajan v Mushtaq Ahmed,* (1883) ILR 5 All 324.
547. *Sumathy Amma v Sankara Pillai,* AIR 1987 Ker 84.
548. *Shyam Sunder Ganeriwalla v Delta International Ltd,* AIR 1998 Cal 233.
549. *Vitthal Maharn Patil v Fakira Bhavsing Patil,* AIR 2011 (NOC) 292 (Bom).
550. See note "Easements" under section 6(c).
551. *Nubeen Chunder v Bhoobun,* (1871) 15 WR 526.

Act, 1882 is that if *A* owns land to which a right of way is annexed and leases it to *B* for 20 years, the right of way would vest in *B* and his legal representatives for so long as the lease continues. A purchaser of land irrigated by the water of a tank is entitled to use the water of the tank for irrigation."[552]

The words "locks, keys, bars" refer to permanent fixtures and fittings. The words "other thing provided" do not include a right of access by a staircase, when the ownership of the staircase itself is not claimed, and the right of way is not an easement of necessity.[553]

Apart from legal easements other rights called quasi-easements are created on the severance of property. As to these, section 13 of the Indian Easements Act, 1882, enacts that on partition the grant of an easement of necessity or of an apparent continuous easement shall be implied. The word "annexed" is used in the same sense as the word "appurtenant" in English law,[554] and indicates that the right is the right of the owner for the time being. The right to a ferry franchise is not necessarily annexed to the land.[555]

Where a common passage was left for the use of the co-sharers in a partition between the members of one family, it was held that such an arrangement did not make the right to a share in the passage a legal incident of the shares allotted to co-sharers.[556] A purchaser of land cannot claim use of water in a well-constructed in a separate and distinct land. A decree for permanent injunction being one granted for protection of the decree-holder's statutory easementary right of way appurtenant to his dominant heritage and annexed with the servient tenement of the judgment-debtors, is enforceable in law against the transferee-judgment-debtor, he being the successor-in-interest of the original judgment-debtor.[557]

(9) Rents and Profits

Rents and profits accrue after the transfer of benefits arise out of the land and are, therefore, within the definition of immovable property. The rents and profits of property mortgaged by an English mortgage form part of the mortgagee's security.[558] A buyer's right to rents and profits, therefore, accrues on the date of the transfer. This is made clear by section 55(4)(a) under which the seller is entitled to the rents and profits of the property until ownership passes to the buyer, and also section 55(6)(a) which declares the buyer entitled to rents and profits when the ownership of the property passes to him. At a court sale, the property vests at the date of sale and so the auction purchaser is entitled to the crops grown between the date of sale and the date of confirmation of the sale.[559] If the vendor retains possession after the ownership has passed to the buyer, he may be charged for use and occupation. Rents and profits accruing due before the transfer are not legal incidents of the property transferred.[560] Such arrears of rent are a debt or an actionable claim, and if they are to be transferred, they must be assigned separately.[561] Where additions and alteration in the suit premises were carried out in pren[illegible] prior to the premises coming into the hands of the

552. *Venkata v Secretary of State,* (1902) 12 Mad LJ 432.
553. *Ahmad Ali v Dhondba,* (1937) ILR Nag 204 : 171 IC 496 : AIR 1937 Nag 179.
554. *Wutzler v Sharpe,* (1893) ILR 15 All 270, p 288.
555. *Nityahari v Dunne,* (1891) ILR 18 Cal 652; *Dhanpat v Raja Pasput,* (1931) ILR 53 All 764 : 135 IC 545 : AIR 1931 All 587.
556. *Hannda Khatun v Barghageri Paerotaqat,* AIR 1947 Pat 122.
557. *Ramachandra Deshpande v Laxmana Rao Kulkarni,* AIR 2000 Kant 298, para 20.
558. *Ma Joo Tean v The Collector of Rangoon,* (1934) ILR 12 Rang 437 : 155 IC 776 : AIR 1934 Rang 321.
559. *Harihar v Narayana,* 145 IC 174 : AIR 1933 Mad 482; *Kota Narayana v P Suryanarayana,* AIR 1973 AP 94; see also Transfer of Property Act, 1882, section 36.
560. *Bhogilal v Jethalal,* (1928) 30 Bom LR 1588 : 114 IC 262 : AIR 1929 Bom 51; *Ganesh v Shamnarain,* (1879) ILR 6 Cal 213; *Muthu v Natravarathi,* 58 IC 383; *Chandrasekharalingam v Naghabushanam,* (1927) 53 Mad LJ 342 : 104 IC 409 : AIR 1927 Mad 817; *Poongavanam v Subramanya,* (1951) 1 Mad LJ 69 : AIR 1951 Mad 601.
561. *Sheogobind Singh v Gouri Prasad,* (1925) ILR 4 Pat 3 : 83 IC 81 : AIR 1925 Pat 310; see also Transfer of Property Act, 1882, section 50.

original landlord, the landlord cannot pass a better title than what he has and his transferee cannot seek eviction of tenant on grounds of alteration of premises.[562]

(10) Attached to the Earth

This phrase is defined in section 3 of TP Act. What is attached to the earth is immovable property within the definition of the term in the General Clauses Act. What is attached to the earth is part of the land, and passes with it on transfer without express mention.[563] In the case of a lease, the right to enjoy the trees and shrubs passes to the lessee.[564] Trees on an occupancy holding, which is inalienable, are attached to the holding, and cannot be transferred by the occupancy holder.[565] A house, being embedded in the earth, is immovable property,[566] and when the land is transferred, buildings erected upon it pass by necessary implication.[567] However, the owner of the land may not necessarily be the owner of its superstructure,[568] nor would the subsoil rights form a part of surficial rights of land if the contract so says.[569] It was held in *Ashok Kumar v Chief Controlling Revenue Authority,*[570] that where the owner of the land executed a lease of the land in favor of *B* for 30 years for construction of a hotel, the ownership rights of this Hotel were not with the owner of the land, but vested in *B*. It has been held by a Full Bench of the Allahabad High Court, disapproving an earlier Allahabad judgment,[571] that it is a question of fact in each case whether the transfer of an interest in a *zamindari* also transfers an interest in a residential house.[572] In case of an auction sale of only the land or a plot, the house built thereupon does not automatically get transferred by virtue of section 8.[573] Similarly, a sale of land would pass ownership only in the land and not of the hotel constructed on it by the lessee with the permission of the owner.[574] All things which are annexed to the property mortgaged are part of the mortgagee's security, and the mortgage need not make mention of structures and fixtures.,[575] but an iron shed resting on the land by its own weight is not attached to the earth, and is a mere chattel which does not pass on transfer of the land.[576]

Unless a different intention is expressed, a transfer of land would include trees standing on it.[577] However, no transfer of land can be presumed from transfer of trees.[578] Failure to

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562. *Yogesh Verma v Shiv Kumar Agarwal,* AIR 2018 (NOC) 278 (Sikkim).
563. *Faqueer Soonra v Khuderson,* (1870) 2 NWP 251 (sale of house and compound includes trees standing therein); *Fitarat Husain v Liaqat Ali,* AIR 1939 All 291. (Holding that title to trees and shrubs passes with the transfer of proprietory rights in the land.)
564. *Badam v Ganga,* (1897) ILR 29 All 484.
565. *Imdad Khatun v Bhagirath,* (1888) ILR 10 All 159; *Kausalia v Gulab,* (1899) ILR 21 All 297; *Janki v Sheoadhar,* (1901) ILR 23 All 211; *Nafar Chandra v Ram Lal,* (1895) ILR 22 Cal 742.
566. *Nathu Miah v Nand Rani,* (1872) 8 Beng LR 508 : 17 WR 309; *Dinonath v Adhor,* (1899) 4 Cal WN 470.
567. *Asgar v Mahomed Medhi Hossein,* (1903) ILR 30 Cal 566 : 30 IA 71; *Macleod v Kissan,* (1906) ILR 30 Bom 250; *Balram v Ganga Singh,* 93 IC 287 : AIR 1926 Oudh 358; *Srimati Krishna Kumari v Bhaya Rajendra,* (1927) ILR 2 Luck 43 : 104 IC 155 : AIR 1927 Oudh 240 (case of a will).
568. *Shivashakti Builders and Financial Co Ltd,* Re (2010) 158 Comp Cas 237 Pat.
569. *K Thippanna v Varalakshmi,* (2012) 3 SCC 576 : LNIND 2012 SC 142 : 2012 (3)SCALE 34 : 2012 3 MLJ 818 SC.
570. *Ashok Kumar v Chief Controlling Revenue Authority,* AIR 2011 All 142 : LNIND 2011 ALL 61.
571. *Umrao Singh v Kacheru Singh,* AIR 1939 All 415.
572. *Deota Din v Gur Prasad,* (1955) ILR 1 All 718 : 53 All LJ 157 : AIR 1955 All 292.
573. *Krishna Mohan v Bal Krishna Chaturvedi,* AIR 2001 All 334 : (2001) 3 AWC 2080.
574. *Ashok Kumar v Chief Controlling Revenue Authority, UP, Allahabad* AIR 2011 All 142.
575. *Macleod v Kissan,* (1906) ILR 30 Bom 250; *Hari Pada v Anath Nath,* (1917) 22 Cal WN 758 : 44 IC 211.
576. *Chaturbhuj v Bennet,* (1905) ILR 29 Bom 323.
577. *Divisional Forest Officer v Daut,* [1968] 2 SCR 112 : AIR 1968 SC 612 : [1968] 2 SCJ 322. See also *Mahmood Haran Khan v Bhikhari Lal,* AIR 1953 All 705; *Bhoop Singh v Sri Ram,* AIR 1940 All 427; *Ram Chandra v Kalyan Singh,* AIR 2006 All 184 : (2006) 1 RD 720.
578. See *Vishwa Nath v Ramraj,* AIR 1991 All 193, p 195.

mention saplings in the agreement to sell the land, was held to indicate that they were not intended to be sold.[579]

(11) Minerals

Minerals are embedded in the earth, and pass on sale of the land. In *Raja Anand v State of Uttar Pradesh,*[580] the Supreme Court observed that prima facie the owner of the surface is entitled *ex jure* to everything beneath the land, and held that a transfer of the right to the surface conveys the right to the minerals underneath, unless there is an express or implied reservation in the grant. Whether a lease passes a right to sub-soil minerals depends on the terms of the grant.[581] A permanent lease by a Bengal *zamindar* does not imply a grant of mineral rights.[582] In *Ali Quadar v Jogendra,*[583] JJ Prinsep and Hill held that a grant of a *patni taluka* transfers mineral rights. The Judicial Committee intimated in one case that this decision had not been overruled,[584] and it has since been followed.[585] However, the point is now settled against the *patnidar*, for in *Bejoy Singh Dudhorin v Surendra Narayan Singh*[586] the Judicial Committee have held that even in the case of a *patni* tenure the onus is on the *patnidar* to prove the inclusion of subsoil rights in the grant. As between *zamindar* and *jagirdar*, it is well-settled that the *zamindar* must be regarded as the owner of the minerals.[587]

In *Raja Anand v State of Uttar Pradesh State,*[588] the Supreme Court applied the same general principle in construing a *sanad* granted by the government creating a *zamindari* and held that as the object was to make the *zamindar* the owner of the soil, he was entitled to the minerals. It is submitted that this decision was given on the peculiar facts of the case, and was based on the language of the particular *sanad* and the subsequent conduct of the parties, and does not affect the general principle stated in earlier editions of this work that if the grantor is the government, there is a presumption that mineral rights are reserved.

Shells

An agricultural tenant may dig up shells for the purpose of cultivating his land, but has not the right to appropriate the shells to his own use.[589]

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579. *Kundan v Addl District Judge, Bulandshahr,* AIR 1990 All 121, p 123—(this decision should be confined to the facts of its own case particularly in view of the finding in the judgment that a "bare perusal of the agreement to sell... would indicate that only the plot (*arazi*) was intended to be sold."
580. *Raja Anand v State of Uttar Pradesh,* [1967] 1 SCR 373 : AIR 1967 SC 1081 : [1967] 2 SCJ 830 : [1967] 1 SCA 591.
581. *Rowbotham v Wilson,* [1860] 8 HLC 348, p 360.
582. *Giridhari Singh v Megh Lal Pandey,* (1918) ILR 45 Cal 87 : 44 IA 246 : 42 IC 651; *Sashi Bhusan v Jyoti Prasad,* (1917) ILR 44 Cal 585, p 594 : 44 IA 46 : 40 IC 139; *Jagat Mohan v Pratab Udai Nath,* (1931) ILR 10 Pat 877 : 134 IC 1073 : AIR 1931 PC 302; *Hari Narayan v Sriram,* 37 IA 136 : 6 IC 785 (PC); *Tituram v Cohen,* (1906) ILR 33 Cal 203 : 32 IA 185; *Gobinda Narayan v Sham Lal,* (1931) ILR 58 Cal 1187 : 58 IA 125 : 131 IC 753 : AIR 1931 PC 89; *Nageshar Bux v Bengal Coal Co,* (1931) ILR 10 Pat 407 : 58 IA 29 : 130 IC 315 : AIR 1931 PC 186; *HV Low and Co Ltd v Jyoti Prasad Singh Deo,* 58 IA 392 : 35 Cal WN 1246 : 54 Cal LJ 366 : 33 Bom LR 1544 : 61 Mad LJ 699 : (1931) All LJ 1112 : 135 IC 632 : AIR 1931 PC 299.
583. *Ali Quadar v Jogendra,* (1912) 16 Cal LJ 7 : 16 IC 441.
584. *Satya Niranjan Chakravarti v Ram Lal Kaviraj,* (1925) 4 ILR Pat 244 : 52 IA 109 : 86 IC 289 : AIR 1925 PC 42.
585. *Rajeswar Prosad v Anil Kumar,* (1928) ILR 55 Cal 35 : 106 IC 117 : AIR 1927 Cal 956.
586. *Bejoy Singh Dudhorin v Surendra Narayan Singh,* (1928) ILR 56 Cal 1 : 55 IA 320 : 111 IC 345 : AIR 1928 PC 234; *Bhupendra v Rajeshwar,* 58 IA 228 : 132 IC 610 : AIR 1931 PC 162.
587. *Bageshwari Charan v Kumar Kamakya Narain Singh,* (1931) ILR 10 Pat 296 : 58 IA 9 : 131 IC 325 : AIR 1931 PC 30.
588. *Raja Anand v State of Uttar Pradesh State,* [1967] 1 SCR 373 : AIR 1967 SC 1081.
589. *Chaladom v Kakkath Kunhambu,* (1902) ILR 25 Mad 669.

(12) Machinery as to the Third clause

The section assumes that the machinery is attached to the earth and is, therefore, a fixture, and then enacts that the movable parts of the machine, although they are detachable, pass with the land and the fixed machine. This is an illustration of the principle stated by Lord Hardwicke in *Lawton v Lawton*[590] that "you shall not destroy the principal thing, by taking away the accessory to it."

(13) House

The fourth clause merely repeats in regard to a house what has already been enacted in the first and second clauses as to property generally. If the property transferred is a house, the easements annexed to it will also pass not only under this section, but also under section 19 of the Easements Act, 1882. The transferee is also entitled to rents and profits accruing after the transfer. Locks, bars, keys doors and windows have no separate existence from the house.[591]

(14) Debts

The fifth clause relates to debts and other actionable claims. The transfer of a debt or actionable claim raises a presumption that the security for the debt has been transferred. The assignment of the debt will, unless a different intention is expressed or implied, draw the securities after it according to the maxim *omne principale trahitadse accessorium.*[592] The transfer of a debt passes all interest the transferor may have to recover the debt. A promissory note is sometimes described as a security for the debt, but the expression is inaccurate, for a promissory note if not itself the contract of loan, is a conditional payment of the debt. If a mortgagee holds a promissory note for a part of the debt, and retains it after transferring the mortgagee, he will be restrained from suing on it pending a suit for redemption.[593] However, a bona fide endorsee for value of the note without notice of the mortgage will be entitled to recover on it.[594] Where what is transferred is not the debt, but the property in the promissory note, the section does not apply.[595]

The question arose in a case before the Supreme Court[596] as to whether the transferee of the entire assets of a company including the right to continue a suit filed by the company obtained, by reason of section 8, the right to obtain a decree in the said suit. Justice Das, (as he then was) held that no decree was in existence at the date of transfer, and that section 8 was inapplicable as it only refers to property in existence at the time of transfer. Justice Bhagwati, who concurred in the result held, however, that in such cases there was, by the transfer of the debt, "necessarily involved also, a transfer of the transferor's right in a decree which may be passed in his favour in pending litigation and the moment a decree is passed in his favour by the court of law, that decree is also automatically transferred in favour of the transferee by virtue of the assignment in writing already executed by the transferor." Justice Imam who was the third Judge on the Bench, expressed no opinion on this point.[597]

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590. *Lawton v Lawton,* [1743] 3 Atk 13, p 15; As to when machinery is considered a fixture, see notes under section 3.
591. *Peru Bepari v Ronuo,* (1884) ILR 11 Cal 164; *Queen Empress v Sheikh Ibrahim,* (1890) ILR 13 Mad 518; *Purshotama v Municipal Council,* (1891) ILR 14 Mad 467.
592. Ghose, *Law of Mortgage,* p 76.
593. *Walker v Jones,* [1866] LR 1 PC 50.
594. *Glasscock v Balls,* [1890] 24 QBD 13.
595. *Raghuvalu v Rajalingam,* AIR 1939 Mad 846.
596. *Jugal Kishore Saraf v Raw Cotton Co Ltd,* [1955] 1 SCR 1369 : AIR 1955 SC 376 : [1955] SCJ 371.
597. A view similar to that of J Bhagwati has been expressed in a different context by the Supreme Court in *Bharat Nidhi Ltd v Takhatmal,* [1969] 1 SCR 595 : AIR 1969 SC 313 : [1969] 1 SCJ 367.

The rule in this section is distinct from the doctrine of subrogation enacted in section 92 by which a co-debtor or a surety is subrogated to the creditor he has paid off. However, the exception made in the parenthesis is similar to that in the last para of section 92. For just as there is no subrogation when a mortgage is partially paid off, so there is no transfer of a security on the payment of a debt when the security covers other debts also.

(15) Mortgage Debts

Before mortgage debts were excluded from the definition of actionable claims, the assignment of the mortgage debt carried with it an assignment of the mortgage security.[598] However, since mortgage debts have been excluded from the definition by Act 2 of 1900, section 8 no longer applies, for the word "debt" in this section must be confined to such debts as fall within the general definition of actionable claims.[599] A mortgage being immovable property can only be transferred by a registered instrument.[600]

In *Perumal v Perumal,*[601] CJ Wallis said that although a debt secured by a written mortgage could not be assigned without a registered deed, yet in the case of a promissory note secured by an equitable mortgage, the endorsement of the note operates to carry the security with it. The authorities cited were *Cunniah v Gopala Chettiars*[602] and *Nataraja v The South Indian Bank.*[603] The authorities do not, however, support the conclusion. In the first case, the note was endorsed merely for collection and in the second case, the mortgage debt was attached and sold in execution. Although a mortgage debt is immovable property under the TP Act, yet it is treated in some cases as movable property under the Code of Civil Procedure 1908—(O 21, rules 45 and 54)—so that if a mortgage debt is attached and sold, the purchaser acquires not only the debt, but also the right to realise it by enforcement of the mortgage.[604] Nevertheless, in principle there is no reason to differentiate between a written mortgage and a mortgage by deposit of title-deeds and the dictum of CJ Wallis was dissented from in *Elumalai v Balakrishna*[605] where it was held that the assignment of a debt secured by a deposit of title-deeds does not pass the security in the absence of a registered assignment of the mortgage.

In the case last cited J Krishnan said:

> In my view, it is only if a mortgage debt is transferred as a secured debt that it will carry the securities with it on the principle embodied in section 8, and not otherwise. Even in the case of a mortgage where there is no promissory note it cannot, I think, be said that the law does not allow the mortgagee to transfer the debt as an unsecured or simple debt without a registered instrument if he thinks fit to do so. The security is for his benefit and he can give it up if he likes; and the transferee will then get the right to the debt, but not to the security. Thus, as regards transferability in law as an unsecured debt, a mortgage for which a negotiable instrument has been taken does not seem to me to differ fundamentally from one where none such has been taken. In my view, in either ease' if the debt is transferred by endorsement or otherwise, without

598. *Subramaniam v Perumal,* (1895) ILR 18 Mad 454; *Perumal v Perumal,* (1921) ILR 44 Mad 196, p 200 : 61 IC 461 : AIR 1921 Mad 137; *Sakhiuddin v Sonaullah,* (1917) 22 Cal WN 641, p 644 : 45 IC 986.
599. *Arunachellam v Subramania,* (1907) ILR 30 Mad 235.
600. *Perumal v Perumal,* (1921) ILR 44 Mad 196, p 200 : 61 IC 461 : AIR 1921 Mad 137; *Bank of Upper India etc v Fanny Skinner,* (1929) ILR 51 All 494 : 119 IC 241 : AIR 1929 All 161 : on app 62 IA 115 : 155 IC 743 : AIR 1935 PC 108; *Villa v Petley,* 148 IC 721 : AIR 1934 Rang 51; *Girdhar v Motilal Champalal,* (1941) ILR Nag 615; (1940) NLJ 151 : 192 IC 556 : AIR 1941 Nag 15.
601. *Perumal v Perumal,* (1921) ILR 44 Mad 196 : 61 IC 461 : AIR 1921 Mad 137.
602. *Cunniah v Gopala Chettiars,* (1919) Mad WN 613 : 52 IC 879.
603. *Nataraja v The South Indian Bank,* (1914) ILR 37 Mad 51 : 13 IC 91.
604. *Elumalai v Balakrishna,* (1921) ILR 44 Mad 965 : 66 IC 168 : AIR 1922 Mad 344, dissenting from *Perumal v Perumal,* (1921) ILR 44 Mad 196, p 200 : 61 IC 461 : AIR 1921 Mad 137.
605. *Elumalai v Balakrishna,* (1921) ILR 44 Mad 965; and see *V Vr Bank v KM Bank,* AIR 1949 Mad 52.

the transferor taking care to transfer the mortgage right by registered instrument, the debt and the security will get dissociated and the security may possibly cease.[606]

In *Imperial Bank of India v Bengal National Bank,*[607] the Privy Council went further. The Calcutta High Court had held that a transfer of a mortgage debt failed for want of a registered assignment, but the Privy Council held that the transfer might be treated as the transfer of a debt dissociated from the security, and that it was capable of being transferred under section 6 of the TP Act. Their Lordships considered that the debt divorced from the security was not an actionable claim, but a species of property for the transfer of which no specific mode was provided in the TP Act so that the transferee had to sue in the name of the transferor.

The question of the transfer of a mortgage debt was again considered in the case of *Fanny Skinner v Bank of Upper India.*[608] Fanny Skinner had borrowed money from the bank secured by a simple mortgage. The bank went into liquidation, and the liquidator as part of an arrangement of reconstruction executed an unregistered agreement transferring the mortgage debt to a trust. The liquidator then sued to enforce the mortgage. It was held that the agreement had not been completed and that as no transfer had been effected, the liquidator was entitled to sue. In the course of the case an interesting argument was raised and disposed of. It was contended that the agreement being unregistered, it operated as a transfer of the debt, but not of the security, so that the bank was left without the debt but with the security, and that the bank having lost the debt could not enforce the security. This was said to be the effect of the decision in *Imperial Bank of India v Bengal National Bank.*[609] Their Lordships explained that that case did not lead to so extraordinary a result. In that case, the mortgage debt were due to the Bengal bank and had been mortgaged by that bank to debenture holders.

The debenture holders could recover from the Bengal bank the moneys they had lent to the bank, and for the security of which the Bengal bank had transferred the mortgage debts due to itself. However, it was only if the debenture holders proceeded to realize the mortgage debts due to the Bengal bank that it was necessary for them to sue in the name of that bank.

(16) Debt Secured by a Charge

A debt secured by a charge is not a mortgage debt, and may be transferred as an actionable claim by an unregistered instrument. A charge differs from a mortgage in that it does not transfer an interest in property, but creates a right to payment out of the property specified.[610] Nevertheless, it falls within section 17 of the Registration Act, 1908 and the assignment of a charge must be by registered instrument.[611] An unregistered assignment of a debt to which a charge was annexed would pass the debt, but not the charge. This is the effect of the decision of the Madras High Court in *Rajagopala v Ranganatha.*[612] Although in that case the assignment had been construed as an express assignment of the charge as well as the debt, it is submitted that this makes no difference

606. (1921) ILR 44 Mad 965, p 969.
607. *Imperial Bank of India v Bengal National Bank,* (1931) ILR 59 Cal 377 : 58 IA 323 : 35 Cal WN 1034 : 54 Cal LJ 117 : (1931) All LJ 804 : 61 Mad LJ 589 : 33 BLR 1338 : 134 IC 6 : AIR 1931 PC 245.
608. *Fanny Skinner v Bank of Upper India,* 62 IA 115 : 5 IC 743 : AIR 1935 PC 108.
609. *Imperial Bank of India v Bengal National Bank.* (1931) ILR 59 Cal 377 : 58 IA 323 : 35 Cal WN 1034.
610. *Gobinda Chandra v Dwarka Nath,* (1908) ILR 35 Cal 837.
611. *Imperial Bank of India v Bengal National Bank,* (1931) ILR 58 Cal 136 : 131 IC 689 : AIR 1931 Cal 223 reversed on another point in 58 IA 323 : 134 IC 651 : AIR 1931 PC 245.
612. *Rajagopala v Ranganatha,* 152 IC 375 : AIR 1934 Mad 615.

for even if the assignment is not an express assignment of the charge, but merely operates as such an assignment, it comes within section 17(1)(b) of the Registration Act, 1908. In a judgment
in an earlier stage of the case last cited, J Madhavan Nair said that section 8 of the TP Act cannot override the provisions of the Registration Act, 1908.[613] Another Madras case must be distinguished, for it referred to a sale certificate which does not require registration.[614] The authority of that judgment is also impaired by an incorrect statement that an assignment of a charge need not be by registered instrument.[615] A case of Calcutta High Court also referred to the assignment of a charge with the debt, but the question of registration was not considered.[616]

(17) Decree

A decree is not an actionable claim, and a purchaser of a money decree for a secured debt cannot be behind the decree and enforce the security.[617]

(18) Interest on Debt

As to the sixth clause—the right of the transferee to the interest or income accrues from the date of the transfer in the same way as the right to rent and profits referred to in the second clause of the section. A transfer of shares, securities and promissory notes carries with it the right to future dividends and interest. If a debt is transferred, interest accruing after the date of the transfer passes as a legal incident of the property transferred, but not arrears of interest. If the debt is time-barred, the court cannot award interest, for interest is an accessory and when the principal is barred, the accessory falls along with it.[618]

(19) Possession

The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possession one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party.

9. Oral Transfer.—A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Synopsis

(1) Oral transfer ..... 121 (2) Part Performance 123

(1) Oral transfer

Writing was not necessary under the Hindu law for the validity of any transfer whatsoever,[619] and in all ancient systems of law, transfer of possession was the only requisite to the transfer of title. The TP Act makes writing necessary in the case of a sale of tangible

613. *Ranganatha v Rajagopala,* 142 IC 730 : AIR 1933 Mad 181.
614. *Sambasiva v Venkatarama,* (1926) 51 Mad LJ 95 : 95 IC 447 : AIR 1926 Mad 903.
615. See *Rangampudi v Venkateswarlu,* 152 IC 772 : AIR 1934 Mad 713 where the same learned judge has expressed the opposite opinion.
616. *Sheonandan Lal v Zainul,* (1915) ILR 42 Cal 849 : 29 IC 869.
617. *Ganpat v Sarupi,* (1878) ILR 1 All 446.
618. *Dhondiram v Taba,* (1903) ILR 27 Bom 330; *Hollis v Palmer,* (1836) 2 Beng NC 713.
619. *Balaram v Appa,* (1872) 9 Bom HC 121; *Hurprashad v Sheo Dayal,* (1876) 26 WR 55 : 3 IA 259, p 278.

immovable property of the value of ₹100 or upwards, or the sale of a reversion or other intangible thing;[620] in the case of a simple mortgage, and in the case of all other mortgages (except a mortgage by deposit of title-deeds) when the principal sum secured is ₹100 or upwards;[621] in the case of a lease if it is from year to year, or for any term exceeding one year or reserving a yearly rent;[622] and in the case of all gifts of immovable property;[623] and of all transfers of actionable claims.[624] Exchanges are subject to the same rule as sales;[625] and the law as to leases is subject to rules which the local government are empowered to make.[626]

Where the TP Act requires a registered instrument, the transfer cannot be effected in any other way. An unregistered deed of gift of immovable property does not effect a transfer.[627] A petition to the Collector admitting a transfer, or recitals in another deed or mutation of names or delivery of possession will not affect a transfer, if the TP Act requires a registered deed.[628] A transfer of title requires a conveyance, and this cannot be given effect by a mere agreement.[629] The Oudh Chief Court has held that a grant by way of *guzara*, being only a right to enjoy the usufruct, need not be made in writing,[630] but the correctness of this decision is doubtful.

Where the law requires a transfer to be made in writing an oral transfer will not convey any right from the transferor to the transferee,[631] but if no writing is required by the TP Act, the transfer may be made orally.[632] Thus, a partition of joint family property,[633] the relinquishment of a right by a joint family member,[634] a surrender of a lease,[635] a release by a mother of her interest in joint family property,[636] a grant of land for life in discharge of a claim for maintenance, an assignment of immovable property under a court's decree passed on the basis of a family settlement contained in a composite deed,[637] may be made orally.[638] Even though an oral agreement to sell is possible, the onus is on the person who pleads such oral sale agreement. As an unregistered document is unenforceable in the eyes of law for the transfer of property,[639] an assignment deed that conveys title in property for more than Rs 100/ must be registered.[640]

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620. Transfer of Property Act, 1882, section 54.
621. Ibid, section 59.
622. Ibid, section 107.
623. Ibid, section 123.
624. Ibid, section 130.
625. Ibid, section 118.
626. Ibid, section 107 and section 117.
627. *Hiralal v Gaurishankar,* (1928) 30 Bom LR 451 : 109 IC 149 : AIR 1928 Bom 250.
628. *Immudipattam v Periya Dorasami,* (1901) ILR 24 Mad 377 : 28 IA 46.
629. *Jadu Nath v Rup Lal,* (1906) ILR 33 Cal 967, p 983; *Rajeswar Prasad v Anil Kumar,* (1928) ILR 55 Cal 35 : 106 IC 117 : AIR 1927 Cal 956; *Keshrimal v Sukan Ram,* (1933) ILR 12 Pat 616 : AIR 1933 Pat 264.
630. *Gajraj v Indarpal,* 49 IC 406.
631. *Munnalal v Atmaram,* AIR 2008 (NOC) 843 (MP); *Kantaben Chandulal Shah v Gagiben,* AIR 2005 Guj 49; *Bishun Mahato v Rahe Khalifa,* AIR 2005 Jhar 85 : (2004) 4 JCR 94.
632. *Weavers Mills Ltd v Balkis Ammal,* (1969) ILR 1 Mad 433 : (1969) 2 Mad LJ 509 : AIR 1969 Mad 462.
633. *Gyannessa v Mobarakanessa,* (1898) ILR 25 Cal 210; *Satya Kumar v Satya Kripal,* (1909) 10 Cal LJ 503 : 3 IC 247; *Ma Sein Nyun v Maung U,* 25 IC 498.
634. *Gangubai v Mahagundappa,* AIR 2006 (NOC) 42 (Kant).
635. *Elias Meyer v Manoranjan,* (1918) 22 Cal WN 441 : 44 IC 297; *Brojo Nath v Maheshwar,* (1918) 28 Cal LJ 220 : 46 IC 100; *Fowler v Secretary of State,* 61 IC 852 : AIR 1921 Mad 363.
636. *Ramdas v Pralhad,* (1964) 66 Bom LR 499 : AIR 1965 Bom 74.
637. *Amteshwar Anand v Virendra Mohan Singh,* AIR 2006 SC 151 : (2006) 1 SCC 148.
638. *Madam Pillai v Badrakale,* (1922) ILR 45 Mad 6 : AIR 1922 Mad 311.
639. *Pravinbhai Becharbhai Viroja v State Of Gujrat,* 2010 SCC OnLine Guj 5607.
640. *Durga Matha Building Constructions Co-op Housing Society Ltd v Sada Yellaiah,* AIR 2010 AP 231 : LNIND 2010 AP 503.

A contract to settle property in consideration of marriage need not be in writing.[641] In *Imperial Bank of India v Bengal National Bank,*[642] CJ Rankin said that partition, release and surrender are all forms of transfer, but that so far as the TP Act is concerned, they come under no restriction. A right to recover a share of immovable property may be relinquished orally, and without an instrument in writing.[643] Oral transfers are valid in Punjab outside the cantonment and municipal limits.[644]

(2) Part Performance

The doctrine of part performance is an encroachment on the rule that when the Act prescribes the mode of transfer, the transfer may not be made in any other way. The doctrine is now enacted in section 53A and explained in the notes to that section.

10. Condition Restraining Alienation.—Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing off his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him:

Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

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(1) Principle Underlying the Section

The principle underlying this section is that a right of transfer is incidental to, and inseparable from, the beneficial ownership of property. An absolute restraint on that power is repugnant to the nature of the estate, and an exception to the very essence of the grant.[645] In

641. *Serandaya Pillai v Sankarlingam Pillai,* (1959) 2 Mad LJ 502.
642. *Imperial Bank of India v Bengal National Bank,* (1931) ILR 58 Cal 136 : 131 IC 689 : AIR 1931 Cal 223.
643. *Lal Singh v Chotey Beti,* (1934) All LJ 107 : 148 IC 502 : AIR 1933 All 854.
644. *Shankri v Milkha Singh,* (1941) 43 Punj LR 656 : 197 IC 282 : AIR 1941 Lah 407.
645. *Venkatrammanna v Brammanna,* (1809) 4 Mad HC 345; *Annatha v Nagamuthu,* (1882) ILR 4 Mad 200; Re *Rosher, Rosher v Rosher,* [1884] 26 Ch D 801 (fee simple), *Rochford v Hackman,* [1852] 9 Hare 475 (life interest); *Bradley v Peixoto,* [1797] 3 Ves 324; *Harbin v Masterman,* [1894] 2 Ch 184, pp 196-197.

Coke upon Littleton, it is said—Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void.[646] Re *Parry and Daggs*,[647] LJ Fry said:

> From the earliest times the courts have always leant against any device to render an estate inalienable. It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership.

In *Metcalfe v Metcalfe*[648] J Kekewich said:

> You cannot limit an estate to a man and his heirs until he shall convey the land to a stranger, because it is of the essence of an estate in fee that it confers free power of alienation, and it has long been settled that the same principle is applicable to gifts of personality.

The section incorporates a rule of justice, equity and goods conscience, and governs transfers to which the TP Act does not apply.[649] The High Court of Karnataka has held that a grant made by government (or by its authorised officer) in accordance with law, cannot be treated as a "transfer" within the meaning of section 5. Hence, section 10 of the TP Act or the rule against perpetuities does not apply to government grants. Accordingly, a permanent restraint on the alienation of the grant, if authorised by the law applicable to such grant, is valid.[650]

Illustrations

(1) *A, B, C* and *D* effected a partition of joint family property, and agreed that if any one of them should have no issue, he would have no power to sell his share but should leave it for the other sharers. *A* sold his share and died without issue, *B, C* and *D* sued to recover the share. The court held that the condition was void as repugnant to one of the legal incidents of property.[651]

(2) The testator devised an absolute estate to his son provided always that if the son, his heirs or devisees, or any person claiming through or under him or them desired to sell the estate in the lifetime of the testator's wife, she should have the option to purchase the estate for £3000. The value of the estate was £15000. The court held that this was an absolute restraint on alienation in the widow's lifetime and void.[652]

(2) Transfer Subject to a Condition or Limitation

The condition referred to in this section must be a condition subsequent as defined in section 31 which divests an estate which has already vested. "Condition" must be distinguished from "limitation." The word "limitation" is a term of English law. It refers to words used in a conveyance to limit or define the nature of the estate created.

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646. Co Litt, section 360.
647. *Parry and Daggs*, [1886] 31 Ch D 130, p 134.
648. *Metcalfe v Metcalfe*, [1890] 43 Ch D 633, p 639.
649. *Chandi Churn v Sidhesawari*, (1889) ILR 16 Cal 71 : 15 IA 149 (transfer before the Act); *Nand Singh v Pratap Das*, 76 IC 16 : AIR 1924 Lah 674 (a case from Punjab, where the TP Act is not in force); *Ramchandraji Maharaj v Lalji Singh*, (1959) ILR 38 Pat 49 : AIR 1959 Pat 49 (transfer to a Hindu idol outside the ambit of the TP Act).
650. *Laxmamma v State of Karnataka*, AIR 1983 Kant 237, paras 51, 53 and 57.
651. *Venkatrammanna v Brammanna*, 1 IC 345
652. Re *Kosher, Kosher v Kosher*, [1884] 20 Ch D 801 followed Re *Cockerill Mackaness v Percival*, [1929] 2 Ch 131. But see *Ratanlal v Ramamijadas*, AIR 1944 Nag 187 in which the Nagpur High Court held that the condition was a partial restraint.

In Indian law, the question whether the words are words of limitation or words of purchase is a matter of construction. Thus, if the bequest is to "*A* and his heirs" the words "and his heirs" are words of limitation indicating that *A* has an absolute estate, but if the bequest is to "*A* for life and after his death to his heirs" the heirs are direct objects of an independent and distinct gift.[653] In an Indian will, the words *putra poutradi krama* are words of limitation denoting an estate of inheritance.[654] In *Madhavrao v Balahhai,*[655] the property was settled in trust for "my daughter *K* during her life...and after her death in trust for the male heirs of the said *K*". It was contended that this was an attempt to create an estate tail which was bad under the Hindu law, but the Privy Council held that it was an independent gift to the person, who answered the description of heirs at the death of *K,* i.e., her sons living at her death. Words of limitation which denote an estate of inheritance do not of course imply a restriction on alienation.[656]

If there is a valid transfer, the condition in restraint of alienation is void, and the transfer stands. Thus, a bequest of an absolute estate subject to a condition that neither the devisee, nor his heirs should alienate the estate except for religious purposes is a valid bequest, but the condition is void for repugnancy.[657] However, limitations may be such as to create an estate not recognized by law, and if that is the case, the transfer fails. This distinction was made by the Privy Council in *Tagore v Tagore,*[658] where the testator attempted to create an estate in tail not recognized by Hindu law, with the result that the donee took an estate for life, and the heir at law succeeded to the estate at his death.

(3) Absolute Restraint on Transfer

A restraint on alienation may be absolute or partial. An absolute restraint is void,[659] a partial restraint is not.[660]

The section says that a condition which absolutely restrains the power of alienation is void. Re *Macleuy,*[661] MR Jessel said that whether the condition took away the whole power of alienation substantially, was a question of substance, not of form thus, Re *Rosher, Rosher v Rosher,*[662] the testator devised an absolute estate to his son with a proviso that if he sold during the lifetime of his wife, she should have an option of purchasing the estate at a price which was one-fifth of the market value. This was held to be in effect an absolute restraint, and void. A similar case was Re *Elliot, Kelly v Elliot*[663] where a tea plantation was devised absolutely, but a condition was annexed that if the devisee should sell the plantation "I will direct her to pay to my brother the sum of £1,000 out of the proceeds of such sale, also the further sum of £500 out of the proceeds of such sale to (her sister)"— the direction was held to be repugnant and void as a restraint on alienation. A provision in a partition deed prohibiting alienation of the property allotted absolutely to each coparcener without the

653. See Indian Succession Act, 1925, section 97.
654. *Ram Lal Mukerjee v Secretary of State,* (1880) ILR 7 Cal 304 : 8 IA 46.
655. *Madhavrao v Balahhai,* n+(1928) ILR 52 Bom 176 : 55 IA 74 : 107 IC 119 : AIR 1938 PC 33.
656. *Rajah Nursing v Roy Koylasnath,* 9 IA 55; *Vinayak Moreshwar v Baba,* (1889) ILR 13 Bom 373.
657. *Saraju Bala v Jyotirmoyee,* (1931) 35 Cal WN 903 : 58 IA 270 : 134 IC 648 : AIR 1931 PC 179; *Lalit Mohun v Chukkun Lal,* (1897) ILR 24 Cal 834 : 24 IA 76.
658. *Tagore v Tagore,* (1872) 9 Beng LR 377; *Saraju Bala v Jyotirmoyee,* (1931) 35 Cal WN 903.
659. *Bhavani Amma Kanakadevi v CSI Dekshina Kerela Maha Idavaka,* AIR 2008 Ker 38 : (2008) 1 KLJ 28 : (2008) 2 KLT 340.
660. See note below on "Partial restraint on transfer".
661. Re *Macleuy* [1875] 20 Eq 186, p 189.
662. *Rosher v Rosher,* [1884] 26 Ch D 81.
663. *Kelly v Elliot,* [1896] 2 Ch 353 See also Re *Cockerill Mackaness v Percival,* [1929] 2 Ch 131.

consent of the other sharers is invalid as an absolute restraint.[664] A condition in the Will, that the legatee is prohibited from alienating his property would be void and the legatee would be empowered to ignore the condition and sell the property to whomsoever he likes.[665] Where a husband settled property on his wives, but subject to a condition that they could not alienate without his consent, the condition was held to be void under this section.[666] The same rule has been applied in Punjab where the TP Act is not in force.[667] After sale of land under a registered sale deed, there was an agreement immediately thereafter between the vendor and the vendee, to the effect that vendee or his heirs will not alienate or dissipate or fritter away the land. It was held that the agreement violated section 10 of TP Act and section 23 of the Indian Contract Act, 1872. As the agreement was unregistered, it did not revoke the sale (section 92, proviso, Indian Evidence Act, 1872). Bar of estoppel or waiver would not operate against the vendee.[668]

In terms of section 10 any condition in respect of use of the land is void. Thus where land was sold to the state government subject to the condition that it would be used only for the purpose of establishing a university, but the alienee transferred the land to PUDA for development of a residential complex, the erstwhile landowner who had parted with their land and accepted compensation more than a decade earlier could not be permitted to dispute the transfer of land.[669]

(4) Restrictions for a Particular Time

As to restrictions for a particular time the case of *Rosher v Rosher,*[670] shows that a condition restraining alienation during a lifetime is invalid.

(5) Partial Restraint on Transfer

A condition only partially restraining alienation is valid.[671] In the case of a partial restraint, section 10 is not attracted.[672] Conditions restraining alienation for a particular time have already been considered in note (4) above. As to prohibition of alienation to a particular class, the English cases are not consistent. In *Attwater v Attwater,*[673] a condition not to alienate except to particular persons was held to be bad. On the other hand, a condition not to sell out of the family was held good by Lord Ellenborough in *Deo d Gill v Pearson,*[674] and by MR Jessel Re *Macleay.*[675] Both these decisions were approved by the Privy Council in *Muhammad Raza v Abbas Bandi Bibi,*[676] where it was held that a condition restraining the transferee from transferring to a stranger, i.e., outside the family, was not an absolute

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664. *Mudara v Muthu Hengsu,* 154 IC 587 : AIR 1935 Mad 33; *TV Sangham Ltd v Shanmugha Sundaram,* (1939) ILR Mad 954 : 2 Mad LJ 345 : 50 Mad LW 254 : (1939) Mad WN 812 : 184 IC 187 : AIR 1939 Mad 709.
665. *A Chammal v Rajamanickam Karthikeyan,* AIR 2010 Mad 34 : (2010) 2 MLJ 1210.
666. *Gomti Singh v Anari Kuar,* (1929) 27 All LJ 880 : 118 IC 152 : AIR 1929 All 492.
667. *Partap Das v Nand Singh,* (1924) 6 Lah LJ 419 : 85 IC 323 : AIR 1924 Lah 729.
668. *Brahma Nand v Roshani Devi,* AIR 1989 HP 21.
669. *Achammal v Rajamanickam Karthikeyan,* AIR 2010 Mad 34 : 2010 (2) Mad LJ 1210 : LNIND 2009 MAD 3158.
670. *Rosher v Rosher,* [1884] 26 Ch D 801.
671. *Canbank Financial Services Ltd v Custodian,* (2004) 8 SCC 355 : AIR 2004 SC 5123; *Mohd Raza v Abbas Bandi Bibi,* AIR 1932 PC 158 : 59 IA 236; *K Muniswamy v K Venkataswamy,* AIR 2001 Kant 246; *Thomas v A A Henry,* AIR 2008 (NOC) 1414 (Ker).
672. *Jagan Nalk v Cheddi Dholr,* AIR 1973 All 307 : 1973 All LJ 202.
673. *Attwater v Attwater,* [1853] 18 Beav 330.
674. *Deo d Gill v Pearson,* 1805] 6 East 173.
675. Re *Macleay* [1875] 20 Eq 186.
676. *Muhammad Raza v Abbas Bandi Bibi,* 59 IA 236 : 36 Cal WN 774 : 55 Cal LJ 510 : (1932) All LJ 709 : 63 Mad LJ 180 : 137 IC 321 : AIR 1932 PC 158.

restriction, and was valid. Cases in which a condition against alienation to a stranger have been held to be an absolute restraint[677] can no longer be regarded as good law. In the Privy Council case above referred to, their Lordships said that after the passing of the TP Act, a partial restriction upon the power of disposition would not, in the case of a transfer *inter vivos*, be regarded as repugnant, and that there was no authority to suggest that a different principle was applied by the courts in India before that Act. A condition in a deed of partition that if any coparcener wished to sell his share in a residential house or if his share were sold in any other way, the other coparcener would be entitled to buy it was held to be valid. An agreement of this sort is proper and is enforceable against the promisor's representatives, and is not hit by section 14.[678] Thus a restriction on alienation of property to strangers aimed at ensuring that property bequeathed did not go into hands of third party is valid and does not violate the rule of perpetuity.[679] Similarly, a condition in a deed of partition by joint owners of land that the owner of a share could only sell it to the members of the community has been held valid.[680] Where the sale-deed permitted the transferee to part with or dispose off his interest in the land to any other person but not within the period of five years, it was held that the sale-deed was not hit by section 10 or 11 of TP Act.[681]

In a case decided by Bombay High Court, the sale deed of a property included a condition that it should not be sold to anybody outside the family of the vendor. The vendee sold the property to cousins of the vendor. It was held that the first cousins very much belonged to the vendor's stock (family). There was no breach of the convenant. Even assuming that there was a breach of the convenant, it was immaterial because the condition incorporated in the sale deed is void under section 10.[682]

A condition that if the vendee sells, he shall give the vendor the option of buying back is obviously not an absolute restraint. Cases relating to such a condition have arisen with reference to the rule against perpetuity, and are considered in section 14 below. A provision in the sale deed that in the event of failure to construct a private college in the property sold there under, the property should be reconveyed by the transferee to the transferor for the same consideration would amount to an absolute restraint on alienation.[683]

A condition in a *kharposh* grant made by a *zamindar* in favour of a junior member that the subject-matter of the grant was not liable to be attached, and sold in execution does not amount to an absolute restraint, and is not void.[684] Similarly, a condition imposed by a bye-law on its members that a member cannot alienate the property to a non-Parsi person would be only a partial restraint and therefore valid and enforceable.[685]

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677. *Faiyaz Hussain v Nilkanth,* (1901) 4 OC 163; *Goya Din v Syed Mumtaz Husain,* (1907) 10 OC 136; *Teja Singh v Moti Singh,* 80 IC 918 : AIR 1925 Oudh 125; *Asghari Begam v Moula Baksh,* (1929) 27 All LJ 515 : 116 IC 90 : AIR 1929 All 381.
678. *Aulad Ali v Ali Athar,* (1927) ILR 49 All 527 : 100 IC 683 : AIR 1927 All 170; *Moulvi Ali Hossain Mia v Rajkumar Haldar,* (1943) 47 Cal WN 557 : (1943) ILR 2 Cal 605; *Ratanlal v Ramanujadasa,* AIR 1944 Nag 187.
679. *K Naina Mohamed v A M Vasudevan Chettiar,* (2010) 7 SCC 603 : 2010 (6) SCALE 449 : 2010 MPLJ 348 (SC).
680. *Mahmud Ali v Brikodar Nath,* AIR 1960 Ass 178.
681. *Loknath Khoud v Gunaram Kalita,* AIR 1986 Gau 52, p 53; See also note on "Agreements and Covenants for Pre-emption" under section 14.
682. *Manohar Shivram Swami v Mahadeo Guruling Swami,* AIR 1988 Bom 116 with respect to the alternative reasoning that the condition is void is not consistent with the Privy Council decision in *Muhammad Raza v Abbas Bandi Bibi,* AIR 1932 PC 158.
683. *Bhawani Amma Kanakadevi v CSI Dekshina Kerela Maha Idevaka,* AIR 2008 Ker 38 : (2008) 1 KLJ 28 : (2008) 2 KLT 340.
684. *Shiba Prasad v Lekhraj and Co,* (1945) ILR 23 Pat 871 : AIR 1945 PC 162.
685. *Zoroastrian Co-operative Housing Society Ltd v Dist Registrar, Co-op Societies (Urban),* AIR 2005 SC 2306 : (2005) 5 SCC 632.

It has been held that a clause in a lease deed, that the interest of the lease holder shall not be transferred without the written permission of the deputy commissioner did not impose a complete ban on transfer and was, therefore, not void under section 10.[686]

(6) Agreement in Restraint of Alienation

The section refers to a condition restricting the estate transferred, it has no application to an agreement affecting the transferee personally. In a case decided by Allahabad High Court,[687] the vendee executed a separate agreement that he would not transfer the property purchased to anyone except the vendor, and then at the same price. It was held that this agreement was void as it deprived the purchaser of the right of alienation. It is submitted that this is not correct unless, as in a Bombay case,[688] the agreement was by a registered instrument and part of the transaction of sale. The true rule was stated in the later Allahabad case of *Devi Dayal v Ghasita.*[689] In that case *A* sold a house to *B* and on the date of the sale, *B* executed a separate unregistered agreement that if he wished to sell the house, he would sell it back to *A* for the same price and would sell it to no one else, unless *A* declined to purchase. If this had been a condition of the sale it would have been invalid as a restraint on alienation,[690] but the court said that "this was a special personal contract between the parties which was binding on them and could be enforced against a transferee with notice". It is submitted that the effect of this decision is that an invalid condition in restraint of partition may yet operate as a personal covenant binding the covenantor personally, and creating an obligation enforcible against a transferee from him with notice under section 40. With reference to an award which contained an invalid condition against partition, the Privy Council said that it may have bound the parties who agreed amongst themselves to abide by it.[691]

(7) Restriction Against Alienation in Compromise

A compromise is not a transfer to which this section applies. A compromise operates, therefore, not as a transfer, but as an admission that the party has no right to alienate. The title so admitted may be a restricted interest which under section 6 is not transferable. This is explained in *Basanowda v Irgodatti*[692] where under a compromise between a widow and a reversioner, the widow was held to have a limited interest such as is referred to in section 6(d) — now section 6(dd)—which she could not alienate. Similarly, in *Diwali v Apaji,*[693] a case to which the TP Act did not apply, there was a compromise of a dispute between a widow and an adopted son under which an allotment of land was made for the maintenance of the widow with a provision in restraint of alienation. It was held that this land could not be attached for her debt as she had no disposing power over it. In *Mata Prasad v Nageshar Sahai,*[694] there was a dispute as to succession between a widow and a nephew. This was compromised on terms that the widow was to retain possession for life while the title of the nephew was admitted with a provision restraining him from

686. *Bhola Ram Chaudhary v State of Bihar,* AIR 1990 Pat 20, p 23.
687. *Dol Singh v Khub Chand,* (1921) 19 All LJ 848 : 64 IC 408 : AIR 1921 All 97.
688. *Allibhai v Dada,* (1931) 33 Bom LR 1296 : 136 IC 509 : AIR 1931 Rang 578.
689. *Devi Dayal v Ghasita,* (1929) 27 All LJ 1255, p 1256 : 119 IC 836 : AIR 1929 All 607.
690. *Gagasi Ram v Shahabuddin,* (1935) All LJ 410 : 157 IC 897 : AIR 1935 All 493.
691. *Jafri Begam v Syed Ali,* (1901) ILR 23 All 383 : 28 IA 111.
692. *Basanowda v Irgodatti,* (1923) ILR 47 Bom 597 : 73 IC 196 : AIR 1923 Bom 276.
693. *Diwali v Apaji,* (1886) ILR 10 Bom 342; *Gulab Kuar v Bansidhar,* (1893) ILR 15 All 371, on app *Bansidhar v Gulab Kuar,* (1894) ILR 16 All 443; *Munnisami Naidu v Ammani Ammal,* (1904) 15 Mad LJ 7.
694. *Mata Prasad v Nageshar Sahai,* (1925) ILR 47 All 883 : 53 IA 398 : 91 IC 371 : AIR 1925 PC 272; *Kapura v Madu Sudan Das,* (1943) 44 Punj LR 183 : 209 IC 609 : AIR 1943 Lah 168.

alienating during the widow's lifetime. The Privy Council upheld this as a family settlement, prudent and reasonable in the circumstances of the case. Similarly, in a Calcutta case,[695] a document settling a dispute between a Hindu widow and two surviving members of the family provided that any lease given of the family property should be void, unless signed and consented to by both parties, and these provisions were held to be valid.

It has been held by the Punjab High Court, however, that where the TP Act does not apply, a condition against alienation in a compromise is void.[696]

(8) Restraint on Mode of Alienation

If, however, the restraint is on the mode of alienation, it is not restraint within the meaning of this section.[697]

(9) Restraint Against Alienation in Gift

Under section 126 of the TP Act, a gift may be made on an agreed condition that it may be revoked on the happening of an event which does not depend upon the will of the donor. However, the condition contemplated by section 126 which is in a chapter dealing with "gifts" should not be repugnant to the provisions of sections 10 & 12 which deal with all "transfers of property by act of parties". Thus, where a deed of gift provided that the donee or his successor had no right to transfer the property and that if they did transfer, the same would be invalid and the donor or his successor would have a right to revoke the gift, the condition was held to be invalid.[698] The last paragraph of the section enacts that the condition of revocation does not affect the rights of transferees for consideration without notice. This makes it clear that the condition of revocation operates only as a personal covenant. It does not restrict the interest of the donee, and is not repugnant to the gift under section 10. It has, therefore, been held that if *A* makes a gift of his property to *B*, with a condition that *A* should be at liberty to revoke the gift if *B* transferred the property without *A*'s consent, the condition does not contravene the provisions of section 10, and is valid.[699]

(10) Partition and family arrangements

Section 10 per se does not apply to family settlements and partitions,[700] yet any total restraint on the right of alienation would be void.[701] In *Malayalandiyil Kayakool Edakozhi Subair v Kayyalakkakath Kunhamina Umma*,[702] the court held that even though section 10 is not applicable to the case of partition, but, the principle underlined is applicable in the case of partition also depending on the nature of the estate obtained. If the case is of absolute ownership, power of alienation must go along with it and any restraint of that power will be against the public policy and will be deemed void. Cases of restraint on partition are dealt with under section 11.

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695. *Kuldip Singh v Khetrani Koer*, (1898) ILR 25 Cal 869.
696. *Gurdit Singh v Babu*, (1954) ILR Punj 165 : AIR 1953 Punj 282.
697. *Mata Prasad v Nageshar Sahai*, (1925) ILR 47 All 883 : 52 IA 398 : 91 IC 370 : AIR 1925 PC 272.
698. *Brij Devi v Shiv Nanda Prasad*, (1939) ILR All 298 : (1939) All LJ 77 : AIR 1939 All 221; *Giani Ram v Balmakand*, (1956) 58 Punj LR 114 : AIR 1956 Punj 255; *Ramasamy v Wilson Machine Works*, AIR 1994 Madras 222 (NOC).
699. *Ma Yin Hu v Ma Chit May*, (1929) ILR 7 Rang 306 : 119 IC 737 : AIR 1929 Rang 226; *Makund v Rajrup*, (1907) 4 All LJ 708; See also note "Agreement in restraint of alienation" above.
700. *K Muniswamy v K Venkataswamy*, AIR 2001 Kant 246.
701. *Shyamal Ranjan Mukherjee v Nirmal Ranjan Mukherjee*, AIR 2008 (NOC)568 (All).
702. *Malayalandiyil Kayakool Edakozhi Subair v Kayyalakkakath Kunhamina Umma*, 2015 (4) KHC 870 : LNIND 2015 KER 15606.

In *Chamaru Sahu v Sona Koer,*[703] J Mookerjee had to construe a deed of family settlement between reversionary heirs and two Hindu widows by which the reversioners were restrained from alienating during the lifetime of the widows. He considered that the restraint was void if not under section 10 then under section 11, but as the object of the restriction was to protect the rights of the widows to receive maintenance from what had been their husband's property, he held that the alienees of the reversioners who had accepted a mortgage contrary to the provisions of the deed of settlement held the property subject to the rights of maintenance possessed by the widows. It is submitted that the restrictions on the reversioners being the result of a family settlement, was valid, as in *Mata Prasad's* case. In *Govind Waman v Murlidhar*[704] the Bombay High Court held that a compromise decree which contained a term contrary to section 10 is not for that reason invalid. The decision was based on the ground that a consent decree is binding on the parties, until it is set aside.

(11) Restraint on Transferor

The section only refers to restraint on alienation by the transferee or those claiming under him. It has no bearing on cases where on a transfer a restraint is put on alienation by the transferor. This may occur where the transfer is of a partial interest as in a mortgage. In such cases, it may be a clog on the equity of redemption.[705]

(12) Exception in the Case of Lease

A lease is an exception to the rule against an absolute restraint on alienation. This exception arises from the very nature of a lease which is a transfer of property for a time, or in perpetuity, but in which the lessor necessarily retains an interest. Thus, a condition in a lease that the lessee shall not sublet or assign is valid—section 108(j) read with the words "in the absence of a contract to the contrary." It is also immaterial that the lease is a permanent lease.[706] A condition requiring the lessee to pay a fourth of the purchase money as *nazar* to the lessor in case he should assign the lease is valid.[707] A condition in a permanent lease, that should the necessity for alienation by the lessor arise the lessee will surrender the lease to the lessor, is valid.[708] So also a condition in a perpetual lease that the lessee's right shall be heritable, but not transferable, is not void.[709]

The words in this section "when the condition is for the benefit of the lessor or those claiming under him" seem to be merely explanatory of the reason for the exception. They have been construed to mean that the restriction is invalid, unless accompanied with a

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703. *Chamaru Sahu v Sona Koer,* (1911) 14 Cal LJ 303 : 11 IC 301.
704. *Govind Waman v Murlidhar,* (1953) ILR Bom 948 : 55 Bom LR 670 : AIR 1953 Bom 412; *Bai Mangu v Bai Vijli,* (1967) 6 Guj LR 915 : AIR 1987 Guj 81. See also *Ramjibhai v Goverdhandas,* (1954) ILR Bom 615 : 56 Bom LR 365 : AIR 1954 Bom 370.
705. See notes under section 60.
706. *Kally Dass Ahiri v Manmohini Dassee,* (1897) ILR 24 Cal 440, p 447 approved in *Abhiram v Shyama,* (1909) ILR 36 Cal 1003 : 36 IA 148 : 4 IC 449; *Vyankatraya v Shivrambhat,* (1883) ILR 7 Bom 256, p 260; *Raja Jagat Ranvir v Bagriden,* AIR 1973 All 11.
707. *Sardakripa v Bepin Chandra,* (1923) 37 Cal LJ 538 : 74 IC 555 : AIR 1923 Cal 679; *Kumar Chandra v Narendranath,* (1930) ILR 57 Cal 953 : 127 IC 76 : AIR 1930 Cal 357; *Nabjan Sardar v Neburali Molla,* (1933) 37 Cal WN 272 : 57 Cal LJ 387 : 144 IC 764 : AIR 1933 Cal 506; *Parbhu Narain Singh v Ramzan,* (1919) ILR 41 All 417; *Swarna Kumar v Prahlad Chandra,* (1921) 26 Cal WN 874 : 67 IC 719 : AIR 1922 Cal 474.
708. *Rama Rao v Thimmappa,* (1925) 48 Mad LJ 463 : 87 IC 433 : AIR 1925 Mad 732; *Chettu Kuth v Kunhunni,* (1910) 9 Mad LT 484 : 9 IC 171.
709. *Bhairo Singh v Ambika Baksha,* (1942) Oudh WN 374; *Raja Jagative Ranvir v Baqriden,* AIR 1973 All 11.

right of re-entry.[710] This has been dissented from in a case decided by Madras High Court[711] on the ground that every such restriction is for the benefit of the lessor; but that case also held that a restriction without a right of re-entry gives the lessor a right to damages, but was invalid as a condition and does not have the effect of rendering the assignment invalid. The amendment made in section 111(g), by Act 20 of 1929, makes it clear that the breach of a condition against alienation will not work a forfeiture, unless the condition reserves a right of re-entry. A condition that in case of alienation by the lessee, the lease shall be void is not now sufficient to determine the lease, and the case of *Vyankataraya v Shivrambhat*[712] is now obsolete. Unless a right of re-entry is reserved, the breach of such a condition merely gives the lessor a right to an injunction and damages.[713]

The restriction on assignment prevents the lessee from assigning without the consent of the lessor. This is frequently expressed in the lease with the added clause that such consent shall not be unreasonably withheld.

A condition in a *darpatni* lease that if the *darpatni* is sold for arrears of rent, derivative tenures created by the *darpatnidar* would be extinguished, is not a restraint on alienation.[714] According to the Allahabad High Court, right to transfer is not legal in case of perpetual lease.[715]

Rent-free grants under the Agra Tenancy Acts—Uttar Pradesh Act 2 of 1901 and Act 3 of 1926—do not convey the proprietary title of the grantor landlord. Such grants are like leases exempt from the rule against absolute restraint of alienation embodied in this section. A condition in a rent-free grant restraining the grantee from alienating is, therefore, valid.[716]

(13) Effect of Involuntary Alienation on Conditions Against Alienation in Leases

An involuntary alienation does not constitute a breach of a condition against alienation in a lease. An assignment by the operation of law, such as a sale in execution, or a sale of the property of a company by an official liquidator,[717] or a sale by the official assignee,[718] is not a breach of the condition. In *Golak Nath v Mathura Nath,*[719] the Calcutta High Court said:

> We take it to be clear law in India, as in England, that a *general* restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum* as a sale under an execution.

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710. *Nil Madhab v Narattam,* (1890) ILR 17 Cal 826; *Udipi Seshagiri v Seshamma,* (1920) ILR 43 Mad 503; *Akram Ali v Durga,* (1912) 14 Cal LJ 614 : 10 IC 489; *Mahananda Saratmani v Saratmani,* (1912) 14 Cal LJ 585 : 10 IC 374.
711. *Parameshri v Vitappa,* (1903) ILR 26 Mad 157.
712. *Vyankataraya v Shivrambhat,* (1883) ILR 7 Bom 256.
713. See notes under section 108(j).
714. *Madhusudan v Midnapore Zemindary Co,* (1918) ILR 45 Cal 940 : 46 IC 129.
715. *Raja Jugal Ranvir v Bagriden,* AIR 1973 All 11.
716. *Har Dayal v Lal Nauratan,* 149 IC 669 : AIR 1934 All 358. See also, *Dinesh Chhapolia v State of Orissa,* AIR 2008 (NOC) 844 (Ori).
717. Re *West Hopetown Tea Co* (1890) ILR 12 All 192; *Tamaya v Timpa,* (1883) ILR 7 Bom 262; *Subbaraya v Krishna,* (1883) ILR 6 Mad 159.
718. *Deo v Bevan,* [1815] 3 M & S 353 : 105 ER 644.
719. *Golak Nath v Mathura Nath,* (1893) ILR 20 Cal 273, p 278; *Nil Madhab v Narattam,* (1890) ILR 17 Cal 826; *Promode Ranjan v Aswini,* (1914) 18 Cal WN 1138 : 26 IC 23; *Mohendra v Gagan Chandra,* 78 IC 802 : AIR 1925 Cal 471.

But there may be an express prohibition of alienation in execution, and if so it will be enforced. In a Bombay case[720] where the condition was "not to let the land be sold or attached in execution," CJ Sargent said that if the lessee allowed the land to be attached and sold by not taking measures to satisfy his judgment creditor, there would be a breach both according to the letter and spirit of the provision in the lease. However, a condition in a decree on a compromise that a party shall have no power of alienation, is not broken if the property is sold in execution of a decree against the party.[721]

(14) Hindu and Mahomedan Law

The prohibition of a condition in absolute restraint on alienation enacted in this section conforms to Hindu and Mahomedan law. Under Hindu law, such a condition either in a gift *inter vivos*[722] or in a will,[723] is void. Thus where the person gets the property under a Will, with absolute powers to enjoy it, any condition restraining alienation would be void.[724] Even before the amending Act which makes the section directly applicable to Hindus, many cases affecting Hindus were decided with reference to this section.[725] In Mahomedan law also, a condition in restraint of alienation attached to a gift is void.[726] However, when a Mahomedan widow was restrained from alienating to a stranger as the result of a compromise, the Chief Court of Oudh applied the rule that a compromise is in no sense an alienation, and held that the restraint was valid.[727] This case was confirmed on appeal by the Privy Council,[728] and their Lordships observed that, apart from the favour with which courts regard family settlements, such a restraint was neither inconsistent with Mahomedan law, nor with section 10 of TP Act, and was permissible under English law which is applicable as a rule of justice, equity and good conscience.

(15) Married Woman

The proviso recognizes as another exception the restraint on the power of anticipation in the case of a married woman who is not a Hindu, Mahomedan or Buddhist. This restraint was a clause introduced in marriage settlements whereby property was settled on married women for their separate use without power to sell or charge the corpus of the estate. The English Common law rule that a woman's property became her husband's on marriage was abrogated in respect of marriage after 1 January 1866, by section 4 of the Indian Succession Act, 1865. However, in settlements designed to protect married women from themselves, this clause was retained and received statutory recognition in this section and in sections 56 and 58 of the Indian Trusts Act, 1882. The Married Women's Property Act, 1874, was passed to establish the separate property of married women who were married before 1 January 1866

720. *Vyankatraya v Shivrambhat,* (1883) ILR 7 Bom 256.
721. *Bachumal v Vessimal,* 99 IC 972 : AIR 1976 Sau 143.
722. *Anantha v Nagamuthu,* (1882) ILR 4 Mad 200; *Bhairo v Parmeshri,* (1885) ILR 7 All 516; *Muthukumara v Anthony,* (1915) ILR 38 Mad 867 : 24 IC 120; *Rukhminibai v Laxmibai,* (1920) ILR 44 Bom 304 : 56 IC 361; *Mahram Das v Ajudhia,* (1886) ILR 8 All 452; *Khiali Ram v Raghunath Prasad,* (1906) 3 All LJ 621; *Krishna v Shanmuga,* (1872) 6 Mad HC 248.
723. *Ashutosh v Doorga,* (1880) ILR 5 Cal 438 : 6 IA 182; *Gokul Nath v Issur Lochun,* (1887) ILR 14 Cal 222; *Rajkishori v Debendranath,* (1888) ILR 15 Cal 409 : 15 IA 37; *Chundi Churn v Sidhesawari,* (1889) ILR 16 Cal 71 : 15 IA 149; *Lalit Mohun v Chukkun Lal,* (1897) ILR 24 Cal 834 : 24 IA 76.
724. *Jagtar Singh v State of Punjab,* AIR 2012 P&H 145 : LNIND 2012 PNH 41.
725. *Ambalal v Baldeodas,* AIR 1947 Rang 191.
726. *Babu Lal v Ghansham Das,* (1922) ILR 44 All 633 : 70 IC 84 : AIR 1922 All 205; *Hussain Khan v Nateri,* (1872) 6 Mad HC 356.
727. *Abbas Bandi Bibi v Saiyed Mohammad Raza,* (1929) ILR 4 Luck 452 : 120 IC 387 : AIR 1929 Oudh 193.
728. *Muhammad Raza v Abbas Bandi,* 59 IA 236 : (1932) All LJ 709 : 34 Bom LR 1048 : 36 Cal WN 774 : 63 Mad LJ 180 : 137 IC 321 : AIR 1932 PC 158.

with reference to their own wages and earnings. Section 7 of that Act says that a married woman may sue or be sued in her own name in respect of her separate property. Section 8 provides that a person entering into a contract with a married woman with reference to her separate property may sue and recover against her to the extent of that property. The High Court of Calcutta held that these provisions enabled a creditor to enforce his claim also against property which a married woman is restrained from alienating.[729] This decision was followed by J Farran in a case of Bombay High Court[730] with great reluctance. The Madras High Court, however, held that full meaning can be given to section 8 of the Married Women's Property Act without imputing to the legislature an intention to ignore conditions in restraint of alienation distinctly recognized in a later Act.[731] Statutory effect has been given to the Madras view by the amended proviso to section 8 of the Married Women's Property Act, substituted by section 2 of the Transfer of Property (Amendment) Supplement Act, 1929. This expressly provides that decrees passed against a married woman under section 8 cannot be executed by the attachment or sale of property she is restrained from alienating during marriage.

(16) Securities and Shares

The definition of "securities" will only take in shares of a public limited company notwithstanding the use of the words "any incorporated company or other body corporate" in the definition. It is evident that for shares of a public limited company to come within the definition of securities they have to satisfy that they are marketable.[732]

Statutory Prohibitions

Transfer of property is not always impermissible but subject to conditions prescribed by Government,[733] and the statutory bar on alienation will override the provisions of the Transfer of Property Act.[734] Thus there may be a statutory restriction on transfer of land by a member of Scheduled Caste to a person other than Scheduled Caste. Such notification would not be hit by section 10.[735] However, when a right of transfer has been provided by provisions of a statute and bar contemplated does not apply to the case at hand, no clause or a condition in original patta granted by zamindar can restrict such a right of transfer.[736]

Creation of life estate:

A life estate can validly be created under a settlement. In *Solomon v Edward Alexander,*[737] *A* executed a settlement creating a life estate in favour of B and his wife and upon their death, the property was to vest absolutely in *C*. *B*'s wife released her right in favour of B and B sold the total property to *D*. It was held that as they had a life estate, neither his wife was competent to release her life interest to her husband nor was *B* competent to execute a sale

729. *Hippolite v Stuart,* (1885) ILR 12 Cal 522.
730. *Cursetji v Rustomji,* (1887) ILR 11 Bom 348.
731. Re *Mantel and Mantel,* (1885) ILR 18 Mad 19; *Goudoin v Venkatesa,* (1907) ILR 30 Mad 378.
732. *Bhagwati Developers Pvt Ltd v Peerless General Finance Investment Company Ltd,* 2013 (9) SCC 584 : (2013) 3 CompLJ 241 (SC) : JT 2013 (10) SC 583 : 2013 (9) SCALE 382.
733. *Laxman Tatyaba Kankate v Taramati Harishchandra Dhatrak,* (2010) 7 SCC 717 : AIR 2010 SC 3025 : 2010 (7) SCALE 45 : LNIND 2010 SC 586.
734. *Goa Foundation v UOI,* (2014) 6 SCC 590; *Gohil Jesangbhai Rayasangbhai v State of Gujarat,* (2014) 5 SCC 199; *Gwalior Sugar Co Ltd v Anil Gupta,* (2012) 12 SCC 19. and would also prevail over sections 10 and 7 *Dipak Babaria v State of Gujarat,* (2014) 3 SCC 502 : AIR 2014 SC 1792 : 2014 (3) SCJ 673 : 2014 (3) All MR 446.
735. *State of Rajasthan v Aanjaney Organic Herbal Pvt Ltd,* (2012) 10 SCC 283 : LNIND 2012 SC 561 : AIR 2013 SC 581 : 2012 (9)SCALE 138.
736. *Gwalior Sugar Co Ltd v Anil Gupta,* (2012) 12 SCC 19.
737. SA (MD) No 559 of 2014, decided on: 16 February 2017, High Court of Madras (Madurai Bench).

deed of his life estate. Their contention that a restraint on their power of alienation was void in light of section 10 was rejected as what was created in their favour was a life estate and not an absolute estate with restraint on power of alienation.

11. Restriction repugnant to interest created.—Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose off such interest as if there were no such direction.

[738][Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.]

Synopsis

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(1) Amendment

The only amendment made in this section by the amending Act 20 of 1929, is the substitution of the second paragraph for the old second paragraph.

(2) Principle

This section refers to a restriction on the enjoyment of property, while section 10 refers to a restriction on the transfer of property. Both sections rest on the same principle that a condition repugnant to the interest created is void. Where property is transferred absolutely, it must be transferred with all its legal incidents. The vendor is not competent to sever from the right of property, incidents which the law inseparably annexes to it, and to abrogate the law by a private arrangement. A condition repugnant to the interest created is void when the property is transferred absolutely.[739] A 'habendum' (the part of the deed of conveyance which defines the nature of the estate granted, beginning with the words 'to hold') cannot override section 54 (which defines 'sale'). In a deed of sale, there cannot be created a life-interest in favour of the vendee. Such a limitation would be repugnant to section 11.[740]

(3) Sections 10 and 11 Compared

Section 11 refers to absolute interest only. A restraint on transfer is repugnant to any interest in property, whether absolute or limited, for the right of transfer is an incident of

738. Subs. by Act 20 of 1929, sec. 8, for the original paragraph.
739. *Achammal v Rajamanickam Karthikeyan*, AIR 2010 Mad 34 : 2010 (2) Mad LJ 1210 : LNIND 2009 MAD 3158.
740. *Manjusha Debi v Sunil Chandra*, AIR 1972 Cal 310 : (1972) 1 Cal LT 346 (HC) : ILR 1973 (1) Cal 23.

ownership. A restriction on enjoyment is repugnant to an absolute interest, but may not be repugnant to a limited interest such as a lease-hold or a life-estate.[741]

ILLUSTRATIONS

(1) *A* makes an absolute gift of a house to *B* with a direction that *B* shall reside in it. The gift is absolute and the direction is void. *B* may live in the house or not as he pleases.

(2) *A* makes a gift of a house to *B* on condition that the gift will be forfeited if *B* does not reside in it. The condition is valid, for the gift is not an absolute gift but one subject to a condition of defeasance—section 28 or 31.

(3) *A* by sale conveys an absolute interest in a farm to *B*. The sale deed contains a direction that *B* shall not cut down the trees. The direction is invalid.

(4) *A* assigns a life interest in a farm to *B* for her maintenance. The deed contains a direction that *B* shall not cut down the trees. The direction is valid.

It has been held that the provisions of this section override section 126, and that a gift restraining enjoyment is void.[742]

Absolute interest fall under both sections 10 and 11, and the words "applied" (section 11) and "disposed" (section 10) show that the sections do to a certain extent overlap. This is well illustrated by the case of *Chamaru Sahu v Soma Koer.*[743] In that case a Hindu widow transferred her husband's estate to the reversionary heirs with a condition that they should not alienate it in her lifetime. The case was one under section 10, but in view of some observations of MR Jessel Re *Macleay,*[744] J Mookerjee doubted if the restraint was absolute within the meaning of section 10, and, therefore, decided the case under this section.[745]

Cases restricting the right of partition fall as much under the section as the other.

(4) Distinction Between section 11 and section 31

The basic distinction between these two provisions relates to:

(i) direction envisaged in section 11;

(ii) a condition envisaged in section 31;

(iii) an interest being created absolutely under section 11; and

(iv) an interest being created not qualified by the word 'absolutely'; but with a condition superadded in section 31 of TP Act.[746]

(5) Indian Succession Act

The section corresponds with section 138 of the Indian Succession Act, 1925. The following illustration is annexed to the section in the Indian Succession Act, 1925:

A sum of money is bequeathed towards purchasing a country residence for *A*, or to purchase an annuity for *A*, or to place *A* in any business. *A* chooses to receive the legacy in money. He is entitled to do so.

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741. See note below, "Absolutely".
742. *N Maneklal v Bai Savita,* in CA 959 of 1963, dated 1 October 1965, unreported.
743. *Chamaru Sahu v Soma Koer.* (1911) 14 Cal LJ 303 : 11 IC 301; see *Manjusha Devi v Sunil Chandra,* AIR 1972 Cal 310 : (1972) 1 Cal LT 346 (HC) : ILR 1973 (1) Cal 23.
744. Re *Macleay* [1875] 20 Eq 186.
745. See note (7) to s 10.
746. *Govindamma v Secretary of Municipal First Grade College, Chintamani* AIR 1987 Kant 227, p 230.

(6) Absolutely

The section does not apply, unless the transfer creates an absolute interest in the transferee. For a transferee to deal with interest in the property transferred "as if there was no such direction" regarding the particular manner of enjoyment of the property, the instrument of transfer should evidence that an absolute interest in favour of the transferee has been created. The section rests on the principle that any condition which is repugnant to the interest created is void, and when property is transferred absolutely, it must be done with all its legal incidents.[747] It does not apply for instance, to a lease which is a transfer of a limited interest, and the lessee is bound by the conditions and covenants expressed or implied in the lease restricting his mode of enjoyment. When a deed of gift gave land to the donees as "they are the descendants of the same stock as my family and there remains nothing now for their support, and the gift was expressed to be for their maintenance, a covenant restrictive of alienation was held not to be void for repugnancy, as the gift was not of an absolute interest, but of usufruct only.[748] So also, when land is granted only for use and cultivation;[749] or when a grant is made for life;[750] or a vendor reserves a subordinate interest for himself.[751] However, when an absolute estate is conveyed, any restriction on its enjoyment is invalid. Thus, when a co-sharer of a village sold his share to another sharer who executed at the same time an agreement not to collect rents, or demand partition, or alienate or encumber, or else the sale would be avoided, the court read the two documents together, and held the agreement to be repugnant to the proprietary interest conveyed by the sale deed.[752] A stipulation in a sale deed for the payment of a certain amount to the vendor out of the profits of the property by way of rent was held to be illegal.[753] In a deed of gift, properties were transferred to the son by his deceased father, on condition to provide maintenance to his dependents. Such a condition is not, in any way, repugnant to the interest created by the instrument. It is not hit by the provisions of section 11. The son was bound to maintain his stepmother, under the express terms of the deed of gift.[754] Where the property was sold absolutely to *B* by a registered sale deed but the deed mentioned that the purchaser would not be entitled to have a *pukka* construction in front of the shop or construct a basement, the restrictions would amount to a restraint within the meaning of section 11 and would be void.[755]

Once an absolute interest is created in favour of a person, no restriction can be placed as to the manner in which such interest is to be enjoyed. Where under a partition deed each coparcener received the property as a full owner thereof, but a condition was incorporated in it preventing a coparcener from alienating his share, it was held that such clause in the partition deed restricting the right of the coparcener over his share would be void and the coparcener can execute a will of the share, bequeath his share and confer a valid title on the legatee.[756]

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747. *Indu Kakkar v Haryana State Industrial Development Corporation Ltd,* (1999) 2 SCC 37 : AIR 1999 SC 296.
748. *Jagdeo Baksh v Jwala Prasad,* (1913) 15 OC 345 : 15 IC 244, p 246.
749. *Kateswar Estate v Muhammad Amir,* (1918) 5 Oudh LJ 149 : 46 IC 73.
750. *Sooramma v Venkatraman,* (1951) 2 Mad LJ 664 : AIR 1952 Mad 116.
751. *Bejoy Krishna v Ishwar Damodar,* AIR 1954 Cal 400.
752. *Mahram Das v Ajudhia,* (1886) ILR 8 All 452; *Official Receiver v Samudravijayan,* (1939) 1 Mad LJ 575 : 49 Mad LW 591 : 1939 Mad WN 378 : 185 IC 288 : AIR 1939 Mad 509.
753. *Shiv Nath v Lachhmi Narain,* AIR 1938 Oudh 17; *Lilawati v Firm Ram Dhari,* AIR 1971 P & H 87; *State of Rajasthan v Jeo Raj,* AIR 1990 Raj 90, p 94.
754. *Panna Lal Hazra v Fulmoni Hazra,* AIR 1987 Cal 368; see also note (2) above, "Principle".
755. *Umashankar Agrawal v Daulatram Sahu,* AIR 2011 Chh 72.
756. *Jayawant Baliramji Panchbhai v Anusuyabai Vasantrao Deshmukh,* AIR 2017 Bom 178 : 2017 (5) Bom CR 423 : 2017 (5) ABR 77.

(7) Partition

A right to partition is an incident of joint ownership of property. In *Umrao Singh v Baldeo Singh,*[757] a testator left his property to his sons jointly with a direction that the property should not be partitioned till all the sons attain majority. The Lahore High Court held that this was an invalid restriction on the right of enjoyment even though it was for a limited time. An agreement not to partition, though it may be binding on the immediate parties, will not bind their successors in interest.[758] The Bombay High Court has held that such an agreement is inconsistent with the Hindu law, and will not bind even the parties themselves;[759] and the Allahabad High Court has held that even an immediate party is not bound by an agreement not to partition for an indefinite time.[760]

ILLUSTRATION

An arbitrator made an award between two sisters giving each a half share of an estate and appointing the husband of one sister manager, but directed that neither sister would have a right to claim partition. One sister died and her son sued for partition. The Privy Council held that the clause in restraint of partition afforded no defence to the *son's* suit for partition. Their Lordship said:

> It may have bound the parties who agreed among themselves to abide by it; but as against the present plaintiff, the clause has no effect whatever ... (The arbitrator) had no power to make property which was divisible by law indivisible forever.[761]

On the other hand, an estate may be impartible by custom, or by the terms of the grant, for the Crown has power to grant or transfer land and by its grant or transfer, to limit in any way it pleases the descent of such lands.[762]

(8) Hindu and Mahomedan Law

The invalidity of conditions in restraint of enjoyment of property is recognized both in Hindu and Mahomedan Law. A direction in restraint of partition in a Hindu will;[763] or in a Hindu gift[764] is void. In *Anantha v Nagamuthu*[765] it was decided under Hindu law that a condition in a gift to *Brahmins* restrictive of alienation is invalid as being repugnant to the nature of grant; and the same decision was given in *Rukminilal v Laxmibai*[766] under this section. An estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents, and there is nothing in the Hindu law which would permit of a departure from that principle.[767] Under Mahomedan law when a gift is made subject to a

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757. *Umrao Singh v Baldeo Singh,* (1933) ILR 14 Lah 353 : 143 IC 615 : AIR 1933 Lah 201.
758. *Anand Chandra v Pran Kisto,* (1866) 3 Bom LR 14; *Anath Nath v Mackintosh,* (1871) 8 Bom LR 60; *Rajendra v Sham Chand,* (1881) ILR 6 Cal 106; *Rup Singh v Bhabhuti,* (1920) ILR 42 All 30 : 58 IC 632; *Abu Muhammad v Kamiz Fizza,* (1905) ILR 28 All 185; *Jafri Begam v Syed Ali,* (1901) ILR 23 All 383 : 28 IA 111, p 118.
759. *Ramlinga v Virupakshi,* (1883) ILR 7 Bom 538; *Radhanath v Tarrucknath,* (1896) 3 Cal WN 126.
760. *Chandar Shekar v Kundan Lal,* (1909) ILR 31 All 3 : 1 IC 554.
761. *Jafri Begam v Syed Ali Raza,* (1901) ILR 23 All 383 : 28 IA 111, p 118. See also *Sirmohan v MacGregor,* (1901) ILR 28 Cal 769, p 786
762. *Rajindra v Raghubans,* (1918) ILR 40 All 470 : 45 IA 134 : 48 IC 213; As to whether a partition is a transfer, see notes under section 5.
763. *Raikishori v Debendranath,* (1888) ILR 15 Cal 409 : 15 IA 37; *Mokoonda Lall v Ganesh Chandra,* (1876) ILR 1 Cal 104.
764. *Narayanan v Kannan,* (1884) ILR 7 Mad 315.
765. *Anantha v Nagamuthu,* (1882) ILR 4 Mad 200.
766. *Rukminilal v Laxmibai,* (1920) ILR 44 Bom 304 : 56 IC 361; *Saraju Bala v Jyotirmoyee,* (1931) 35 Cal WN 903 : 58 IA 270 : 134 IC 648 : AIR 1931 PC 179.
767. *Smt Ram Kali v Smt Sumitra,* AIR 1983 All 429.

condition which derogates from its completeness, the gift is valid, but the condition is void.[768]

(9) Restrictions for Beneficial Enjoyment of One's Own Land

This section relates to the enforcement of the restrictions against the transferee, while section 40 refers to the enforcements of the restriction against purchasers from the transferee.

The words "compel the enjoyment", which occurred in the old section, have been omitted in the section as amended. The omission of those words, however, does not effect any change in the law, for though words have been omitted, the substituted words "to enforce such direction" have the same effect. In other words, the section as amended recognizes as much as did the old section that there may be a covenant which, though affirmative in character, may be enforceable as between the actual parties to the transfer, i.e., the transferor and transferee. Where upon the sale of the property, a portion of the property was retained by the seller and the imposition of a restriction was necessary in order the vendor could enjoy his property, such restriction or condition would be valid and enforceable. However, if the seller fails to demonstrate that the condition imposed in the sale deed was made for the purpose of securing the beneficial enjoyment of his another property the condition would amount to a restriction repugnant to the interest created and thus void.[769] In *Bhupati Bhushan v Birendra Mohan*[770] it was held that a condition in a deed by which a vendee agrees to pay an annuity to *B* for life, and thereafter to the vendor, his heirs and successors forever out of a specific property, such a condition though not a covenant recurring with the land is a perpetual charge binding on the vendee and his heirs. Respondent-transferee is bound by the covenant in the sale deed mentioning the existence of a decree of permanent injunction against the vendors, in the enjoyment of the property purchased by him.[771]

In *Umashankar Agarwal v Daulatram Sahu,*[772] a shop was sold subject to a condition that purchaser shall not be entitled to construct any basement or any pakka construction but there was nothing to show that this direction was made for the purpose of securing the beneficial enjoyment of vendor's another property. The condition stipulated was held contrary to the mandate of section 11 and hence void.

(10) Position under section 40

Paragraph 1 of section 40 before its amendment, also contained the words "compel its enjoyment," which recognized that an affirmative covenant may be enforced even against a purchaser from a transferee. However, those words have now been omitted in that section, and the legislature has adopted the view that an affirmative covenant cannot now be enforced against a purchaser from a transferee. It is only a negative covenant that may be enforced against him, eg a covenant not to build. If there is such a covenant, and the purchaser buys with notice of the covenant, the court may restrain him by an injunction from building. There is no substitution in section 40 of the words "enforce such direction" for the words "compel the enjoyment" as in section 11. A restrictive covenant imposed for the better enjoyment of property cannot be enforced against the covenantor by a stranger, unless such a right can be specifically transferred to him.[773]

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768. *Moulvi Muhammad v Fatima Bibi,* 12 IA 159.
769. *Umashankar Agrawal v Daulatram Sahu,* AIR 2011 Chh 72.
770. *Bhupati Bhushan v Birendra Mohan,* (1948) ILR 1 Cal 492.
771. *Ramachandra Deshpande v Laxmana Rao Kulkarni,* AIR 2000 Kant 298, para 19.
772. *Umashankar Agarwal v Daulatram Sahu,* AIR 2011 Chh 72.
773. *BD Bamable v Michale K Lal,* AIR 1951 Ajmer 75.

The result then is that there is no alteration in the law in section 11. The alteration is in section 40 to the extent mentioned above. In *Nand Gopal v Batuck Prasad*[774] a covenant to pull down, when required by the vendor, the rooms over a passage between the house of the vendor and the house sold, was held to fall under the second paragraph of section 11, and to be enforceable under section 40 against a transferee from the vendee. The case was decided under the law as it was before the amendment of the two sections. Under the amended sections, the covenant could have been enforced against the vendee under section 11, but being an affirmative covenant it could not have been enforced against a transferee from the vendee.

In determining whether a covenant is negative or positive, the court looks to the substance, and not to the form of expression.[775] Thus absence of negative words cannot by itself always indicate that the covenant is of a positive character. Thus covenant to leave a space having the width of 12 fingers to the respective side's from a common wall in case of future reconstruction of respective portions of building though positive in form is negative in its essence and character.[776]

(11) Enforceable Against Whom

A single Judge of the Allahabad High Court has held that the second part of section 11 can be enforced only by the transferor, and not by a transferee of another portion of the property. This is so even though all the transfers have similar conditions imposed, and all were concluded on the same day and the conditions are imposed for the beneficial enjoyment of the portions transferred to such other transferees. A contract binds only the parties thereto. Section 40 also does not apply as it is confined to land burdened with restrictive covenants.[777]

In *Santhakumaran v Vivekanandan*,[778] the parents of two sons, S_1 and S_2 assigned a part of property in the north of the property owned by them and rice mill therein to S_2. Since they retained a portion of the property with them, the assignment imposed a few covenants on S_2, to prevent the possible nuisance on account of the functioning of the rice mill. By virtue of the covenants, S_2, among others, was to construct a compound wall at a height of 8 feet separating the properties given to him and retained by the parents; to keep a gate opening to the property in dispute for entry to the rice mill on the compound wall directed to be constructed; to construct a compound wall on the western boundary of the property and to maintain the gate at the southern boundary of the property for the use of S_2 as also the parents by keeping one of its key with him and giving one key to the parents. Later, S_1 purchased the residential property retained by the parents. After the parents' death, both the parties obtained rights in the remaining one half of the property in dispute. Thereafter, S_2 demolished the compound wall on the western boundary and the gate installed on the southern boundary of the property. The issue was whether a transferee of the covenantee is entitled to enforce the covenants imposed for the beneficial enjoyment of the property acquired by him. The court held that the second part of section 11 saves the restrictions made for the purpose of securing the beneficial enjoyment of the remaining property of the transferor and when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land and said to run with it. Further, the benefit annexed to the land is available even to an assignee who is not aware of the benefit at the time of assignment. Therefore S_2 had to abide by the covenants.

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774. *Nand Gopal v Batuck Prasad*, (1932) ILR 54 All 17 : (1932) All LJ 3 : 133 IC 541 : AIR 1932 All 78.
775. *Wolverhampton and Walsal Rly Co v London and NW Rly Co*, [1873] 16 Eq 433, p 440; *Lord Strathcona Steamship Co v Dominion Coal Co*, [1926] AC 108 : [1925] All ER Rep 87.
776. *Princy v Jose*, AIR 2010 Ker 1 : (2009) 2 KLJ 335 : (2009) 2 KLT 426.
777. *Bhagwat Prasad v Damodar Das*, AIR 1976 All 417; *Leela v Ambujakshy*, AIR 1989 Ker 308, p 310.
778. *Santhakumaran v Vivekanandan*, 2016 (1) KLJ 419 : 2016 (1) KLT 841.

12. Condition making interest determinable on insolvency or attempted alienation.—Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose off the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

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(1) Forfeiture on Insolvency

The object of the section is to protect the creditors of the transferee who would otherwise be prevented from having recourse to the property transferred for the satisfaction of their debts. Despite a condition of defeasance on insolvency, the property would vest in the official receiver or the official assignee, as the case may be. The words "dispose off" no doubt refer to settlements, for it would be a fraud on creditors if a man was permitted to settle his property in trust for himself until he should take advantage of the Act for the relief of insolvent debtors, and after that on a near relation.

ILLUSTRATION

A settles property in trust for himself until his death or bankruptcy and then over, on either of these events, on his wife. *A* is adjudged insolvent. *A*'s life interest vests in the Official Receiver or Official Assignee.

(2) Forfeiture on Attempted Alienation

In so far as the section invalidates a condition of defeasance on an attempted alienation, it rests on the same principles as sections 10 and 11 as to restrictions repugnant to the interest transferred.

Provident Fund

A rule of Provident Fund that a member purporting to transfer or assign his share or interest in the fund should forfeit such share or interest was held to be invalid under this section. The member applied to be declared insolvent. The Calcutta High Court held that though the vesting in the official assignee, which was the effect of the application, was a transfer by operation of law, yet the member's application to be declared insolvent was a voluntary transfer under the rule. However, as the rule was invalid there was no forfeiture to the fund, but the interest did not vest in the official assignee for the benefit of the creditors.[779]

Stock Broker's card

The section has no application to a rule of Stock Brokers' Association forfeiting a defaulting member's card of membership.[780]

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779. Re *Earnest Clarence O'Brein,* (1933) ILR 60 Cal 926 : 37 Cal WN 1050 : 147 IC 422 : AIR 1933 Cal 701; *Rochford v Hachman,* [1852] 9 Hare 475.
780. *Official Assignee of Bombay v Shroff,* 59 IA 318 : 36 Cal WN 909 : 55 Cal LJ 592 : 63 Mad LJ 623 : 137 IC 766 : AIR 1932 Cal 186.

(3) Indian Succession Act, 1925

In this matter, the provisions of the Indian Succession Act, 1925 differ, for a bequest may be made subject to a condition of defeasance in the event of insolvency. Illustration (vii) to section 120 of that Act which is corresponding to illustration (g) to section 107, Indian Succession Act, 1865 are relevant in this respect.[781]

(4) Lease

Leases constitute an exception, for the lessor having the *jus dis-ponendi* may annex any conditions he pleases to his grant, provided they be not illegal or unreasonable.[782] A covenant determining a lease in the event of the insolvency of the lessee is valid.[783] The condition applies to the insolvency of the person who has the term created by the lease. If the lessee assigns the term and then becomes insolvent, the condition does not apply.[784] The insolvency of the lessee will not involve a forfeiture, unless there is a provision in the lease that the lessor may re-enter on the happening of such event. This is expressly enacted in the amendment made in section 111 (g) by the amending Act 20 of 1929. The new section 114A provides for relief of forfeiture in such cases.

A *kharposh* grant of certain property made by the holder of an impartible property in favour of junior for maintenance, is not a lease. A condition in such grant that if the said property is sold in auction for the grantee's debt the grant will come to an end, is not an absolute restraint on alienation and is not invalid under section 10, but is wholly void under section 12.[785]

(5) For the Benefit of the Lessor

The amendment of section 111(g) makes it clear that these words refer to a condition giving the lessor a right of re-entry.

13. Transfer for benefit of unborn person.—Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

ILLUSTRATION

A transfers property of which he is the owner to *B* in trust for *A* and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A*'s remaining interest in the property.

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781. See notes to section 21 below.
782. *Roe d Hunter v Galliers,* [1787] 2 Term Rep 133 : 1 RR 445.
783. *Ex Parte Gould, Re Walker* [1884] 18 QBD 454; *Vyankatraya v Shivrambhat,* (1883) ILR 7 Bom 256, p 271.
784. *Smith v Gronow,* [1891] 2 QB 394.
785. *Shiba Prasad v Lekhraj and Co,* (1945) ILR 23 Pat 871 : AIR 1945 Pat 162.

(1) Transfer for Benefit of Unborn Person

A transfer cannot be made directly to an unborn person, for the definition of transfer in section 5 is limited to living persons. Such a transfer can only be made by the machinery of trusts. A trust may thus be created in favour of an unborn person if it satisfies the condition laid down in section 13 even though coming into existence of such a person is uncertain.[786] Possibly it is intended to express this distinction by the words "for the benefit of," the trustees being the transferees who hold the property for the benefit of the unborn person.

Under Hindu[787] law, a child *en ventre sa mere* is in existence. In a case of Andhra Pradesh High Court, *M* executed a settlement deed in respect of the suit property, giving a life estate to his son *G* and, after *G's* death, to the sons of *G*, to be born, absolutely. *G*, in turn, executed a "relinquishment" deed of his estate in favour of his father. It was held that merely because the relinquishment deed was executed before the birth of the sons of *G*, the gift in favour of the unborn sons would not fail. The invalidity of the transfer must be judged with reference to the original settlement deed, and not by the voluntary act of the donees under the deed itself. A person who obtains the benefit of a deed cannot, by his volition, defeat the terms of the deed under which he obtained the interest. The unborn acquired a vested interest on his birth under section 20. No one can defeat such interest. The life estate holder cannot defeat the interests of the unborn person by transferring the life estate to a third person. In this case, there was no possibility of defeating the interests of the unborn children as violative of the provisions of section 16.[788] Where *A* transfers the property in favour of *B* with his other siblings not in existence on the date of the transfer, the transfer in favour of unborn persons is valid and *B* would have to share the property with them.[789]

(2) Subject to a Prior Interest

The estate must vest in some person between the date of the transfer, and the coming into existence of the unborn person. The interest of the unborn person must, therefore, be in every case preceded by a prior interest; and the section in effect says that the interest of the unborn person must be the whole remainder, so that it is impossible to confer an estate for life on an unborn person. In the illustration to the section, the interest created for the benefit of the unborn eldest son is only a life interest and it, therefore, fails. A transfer in favour of an unborn person is therefore valid, provided it is effected through a living person.[790] Where property was gifted by the owner to his grandson without any power of alienation and after the death of such grandson, the property was to vest in his male children absolutely, such gift would be valid, and the condition restraining alienation by the grandson is valid and therefore alienation by him during his life would be void.[791] Where the property was transferred by the transferor by way of gift deed in favour of the grandson without any power of alienation and the property thereafter was to vest in male children of the grandson, such gift created a life interest in favour of the grandson and absolute interest in favour of his unborn sons, and would be valid under this section. Restraint on powers of alienation of the grandson would be valid and alienation at his behest would be improper. His sons would be entitled to sale consideration received by the father upon such sale.[792] In *R Sakunthala v P Renganathan*,[793] a testator created a life interest for

786. *Madras Bar Association v UOI*, (2014) 10 SCC 1 : AIR 2015 SC 1571 : 2014 (11)SCALE 166 : LNIND 2014 SC 853.
787. *Tagore v Tagore*, (1872) 9 Beng LR 337.
788. *JV Satyanarayana v Pyboyina Manikyan*, AIR 1983 AP 139, paras 9, 12.
789. *Devaru Ganapathi Bhai v Prabhakar Ganapathi Bhai*, (2004) 2 SCC 504 : AIR 2004 SC 2665.
790. *P Rajamani Rurukul v Rama*, (2010) 4 Mad LJ 47 : AIR 2010 Mad 197 : LNIND 2010 MAD 1246.
791. *Sridhar v N Revanna*, AIR 2012 Kant 79 : LNIND 2012 KANT 25 : 2012 (2) Kant LJ 202.
792. *Sridhar v N Revanna*, AIR 2012 Kant 79.
793. *R Sakunthala v P Renganathan*, (2017) 3 MLJ 303.

his sons without right of alienation and after their life time it was to devolve upon their male descendants for life and thereafter their descendants for generations. The recital, it was held fell under the mischieve of both section 13 and the rule against perpetuity, which is against public policy hence, the later part of the Will would have no effect. Where through a settlement deed a large portion of property was settled absolutely in favour of the other while a portion of property by way of life interest was retained by himself and his descendants, an absolute settlement made with respect to the retained property later would be void.[794] In *Girish Dutt v Data Din*,[795] *A* made a gift of her property to *B*, her nephew's daughter, for life, and then to *B*'s male descendants, if she should have any, absolutely; but if she should have no male descendants then to *B*'s daughter without power of alienation; but if there were no descendants of *B*, male or female, then to her nephew. *B* died without issue. The gift to the unborn daughters, being of a limited interest and subject to the prior interest created in favour of *B*, was invalid under section 13 and the gift to the nephew, therefore, failed under section 16. The illustration to section 113 of the Indian Succession Act, 1925, may also be referred to in this connection.

(3) Indian Succession Act, 1925

The section is almost identical with section 113, Indian Succession Act, 1925. The difference between the two sections is that the former relates to transfer *inter vivos*, while the latter deals with bequest which take effect only on the death of the testator. The principle underlined in section 113 is that a person disposing of property to another shall not fetter the free disposition of that property in the hands of several generations. The rule is quite distant from rule against perpetuity, though their effects sometimes overlap.

Section 13 controls section 113 and, therefore, both these sections should be read together.[796]

An instance of a bequest held invalid under this section is the case of *Putlibai v Sorabji Naoroji*.[797]

In *Sopher v Administrator-General of Bengal*.[798] The Privy Council, considered the effect of section 113 of the Indian Succession Act in a will which provided for an ultimate bequest in favour of persons not born at the time of the testator's death, and the question that arose for decision was whether the bequest comprised the whole of the testator's remaining interest in the thing bequeathed. Two clauses in the will provided for the forfeiture of the interests of the unborn beneficiaries in certain contingencies. It was held that:

> if under a bequest in the circumstances mentioned in section 113 there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it and that the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed.

This decision was considered by Blagden J in *Ardeshir v Dadabhoy*,[799] a case where a settlement provided for a gift to the settlor's grandsons who were not yet born and which provided that if the settlor's sons pre-deceased the senior without male issue, the property

794. *Sri Siddaraju v Sri Gangadhara*, AIR 2012 Kant 143 : LNIND 2012 KANT 57.
795. *Girish Dutt v Data Din*, (1924) ILR 9 Luck 329 : 147 IC 991 : AIR 1934 Oudh 35.
796. *T Subramania Nadar v T Varadharajan*, AIR 2003 Mad 364, p 368 : (2003) 2 MLJ 224.
797. *Putlibai v Sorabji Naoroji*, (1923) 25 Bom LR 1099 : 76 IC 996 : AIR 1923 PC 122.
798. *Sopher v Administrator-General of Bengal*, 71 IA 93 : 216 IC 53 : 46 Bom LR 86 : AIR 1944 PC 67.
799. *Ardeshir v Dadabhoy*, (1945) ILR Bom 493 : 47 Bom LR 287 : AIR 1945 Bom 395.

was to revert to the settlor. The settlement also reserved a power of revocation in the settlor. The learned judge observed:

> it does seem unfortunate that their Lordships' attention was apparently focussed entirely on section 113 and 120 of the Indian Succession Act and does not seem ever to have been called to illustration 3 to section 114...

In view of the decision in *Sopher's* case, questions would arise as to the validity of such settlements in which the settlor reserves a power of revocation or variation or in which the settlor provides for the management of the interests of the unborn persons after their birth and during their minority.

Both these decisions were considered by the Bombay High Court in *Framroz Dadabhoy Madon v Tehmina.*[800] The court held that the principle of *Sopher's* case was inapplicable to trusts of a settlement *inter vivos.*[801] The court construed the word "extends to the whole of the remaining interest of the transferor in the property" as directed to the extent of the subject-matter and to the absolute nature of the estate conferred, and not to the certainty of its vesting.[802] This decision has been subsequently followed by the same high court.[803]

The Bombay legislature has, however, passed the Disposition of Property (Bombay Validating) Act, 1947, by which it is provided that trusts or wills made prior to 1 January 1947, would not be deemed to be invalid by reason of section 13 of the TP Act or section 113 of the Indian Succession Act, i.e., by the construction put on those provisions by the Privy Council in *Sopher's case.*

(4) Movables

As its position in the TP Act shows, the section applies to movable as well as immovable property.[804]

(5) Hindu Law

According to pure Hindu law, a gift or bequest in favour of an unborn person is void.[805] However, this rule has been modified by statute. The Madras Act 1 of 1914, Hindu Disposition of Property Act, 15 of 1916, and Act 8 of 1921 validate gifts to unborn persons. These Acts have been amended by sections 11, 12 and 13 of Act 21 of 1929, and the amendments enact that subject to the limitations in chapter II of TP Act, and in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925, no transfer *inter vivos* or by will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such dispositions. The omission of the word Hindu in section 2 makes this section directly applicable to Hindus.[806]

(6) Mahomedan Law

A gift to a person not in existence is void under Mahomedan law.[807]

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800. *Framroz Dadabhoy Madon v Tehmina,* (1947) 49 Bom LR 882.
801. See, however, *Isaac Nissim v Official Trustee,* AIR 1957 Cal 118.
802. See the "parable" cited by J Blagden in *Ardeshir v Dadabhoy,* (1945) ILR Bom 493, p 503.
803. *David Joseph Izra v Sir Alwyn Izra,* (appeal 22 of 1947 from suit 310 of 1946).
804. *Cowasji v Rustomji,* (1896) 20 ILR Bom 511.
805. *Tagore v Tagore,* (1872) 9 Beng LR 377; *Mamubai v Dossa,* (1891) ILR 15 Bom 443; *Sri Raja Venkata v Sri Rajah Suraneni,* (1908) ILR 31 Mad 310.
806. See note to section 2(d).
807. *Abdul Cadur v Turner,* (1884) ILR 9 Bom 158; *Mohamed Shah v Officials Trustee of Bengal,* (1909) ILR 36 Cal 431 : 2 IC 291.

14. Rule against perpetuity.—No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

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(1) Principle

The rule against perpetuity is founded on the general principle of policy guiding judges, that the liberty of alienation shall not be exercised to its own destruction, and that all contrivances shall be void which tend to create a perpetuity or place property forever beyond the reach of the exercise of power of alienation.[808]

(2) "Perpetuity"

A perpetuity, in the primary sense of the word, is a disposition which makes property inalienable for an indefinite period.[809] In this sense it is concerned with certain interests created *in praesenti*, which are sought to be made inalienable for an indefinite period. In its modern sense, it is concerned with interest arising *in futuro,* and not with interest arising *in praesenti.* The present section, strictly speaking, deals only with the modern rule against perpetuities. In this sense TP Act appears to be incomplete.

(3) Rule as perpetuity in its primary sense

Examples of such interest *in praesenti* which have been held void under the name of perpetuity or as tending to a perpetuity are, as conveniently classified in *Halsbury's Laws of England*[810] as follows:

> (1) Estates and interests limited in praesenti with an unauthorised mode of devolution, for example an estate of inheritance not known to the common law; an unbarrable entail; an estate in which successive heirs take life estates only; the attempted entail of a chattel made prior to 1926.
>
> (2) Interests held on perpetual non-charitable trust, where no person or persons can take any benefit, eg trusts to keep in repair a tomb not part of the fabric of a church.
>
> (3) Gifts to trustees for non-charitable indefinite objects or for non-charitable unincorporated institutions or societies which may last for an indefinite time.

808. *William's Real Property,* 24th Edn, p 485.
809. *Jarman on Wills,* 8th Edn, vol I, p 284.
810. *Halsbury's Laws of England* 3rd Edn, vol 29, p 278.

As regards the first class, it will suffice to say that even under the Hindu law no estate can be created which is unknown to Hindu law. The principle on which the second class is put has been applied in India in *Administrator General v Hushes.*[811] The cases falling within the third class require consideration.

Their Lordships of the Privy Council in an appeal from Australia[812] cited with approval the following passage from an unreported judgment of Lord Hanworth:

> The problem may be stated in this way. If the gift is in truth to the present member of the society described by their society name so that they have the beneficial use of the property and can, if they please, alienate and put the proceeds in their own pocket, then there is a present gift to individuals which is good, but if the gift is intended for the goods not only of the present but of future members so that the present members are in the position of trustees and have no right to appropriate the property or its proceeds for their personal benefit, then the gift is invalid.[813]

An Indian decision on the point is to be found in *MAE Halfhyde v CA Saldanha.*[814] On the authorities, it seems that the question of validity or otherwise of such a gift has to be approached by stages. The first question is: whether it is a gift to the individual members for the time being constituting the association, or is it a gift to the association. If it is the former, the gift is good. If it is a gift to the association as such, the next question is: whether it is a gift, free and unfettered, or is it a trust. If it is an unfettered gift, the gift is good. If it is a trust, the final question arises: whether it is an endowment so that the donee must hold the corpus for all times to come and cannot deal with the corpus as and when he pleases, or it is an immediate beneficial gift so that the donee can use the corpus and income as and when the donee pleases.[815] If it is an endowment, the gift fails as offending the rule against perpetuities in its primary sense and if not, it is good and valid.

Our section does not in terms deal with "perpetuity" in its primary sense, and therefore, a perpetual gift *in praesenti* whether free or fettered, will not strictly be within the mischief of section 14. Where husband and wife intend to have a benefit of the property for their life and vested remainder to their unborn children, there is nothing illegal in giving the vested remainder to their unborn children, and creating life interest in themselves. This life interest created in favour of the wife can be enjoyed by her along with her husband, and on his demise for her residue period. This would be an interest created in them to appropriate *in praesenti* its uses for their own benefit. The life estate so created in favour of the wife does not offend the rule of perpetuity as incorporated in section 14.[816]

(4) Modern rule against perpetuities

The modern rule against perpetuities is thus enunciated by Jarman:[817]

> Subject to the exceptions to be presently mentioned, no contingent or executory interest in property can be validly created, unless it must necessarily vest within the maximum period of one or more lives in being and twenty-one years[818] afterwards.

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811. *Administrator General v Hushes,* (1913) ILR 40 Cal 192 : 21 IC 183.
812. *Leahy v Attorney-General,* [1959] AC 457 : [1959] 2 All ER 300. See also Re *Clarke* [1901] 2 Ch 110; Re *Drummend* [1914] 2 Ch 90; Re *Price* (1943) Ch 422.
813. [1959] AC 483, p 484.
814. *MAE Halfhyde v CA Saldanha,* (1944) 49 Cal WN 145.
815. Meggary and Wade, *Law of Real Property,* 2nd Edn, p 262.
816. *United India Insurance Co Ltd v Katukuri Raghavareddy,* AIR 1989 AP 33, pp 36, 37.
817. *Jarman on Wills,* 8th Edn, vol I, p 304.

The exceptions to the rule are conveniently set out in *Halsbury's Laws of England.*[819] It is this modern English rule which is with certain modifications, adopted by this section. The only exception to the rule expressly recognised by TP Act is that embodied in section 18. It will be presently seen that some of the exceptions recognized by the English law have also been recognized by courts in India.

So long as the transferees are living persons, any number of successive estates can be created. A transfer may be made to *A* for life, and then to *B* for life, and then to *C* for life, and so on, provided *A, B* and *C* are all living persons at the date of the transfer. However, if the ultimate beneficiary is some one not in existence at the date of the transfer, section 13 requires that the whole residue of the estate should be transferred to him. If he is not born before the termination of the last prior estate, the transfer to him fails under this section. If he is born before the termination of the last prior estate, he takes a vested interest at birth and possession immediately on the last prior estate.

The rule against perpetuities, however, does not require that the vesting shall take place at the birth of the ultimate beneficiary. What it does require is that the vesting cannot be delayed in any case beyond his minority. Thus, if after the life estates to *A, B* and *C*, the ultimate beneficiary is the eldest son of *C*, the limitation would be to *C* for life with remainder to *C*'s eldest son, in which case the eldest son would take a vested interest at birth, although he may not have been born at the date of the transfer. However, if it is intended that the estate shall not vest in an infant, the limitation would be to *C* for life and then on trust for such son of *C* as shall first attain the age of 18; the son of *C* has then a contingent interest which becomes vested when he attains the age of 18. If the last limitation had been to *C* for life, and then on trust for such son of *C* as shall first attain the age of 19, the transfer after *C*'s death would be void. The result of the rule against perpetuity is that the minority of the ultimate beneficiary is the latest period at which an estate can be made to vest.

(5) Regard Must be Possible and not Actual Events

In deciding questions of remoteness, regard must be possible, and not to actual events.[820] This is made quite clear in the corresponding section 114 of the Indian Succession Act, 1925, where the words are "*may* be delayed".

Illustration

R has a share in a village which he sold to the defendant reserving two bighas of land under the following condition: "Two bighas of land which I have excluded from the sale shall remain in my possession for life, and after my death in the possession of my lineal descendants...I and my lineal descendants have no right to transfer the land excluded...If none of my lineal descendants be alive then the land shall be the own property of the vendee." This was a transfer to take effect on the death of the vendor's last lineal descendant. *R* had only one son who was alive at the date of the transfer, but who died childless. On actual facts, the transfer operated within the period allowed, but as it was possible that

818. In Indian law, under the TP Act, the time specified is not 21 years but the minority of a beneficiary that culminates on his attaining 18 years of age.

819. *Halsbury's Laws of England* 3rd Edn, vol 29, pp 279, 299.

820. *Soudaminey v Jogesh,* (1877) ILR 2 Cal 262; *Ranganadha v Baghirathi,* (1906) ILR 29 Mad 412; *Ram Newaz v Nankoo,* 92 IC 401 : AIR 1926 All 283; *Kalachand v Jatindra Mohan,* (1929) ILR 56 Cal 487 : 117 IC 855 : AIR 1929 Cal 263; *Nabin Chandra v Rajani Chandra,* (1921) 25 Cal WN 901, p 904 : 63 IC 196 : AIR 1921 Cal 162; *Srimati Bramamayi v Joges Chandra,* (1871) 8 Beng LR 400; *Rajaramji v Ramnath,* 105 IC 54 : AIR 1927 Pat 412; *Pan Kuer v Ram Narain,* 117 IC 33 : AIR 1929 Pat 353, p 357.

the transfer might have been postponed for 100 or 200 years until the vendor's lien was extinct, the transfer of the two bighas was void.[821]

In the case of special powers of appointment, regard should be had to the facts which are ascertained when the power is exercised.[822]

ILLUSTRATION

A testator died in 1872 leaving his property to his wife for life. He also gave his wife power to appoint on trust for their son and his issue in such manner, as she though fit. The wife died in 1893 leaving a will whereby she appointed the property to her son for life with remainder to such of his children living at her death as shall attain the age of 25. All the son's children attained the age of 25 before the wife died, i.e. before 1893. The appointment was held to be valid.[823]

(6) Indian Succession Act

The rule against perpetuity is in section 114 of the Indian Succession Act, 1925. The following are the illustrations to that section:

(i) A fund is bequeathed to *A* for his life and after his death to *B* for his life; and after *B*'s death to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B* who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more then 18 years have elapsed from the death of the longer liver of *A* and *B;* and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B* and the minority of the sons of *B*. The bequest after *B*'s death is void.

(ii) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B*'s death to such of *B*'s sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25, necessarily falls within his own lifetime. The bequest is valid.

(iii) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that after *B*'s death it shall be divided among such of *B*'s children as shall attain the age of 18, but that, if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B,* a person living at the testator's decease. All the bequests are valid.

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.

In *Anandrao Vinayak v Administrator-General of Bombay*[824] there was a gift of movable property to a son with a gift of shares in the property to the son's sons when they should attain the age of 21. The gift was held void as offending against perpetuity. Similarly in *Kashinath v Chimnaji*[825] a bequest to a son who might at any time be adopted by the life tenant was held to be invalid on the same ground. A disposition by the testatrix providing that the sons were to remain in possession of the properties and thereafter their sons without any power of alienation and further that the great grandsons will get the properties as

821. *Ram Newaz v Nankoo,* 92 IC 401 : AIR 1926 All 283.
822. Re *Thompson* (1906) 2 Ch 199. See also note below on "Power of Appointment".
823. Re *Thompson* [1906] 2 Ch 199.
824. *Anandrao Vinayak v Administrator-General of Bombay,* (1896) ILR 20 Bom 450; *Sivasankara v Soobramania,* (1908) ILR 31 Mad 517.
825. *Kashinath v Chimnaji,* (1906) ILR 30 Bom 477.

absolute owners, was held to be not hit by the rule against perpetuity on the ground that the sons of the testatrix and their respective sons were alive.[826]

(7) Minority

Minority in India terminates at the end of 18 years. In a Privy Council case,[827] the bequest was to the testator's daughters for their lives with remainder to their children at the age of 21. The bequest to the children was held to be void under sections 114 and 115 of the Indian Succession Act, 1925. An attempt, however, was made to support the bequest on the ground that if guardians of the children were appointed by the court under the Indian Majority Act, 1875, they would not under that Act attain majority till the age of 21, but the contention failed because at the testator's death, it was not certain that any of the children would have guardians appointed.

(8) Hindu Law

Since the amendment of section 2 this section applied directly to Hindus. It was applied by the Hindu Disposition of Property Act, 1916, and similar provisions were contained in the Madras Act I of 1914 and in Act 8 of 1921. The amendment made to those Acts by Act 21 of 1929 make transfers by Hindus to unborn persons subject to the limitations contained in chapter II of TP Act, and bequests by Hindus to unborn persons subject to the rules contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925. However, irrespective of the statute, a perpetuity is repugnant to Hindu law except in the case of religious and charitable endowments.[828] A disposition of *shebaitship* by creating successive life interests is invalid.[829]

(9) Mahomedan Law

With reference to Mahomedan law, the Privy Council held in *Abul Fata Mahomed v Rasamaya*[830] that a gift to remote and unborn generations is forbidden by Mahomedan law except in the case of a *wakf*, and that a *wakf* is invalid if the gift is illusory. However, the law has since been altered by the Mussalman Wakf Validating Act, 1913, under which a *wakf* is valid even if the gift to charity is unsubstantial and illusory, provided there is an ultimate gift to charity. To this Act retrospective effect has been given by Act 32 of 1930.

In another case a *Walf-Alal-aulad* was created by a Muslim. The settlor executed a trust, settling properties for the benefit for the family, children or descendents from generation to generation, and thereafter for the maintenance of a holy shrine. It was held that the *wakif*-settlor made a dedication in perpetuity of the subject-matter of these trusts for purposes which are considered pious under Islamic law. The properties, therefore, ceased to be the properties for the settlor on the creation of the *wakfs* in 1953. It was further held that when the settlor died in 1967, the property could not form part of his estate as the settlor had divested himself of these properties 14 years prior to his death.[831]

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826. *Veerattalingam v Ramesh*, (1991) 1 SCC 489, p 494.
827. *Soundara Rajan v Natarajan*, (1925) ILR 48 Mad 906 : 52 IA 310 : 92 IC 289 : AIR 1925 Pat 244.
828. *Sookhmoy Chunder v Monoharri Dassi*, (1885) ILR 11 Cal 684 : 12 IA 103; *Vullabdas v Gordhandas*, (1890) ILR 14 Bom 360; *Kumara Ashina v Kumara Krishna*, (1869) 2 Beng LR 11; *Chundi Churn v Sidheswari*, (1889) ILR 16 Cal 71 : 15 IA 149; *Anantha v Nagamuthu*, (1882) ILR 4 Mad 200.
829. *Sitesh Kishore Pandey v Kishore Pandey*, AIR 1982 Pat 339.
830. *Kashinath v Chimnaji*, (1894) ILR 22 Cal 619 : 22 IA 76; *Yusuf Khan v Misal Khan*, 73 IC 99.
831. *Trustees of Sahebzadi Oalia Kulsum Trust v Controller of Estate Duty, AP* AIR 1998 SC 2986 : (1998) 6 SCC 267.

(10) Movable and Immovable Property

The rule against perpetuity applies to movable as well as to immovable property.[832] This is indicated by the position of the section in this chapter.

(11) Charities

The rule against perpetuity does not apply to charities.[833]

(12) Power of Appointment

A general power of appointment does not tie up land, and, therefore, the period for the application of this section does not begin to run until the date of the exercise of the power.[834] Under special powers of appointment, the donee can transfer only to specified persons, and the effect, therefore, of such a power is to tie up land. In the case of a special power the period is to be reckoned from the date of creation of the power.[835] In ordinary cases, as already noted in note (5), in applying the section, regard should be had to possible and not actual events, but in the case of special powers, the facts to be regarded are ascertained when the power is exercised.[836]

In Re *Legh's Settlement Trusts*[837] by a deed of arrangement and re-settlement dated 2 October 1891, the trustees were amongst other things, directed to hold the residue of the trust funds and the income thereof upon trust to pay the income thereof to *A* during his life and after his death to hold the capital and income in trust for all or any one or more of the issues of *A* whether children or remote issue as *A* should by deed or by will appoint. *A* had five children including one daughter *D*, who predeceased *A* leaving two children *B* and *C* who were born respectively on 13 March 1929 and 12 May 1931. *A*, died on 5 March 1935, having made his will dated 3 March 1933. By that will *A* amongst other things, made an appointment of a share to *B* and *C* for their joint lives and after the death of either of them to the survivor for life. It will be noted that—

(1) the power of appointment given to *A* was a special power;

(2) that the appointees were persons not in being at the date of the deed of arrangement;

(3) at the date of the death of *A* when his will took effect the appointees were in being.

In these circumstances, the appointment in so far as it was to *B* and *C*, for their joint lives was quite good for the vesting of that interest must take place immediately upon the death of *A* and, therefore, could not be delayed beyond a life in being at the date of the deed (i.e. the life of *A*) and 21 years thereafter. The question was: whether the appointment in so far as it was to the survivor of them for life was hit by the rule against perpetuities. That depended on whether that appointment was a vested, or a contingent one. It was held that it was contingent, for there was no knowing as to who would be the survivor. It was quite possible that both of them might live for more than 21 years after the death of *A* (the life in being at the date of the deed) and, therefore, the vesting of the life estate to the survivor might be delayed beyond the life in being at the date of the deed and 21 years. In the premises it was held that the reversionary life interest of the survivor being a contingent interest, offended against the rule.

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832. *Cowasji v Rustomji*, (1896) ILR 20 Bom 511.
833. See Transfer of Property Act, 1882, section 18.
834. *Rous v Jackson*, [1885] 29 Ch D 521.
835. Re *Nash Cook v Frederick*, [1910] 1 Ch 1.
836. Re *Thompson* [1906] 2 Ch 199.
837. *Legh's Settlement Trusts* [1938] I Ch 39 : [1937] 3 All BR 823.

(13) Provisions for Payment of Debts of Settlor

This is dealt with in section 17(2), and in the note "Exception (i)—Payment of debts".

(14) Agreement and Rule Against Perpetuities

The rule against perpetuity does not apply to personal agreements,[838] i.e., agreements which do not create an interest in the property.

ILLUSTRATION

The shebaits of a temple agree to appoint the family of C as pujaris from generation to generation to perform the services of the temple and make provision for the expenses and remuneration of the office. The agreement is valid and not affected by the rule against perpetuity.[839]

A condition in a mortgage that the mortgagor may redeem whenever he likes, refers only to the exercise of the equity of redemption which is a present interest. It is, therefore, outside the scope of the rule against perpetuity.[840]

Agreement to purchase land: Covenants for Pre-emption

Section 54 enacts that an agreement for the sale of land does not, of itself, create an interest in land. There was a considerable conflict of decisions as to the application of the rule against perpetuity to such agreements. This conflict has been resolved by the Supreme Court in *Ramharan v Tarn Mohit*[841] where it held that a mere contract for sale of immovable property does not create any interest in immovable property; it follows that the rule cannot apply to such contracts, eg a covenant of pre-emption.

Infact, section 14 begins with the words "No transfer of a property can operate ..." and does not, therefore, apply where there is no "transfer" of property, but only a contract which creates no interest in the land.[842]

In *Maharaj Bahadur Singh v Balchand*,[843] the Privy Council construing an agreement made before the TP Act, held that a covenant of pre-emption created an equitable interest in land, and is hit by the rule. This decision was later overruled by the Supreme Court in *Ram Baran v Ram Mohit*.[844]

Similarly, an agreement by a permanent lessee to surrender the lease whenever the land should be required by the landlord is a personal agreement not void for remoteness.[845] An agreement in a lease granting a perpetual option to renew from time to time is not hit by the rule as it does not create an interest in property.[846]

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838. *Rambaran v Ram Mohit,* [1967] 1 SCR 293 : AIR 1967 SC 744; *Walsh v Secretary of State,* [1863] 10 HLC 367; *London and SW Rly v Gomm,* [1882] 20 Ch D 562; *Borlands Trustee v Steel Bros,* [1901] 1 Ch 279; *South Eastern Railway v Associated Portland Cement Manufacturers,* [1901] I Ch 12, p 33 : [1908-10] All ER Rep 353; *Nafar Chandra v Kailash,* (1921) 25 Cal WN 201 : 62 IC 510 : AIR 1921 Cal 328.
839. *Nafar Chandra v Kailash,* (1921) 25 Cal WN 201 : 62 IC 510 : AIR 1921 Cal 328.
840. *Padmanabha v Sitarama,* (1928) 54 Mad LJ 96 : 106 IC 158 : AIR 1928 Mad 28, p 33.
841. *Ramharan v Tarn Mohit,* [1967] 1 SCR 293 : AIR 1967 SC 744.
842. *Jagar Nath v Chhedi Dhobi,* AIR 1973 All 307 : (1973) All LJ 202.
843. *Maharaj Bahadur Singh v Balchand,* 48 IA 376 : 61 IC 702 : 25 Cal WN 770 : AIR 1922 PC 165.
844. *Ram Baran v Ram Mohit,* AIR 1967 SC 744 : [1967] 1 SCR 293.
845. *Rama Rao v Thimmappa,* (1925) 48 Mad LJ 463 : 87 IC 433 : AIR 1925 Mad 732; *Raja of Karvetnagar v Velayudu,* (1915) 18 Mad LT 83 : 29 IC 435; *Ganesh Sonar v Purncndu Narayan,* AIR 1962 Pat 201.
846. *Kempraj v Barton Son and Co,* [1970] 2 SCR 140 : AIR 1970 SC 1872 : [1970] I SCJ 905 : (1969) 2 SCC 594.

(15) Charge and rule against perpetuities

A charge does not amount to transfer of an interest in land and is, therefore, not affected by the rule against perpetuities.[847] However, if there is no charge on land, a trust for the payment of income to a payee and his descendants from generation to generation is void as offending against the rule of perpetuity.[848]

(16) Mortgage and rule against perpetuities

In *Padmanabha v Sitarama*[849] it was held that the rule against perpetuities applied only to cases where there was a new interest in immovable property contemplated to be created after the expiry of the time prescribed by the rule, namely the lifetime of a person living and the minority of one who might be in existence then and that in the case of a mortgage, there was no such future interest in property contemplated to be created because it was of the very essence of the mortgage that the equity of redemption was a present interest in the property in exercise of which alone the property was sought to be redeemed. In a case,[850] by a mortgage deed of 1931, the mortgagor covenanted to repay the mortgage money with interest by 80 half-yearly instalments and also demised the mortgaged premises to the mortgagee for 3000 years with the usual proviso for cesser on repayment of the mortgage money with costs and interests. The mortgagors being desirous of redeeming the mortgage brought an action for a declaration that the mortgagor was so entitled. It was contended on behalf of the mortgagor, amongst other things, that the mortgage which fixed the date of redemption so many years ahead offended the rule against perpetuities. The House of Lords in agreement with both the courts below on this point, held that the rule against perpetuities had no application to mortgages.

15. Transfer to class, some of whom come under sections 13 and 14.—If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails [851][in regard to those persons only and not in regard to the whole class.]

Synopsis

(1) Amendment 142
(2) Indian Succession Act 153
(3) Hindu Law as to Gift to a Class 153
(4) Mahomedan Law as to Gift to a Class .. 155

(1) Amendment

Before the amending Act 20 of 1929, the section was as follows:

> If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails *as regards the whole class.*

847. *Matlub Hasan v Kalwati,* 147 IC 302 : AIR 1933 All 934; *Raja of Ramnad v Sundara Pandiyasami Tewar,* 46 IA 64 : 581 IC 704; *Bhupati Bhushan v Beradari Mohan,* (1948) ILR 1 Cal 492; *K Appu v Mary,* AIR 1965 Ker 27.
848. *Wahajuddin v Ali Ahmad,* 153 IC 595 : AIR 1934 All 983.
849. *Padmanabha v Sitarama,* (1928) 54 Mad LJ 196 : 106 IC 158 : AIR 1928 Mad 28, p 33.
850. *Knightbridge Estates Trusts Ltd v Byrne,* [1939] Ch 441, p 463 : [1938] 4 All ER 618, p 631 (CA) : affd [1940] AC 613, p 625 : [1940] 2 All ER 401, p 408.
851. Subs. by Act 20 of 1929, sec. 9, for "as regards the whole class".

Thus, in *Raj Bajrang Bahadur Singh v Thakurain Bakhtaraj Kuer*,[852] the Supreme Court held that it was true that no interest could be created in favour of an unborn person, but when the gift was made to a class or a series of persons, some of whom were in existence and some were not, it did not fail in its entirety; it was valid with regard to those persons who were in existence at the time of the testator's death, and was invalid as to the rest.

(2) Indian Succession Act

The present section of the Act corresponds to section 115 of the Indian Succession Act, 1925. The first two illustrations to that section are as follows:

ILLUSTRATIONS

(i) A fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25. The gift to *A*'s children is a gift to a class. *A* survives the testator, and has some children living at the testator's death. Each child of *A*'s living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*. The bequest to *A*'s children, therefore, is inoperative as to any child born after the testator's death and in regard to those who do not attain the age of 25 within 18 years after *A*'s death, but is operative in regard to the other children of *A*.

(ii) A fund is bequeathed to *A* for his life, and after his death to *B, C, D,* and all other children of *A* who shall attain the age of 25. *B, C,* and *D* are children of *A* living at the testator's decease. In all other respects the case is the same as that supposed in illustration (i). Although the mention of *B, C* and *D* does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children *B, C,* or *D,* who attains the age of 25 within 18 years after *A*'s death.

This section applies only in a case in which the whole class is intended to be benefited. It does not apply where there is no benefit to a class.[853]

(3) Hindu Law as to Gift to a Class

Prior to the Acts of 1914, 1916 and 1921, relating to gifts and bequests to unborn persons (section 13), a gift to a person who was not in existence at the date of the gift was void; and so was a bequest to a person who was not in existence at the date of the testator's death. This proceeded on the principle that a person who was not in existence at the material date was incapacitated from taking the bequest. Thus, if a gift was made by a Hindu to his grandsons and none of them was in existence at the date of the gift, none of them had the capacity to take, and the gift was, therefore, void. However, what if a gift was made by a Hindu to his grandson section who was in existence at the date of the gift, and to other grandsons (brothers of S) who might be born after the date of the gift, and some grandsons are born in fact after the date of the gift? It is obvious that the grandsons who were born after the date of the gift could not take; but could section take? In some of the earlier cases it was held on the analogy of the rule in *Leake v Robinson*,[854] that the gift having failed as to the other grandsons, it was wholly void, and that section too could not take. However, it was held in later cases and also by the Judicial Committee that the rule in *Leake v Robinson* was a rule of construction of the English law, and that it did not apply to Hindus, and that the incapacity of the other grandsons to take did not incapacitate section from taking, with the

852. *Raj Bajrang Bahadur Singh v Thakurain Bakhtaraj Kuer*, [1953] SCR 232 : AIR 1953 SC 7 : [1952] SCJ 655 : [1953] SCA 369.
853. *Devaka Prasad v CIT*, AIR 1948 Bom 418.
854. *Leake v Robinson*, [1817] 2 Mer 363.

result that section took the whole of the property which was the subject-matter of the gift.[855] The sections of the TP Act and the Indian Succession Act which contain the rule against perpetuity did not then apply to Hindus, and *Leake v Robinson*, therefore, could not possibly apply to Hindu gifts and bequests and ought not to have been applied to them.

The course of legislation is worth observing. First came the Madras Act of 1914. It validated gifts and bequests in favour of unborn persons, and thus removed the bar of incapacity. It also applied for the first time the rule against perpetuity to cases governed by the Act. Similar provisions were introduced by the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests (City of Madras) Act, 1921. The result of this legislation was that in the case put above, grandsons other than *S*, though not in existence at the date of the gift, could also take under the deed.

The Indian Succession Act in force when the three Acts were passed was that of 1865. Section 100 related to bequests for the benefit of unborn persons; it is now section 113 of the Indian Succession Act, 1925. Section 101 related to the rule against perpetuity; it is now section 114 of the Indian Succession Act, 1925. Section 102 related to bequests to a class; this corresponds to section 115 of the Indian Succession Act, 1925, before it was amended in 1929. Another Act in force when the three Acts were passed was the Hindu Wills Act, 1870. Certain sections of the Indian Succession Act, 1865, were made applicable to cases governed by the Hindu Wills Act, one of them being section 102. Section 102 was in the following terms:

> If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections, or, either of them, such bequest shall be *wholly void.*

Though section 101 was incorporated in all the three Acts, section 102 was not, the intention being to keep alive the rule of Hindu law that if a gift or bequest was made to a class of persons with regard to some of whom it was inoperative by reason of the fact that "they were not in existence at the material date", the gift or bequest failed in regard to those persons only and not in regard to the whole class. However, the legislature, it would appear, overlooked the Hindu Wills Act, and particularly the inclusion in that Act of section 102. This was not noticed until the decision of the Judicial Committee in *Soundara Rajan v Natarajan.*[856] The will in that case was governed by the Madras Act of 1914. Amongst the properties disposed off by the will, were some immovable properties situated in the city of Madras. This attracted the applicability of the Hindu Wills Act. The testator died in 1904, leaving three daughters, *A*, *B* and *C*. *A* had four children, three born before, and one after 1904. *B* has one child born before 1904. *C* had six children all born after 1904. By his will the deceased directed his trustees to apportion his residuary trust fund into as many equal shares as there were daughters, to pay the income from each of such shares of the daughters for life respectively, and after the death of each daughter to hold the share appropriated to her "upon trust for the children of such daughter who shall attain the age of 21 years". The

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855. *Rai Bishen Chand v Asmaida Koer,* (1884) ILR 6 All 560 : 11 IA 164; *Ram Lall Sett v Kanai Lall Sett,* (1886) ILR 12 Cal 663; *Bhagabati v Kali Charan,* (1911) ILR 38 Cal 468 : 38 IA 54 : 10 IC 41 (affirming SC in (1905) ILR 32 Cal 992); *Ranimoni Dassi v Radha Prasad,* 41 IA 176 : 23 IC 3 : (1914) ILR 41 Cal 1007; *Manajamma v Padmanabhayya,* (1889) ILR 12 Mad 393; *Rangandha v Baghirathi,* (1906) ILR 29 Mad 412; *Mangaldas v Tribhuvandas,* (1891) ILR 15 Bom 652; *Tribhuvandas v Gangadas,* (1894) ILR 18 Bom 7; *Krishnarao v Benabai,* (1896) ILR 20 Bom 571; *Khimji v Morarji,* (1898) ILR 22 Bom 533; *Advocate General v Karmali,* (1905) ILR 29 Bom 133, pp 155–156; *Kanai Lal v Kumar Purnendu Nath,* (1946) 51 Cal WN 227; *Rabindranath v Sushil Chandra,* AIR 1952 Cal 427.

856. *Soundara Rajan v Natarajan,* 52 IA 310 : (1925) ILR 48 Mad 906 : 92 IC 289 : AIR 1925 PC 244. See *Sewdayal v Official Trustee,* (1931) ILR 58 Cal 768 : 134 IC 436 : AIR 1931 Cal 651.

testator was survived by the three daughters. After their death, a suit was brought by the children of the third daughter *C*, against the children of *A* and *B* for construction of the will and for administration of the estate of the testator. The Judicial Committee held that the bequest to the unborn children was invalid under section 101 of the Indian Succession Act, 1865, now the Indian Succession Act, 1925, section 114, as it offended the rule against perpetuity, and that the bequest being to a class and being invalid as to some members, it failed also in regard to the children born before the death of the testator under section 102 of that Act (corresponding to the Indian Succession Act, 1925, section 115, before it was amended in 1929). In the case under consideration, the bequest to the children to an unborn person is void, for the Madras Act validated such bequest, but because of the rule against perpetuity contained in section 101. The bequest being void as to some members of the class under section 101, it was wholly void under section 102. This led to the amendment of section 15 of the TP Act, and section 115 of the Indian Succession Act, 1925, in the manner stated above. When a gift to a class was bad in accordance with the ordinary rule of English Law, the members of the class take per capita. In the case of a gift made by a Hindu testator, the will must be construed according to the notions of a Hindu and the Hindu Law of succession, and it can be held that the members of the class take per stirpes.[857]

(4) Mahomedan Law as to Gift to a Class

The rule in *Leake v Robinson* mentioned above has been held not to apply to *khojas* in Bombay.[858] It has, accordingly, been held that where there is a bequest to a class of persons some of whom are in existence at the testator's death and some are born after his death, the gift fails in regard only to those who were born after the testator's death, and not in regard to the whole class. This decision coincides with the amended section 15. There is no reason why other sects of Mahomedans should be governed by a different rule.

[859][**16. Transfer to take effect on failure of prior interest.**—Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.]

Synopsis

(1) Amendment 155
(2) Principle 155
(3) Prior Interest Otherwise Invalid 156
(4) Prior Interest not Invalid but Subsequently Fails 156
(5) Indian Succession Act 156
(6) Alternative limitations 156
(7) Vested Gift 156
(8) Hindu Law 157

(1) Amendment

This section was amended by the amending Act of 1929.

(2) Principle

The section follows the English law that a limitation following upon a limitation void for remoteness is itself void even though it may not of itself transgress the rule against perpetuity.

857. *Jabali Krishna Das v Jetendra Nath,* (1949) 51 Bom LR 449.
858. *Advocate-General v Karmali,* (1905) ILR 29 Bom 133.
859. Subs. by Act 20 of 1929, sec. 10, for sections 16 to 18.

The case of *Girjesh Dutt v Data Din*[860] cited in the note on section 13 is an illustration of the rule under this section. *A* made a gift of her property to *B* her nephew's daughter, for life, and then to *B's* male descendants, if she should have any, absolutely; but if she should have no male descendants, then to *B's* daughters without power of alienation; but if there were no descendants of *B*, male or female, then to her nephew. *B* died without issue. The gift to the unborn daughters, being of a limited interest and subject to the prior interest of *B*, was invalid under section 13, and the gift to the nephew, therefore, failed under section 16.

(3) Prior Interest Otherwise Invalid

The prior interest may be invalid otherwise than under the rules contained in sections 13 and 14. It may depend upon a condition precedent which is invalid under section 25. If so the subsequent interest, if it is to take effect after the prior interest, would fail under section 25, for it would also be dependent on the invalid condition. If the subsequent interest is to take effect upon failure of the prior interest and the prior interest is invalid under section 25, the subsequent interest would fail under the combined effect of sections25 and 28.

(4) Prior Interest not Invalid but Subsequently Fails

If the prior interest is not invalid, but subsequently fails because the condition upon which it depends is not fulfilled, section 27 applies, and the subsequent interest is, as a rule, accelerated.

(5) Indian Succession Act

This section corresponds to section 116 of the Indian Succession Act, 1925.

(6) Alternative limitations

The rule does not apply if the subsequent interest is not dependent on the prior interest, but is alternative to it. If there are two alternative limitations, one branch of which is remote and the other capable of taking effect, the court will disregard the void limitation and give effect to that which is legal.[861] An alternative or independent gift or a gift which can take effect independently of a void limitation is valid.[862] Thus, in *Monypenny v Derring*,[863] the gift was to *A* for life, then to his first son for life, then to the first son of that first son and his heirs male and in default of such heirs male to other sons of *A* "and in default of issue of the body of *A*, or in case of his not leaving any at his decease, for *B* for life." Lord St Leonards held that the limitation to the unborn grandson of the unborn son was void, but in the event that actual happened, i.e., *A* not leaving any issue at his decease, the alternative gift to *B* was valid. There have been other instances of an alternative gift.[864]

(7) Vested Gift

The section in terms hits "any interest created in the same transaction and intended to take effect or upon the failure of such prior interest". Any interest created in the same transaction and intended to take effect immediately and independently of the prior gift, and which does so take effect is clearly not within the mischief of the section. A gift may be vested in interest although it is not vested in possession. An ulterior gift

860. *Girjesh Dutt v Data Din*, (1934) ILR 9 Luck 329 : 147 IC 991 : AIR 1934 Oudh 35.
861. *Evers v Challis*, [1959] 7 H LC 531.
862. Re *Davy* [1915] 1 Ch 837.
863. *Monypenny v Derring*, [1852] De GM and G 145.
864. Re *Curryer's Will Trusts Wyly v Curryer*, [1938] 1 Ch 952 : [1938] 3 All ER 574.

which is vested in interest *in praesenti* does not fail if the prior gift is bad by reason of sections 13 and 14.

(8) Hindu Law

Some cases decided under the Hindu law are illustrations of the section. In the *Tagore case*[865] property was bequeathed to *A* and his male heirs in tail and after the failure or determination of that estate, to *B* and his male heirs in tail, and then to *C* and his male heirs in tail. The limitations in tail male were void both under Hindu law, and the rule against perpetuities. *A* took an estate for life and though *B*'s son and *C*'s grandson were alive at the death of the testator, the estate passed at *A*'s death to the heir at law. Again, in *Brajanath v Anandamayi*,[866] the testator, not having any great-grandsons living at his death, bequeathed his property to great-grandsons on their attaining majority, and in case there were no great-grandsons, to the daughter's sons. The gift to the great-grandsons was void for remoteness, and the court held that the gift to the daughter's sons was dependent on and not alternative to it, and, therefore, also failed.

Alternative limitations are also illustrated by Hindu law cases. In *Javerbai v Kablibai*,[867] *A* by will bequeathed his property to his wife and his brother *B* for their lives, and after the death of the survivor of them to the male issue of *B*, and in default of such male issue, to such persons as *B* may appoint. *B* had no male issue and exercised the power of appointment in favour of his daughter. The gift to the male issue of *B* was void, but the gift over under the power of appointment was an independent and alternative gift and, therefore, valid. It should be observed that the daughter took from the testator *A* and not from *B*, for under a power of appointment, the property is taken not from the donee of the power, but from the grantor of the power.[868] Another instance is *Kumar Tarakeswar Roy v Kumar Shoshi Shikhareswar*.[869] *A* bequeathed his property to three nephews *B, C,* and *D* and their descendants in the male line without power of alienation, with a gift over in the following terms: "If any of the nephews should die without leaving a male child, then his share devolves on the surviving nephews and their male descendants." Here the attempt to create an estate in tail male failed and such nephew took an estate for life. However, though the estate in tail male which was dependent on each life-estate failed, the independent gift over from one nephew to another was not affected. On the death of *B* and *C* without issue their shares passed to *D*, but only for a life-estate, for the estate in tail male of the surviving nephew was also void. When the donor made gifts to relations and for charitable purposes, the Privy Council have held that the provisions for his relations would fail in so far as they were contrary to law, and the other dispositions would also fail if they were dependent thereupon and inseparable therefrom, but the invalidity of certain of the gifts to relatives would not be fatal to other dispositions apparently separable, and charitable gifts would not be bad because, though substantial, they did not involve a sufficiently large part of the settled property or because the beneficial interest was not given to a specified individual or individuals. The Privy Council further held that though the settlor had certain religious objects, the case was in its general character one of private bounty and educational trusts. Under sections 14, 16, 17 and 18 of the TP Act non-charitable dispositions bad for perpetuity would not be

865. *Tagore case* (1872) 9 Beng LR 377.
866. *Brajanath v Anandamayi*, (1872) 8 Beng LR 208.
867. *Javerbai v Kablibai*, (1891) ILR 16 Bom 492.
868. *Motivahoo v Momoobai*, (1897) ILR 21 Bom 709 : 24 IA 93.
869. *Kumar Tarakeswar Roy v Kumar Shoshi Shikhareswar*, (1883) ILR 9 Cal 952 : 10 IA 51, p 56.

validated by the presence of a charitable trust.[870] Here the gift to charity was not dependent on the gift to the relatives.

[871][17. **Direction for accumulation.**—(1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

(a) the life of the transferor, or

(b) a period of eighteen years from the date of transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed off as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the transferor or any other person taking any interest under the transferor, or

(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer; or

(iii) the preservation or maintenance of the property transferred,

and such direction may be made accordingly.]

Synopsis

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(1) Amendment

This section was inserted by the amending Act of 1929.

(2) Accumulation of Income

A direction which separates the income from the ownership of property so as to form a separate fund, or so as to postpone the beneficial enjoyment of property, is a direction for

870. *Kayastha Pathshala, Allahabad v Bhagwati Devi*, 64 IA 5 : (1937) ILR All 3 : (1937) All LJ 379 : 39 Bom LR 322 : 41 Cal WN 262 : (1937) 1 Mad LJ 166 : 166 IC 4 : AIR 1937 PC 4.
871. Subs. by Act 20 of 1929, sec. 10, for sections 16 to 18.

accumulation. The rule against perpetuities has for its object, the circumscription of the period during which the property might be tied up in such a way as to prevent its being transferred absolutely. Earlier, an accumulation of income could be directed for so long as the property could be tied up without infringing the rule against perpetuities. The object of this section is to make a separate rule further restricting the period for the accumulation of income.

A direction for accumulation may be express as well as implied. The question is one of construction, and if the disposition cannot be carried out without an accumulation, the section applies.[872]

(3) Void Under the Rule Against Perpetuities

Independently of this section, a direction for accumulation may be void under the perpetuity rule if the accumulation is directed for a period in excess of that allowed by the perpetuity rule. Thus, if *A* transfers property to *B* for life and then to the son of *B* who shall first attain the age of 25, with a direction to accumulate the income till the son attains that age the direction would be void under the perpetuity rule. However, if A transfers property to *B* for life, and then to the first son of *B* who shall attain the age of 18 with a direction to accumulate the income during the lifetime of *B* and until the son attains that age, there is no infringement of the perpetuity rule, and the direction would be valid for one of the statutory periods allowed by this section.

(4) Void for Repugnancy

Independently of this section, a direction for accumulation may be void for repugnancy. A direction for accumulation is a restriction on enjoyment such as is referred to in section 11. However, while section 11 is limited to transfers which create an absolute interest in the transferee, section 17 refers indifferently to any transfer. Where a transfer is of an absolute interest, the exceptions to this section are also exceptions to section 11. However, if there is an absolute gift, a direction for accumulation for the benefit of the donee, merely postpones enjoyment, and is void for repugnancy. This is illustrated by Indian[873] cases. The first illustration to section 56 of the Indian Trusts Act, 1882, shows that a direction for the accumulation of the income of a minor is determinable when he attains majority.[874]

(5) Savings Out of Income

The section does not apply to savings out of income made voluntarily by the person entitled to the income, or by the court on behalf of an infant.[875] Nor does it affect the discretionary power of trustees to make accumulations out of a minor's income under section 41 of the Indian Trusts Act, 1882.

(6) Powers to Accumulate

In England, the law prohibits any person from settling or disposing of property in such a manner that the income thereof, would be accumulated beyond the periods there indicated.[876] It followed that it hit cases where, though there was no direction to accumulate beyond the permitted periods, there was power to trustees to do so, and where the trustees were in fact accumulating the income beyond the permitted periods or were contemplating

872. *Tench v Cheese,* [1855] 6 De GM and G 453, pp 462, 473.
873. *Cally Nath v Chunder Nath,* (1882) ILR 8 Cal 378; *Mokoonda Lal v Ganesh Chandra,* (1876) ILR 1 Cal 104; *Srimati Bramamayi v Joges Chandra,* (1871) 8 Beng LR 400.
874. See notes "Enjoyment postponed" and "Accumulation of income" under section 19.
875. *Tench v Cheese,* [1855] 6 De GM and G 453, p 463 (CA).
876. Re *Robb's Will Trusts* [1953] Ch 459 : [1953] 1 All ER 920.

doing so. It is submitted that this would not be the case in India where section 17 only prohibits directions providing for an accumulation of income beyond the permitted periods.

(7) Period

The period are expressed to be in the alternative so that an accumulation cannot be directed during a combination of two periods. The appropriate period is a question of construction, and is the one that best accords with the intention expressed in the instruments.[877]

(8) Excessive Accumulation

If accumulation is directed to be for a longer time than that allowed by the section, it is invalid for the excess over the appropriate period, and that income for the excess period as well as the interest on the accumulated fund, belongs to persons, who would have been entitled, if there had been no direction to accumulate.[878]

(9) Failure of Purpose

Where on a true construction of the instrument directing accumulation and investment, the purpose or object to which that accumulation and investment is directed entirely fails, the provision cannot be enforced and the direction for accumulation cannot be read as an independent provision. Thus, where a testator after bequeathing an annuity to his mother directed his trustees out of the income of his residuary estate to pay an annuity to his wife and to accumulate the surplus income during the life of his wife or for 21 years from his death (whichever was the shorter) and directed that at the end of the period of accumulation, the residuary estate including the accumulation for his children should be held on trust for his children, but died without issue, it was held that the testator having died without issue, there was no effective disposal by his will within the meaning of section 49 of the Administration of Estate Act, 1925, of the residuary estate, and that the direction for accumulation was not a direction to which the property not effectively disposed off by the will was subject. The direction for accumulation here came to an end by reason of the failure of its object and purpose, and the widow became entitled to the surplus income as on an intestacy.[879]

(10) Exceptions

The first two exceptions closely follow those in section 164 of the Law of Property Act, 1925. The third exception is not in the English Act, but follows the case of *Vine v Raleigh.*[880]

Exception (i)—Payment of debts

A provision for the payment of debts, not being the debts of the transferor, but payable on a contingency which might happen outside the perpetuity period would be void as infringing the rule against perpetuities. So also, a transfer contingent on the payment of specified debts, for the debts might not be paid within the perpetuity period.[881] However, directions for the payment of debts or provisions for accumulation of income for that purpose, for however long a period, are not only exempt from the statutory restriction on accumulation, but do not infringe the rule against perpetuities. Such a provision does not tie up property absolutely so as to prevent its being transferred absolutely, because the creditor may at any time insist on payment, or the person

877. Re *Errington, Errington-Turbutt v Errington,* (1897) 76 LT 716.
878. *Griffiths v Vere,* [1903] 9 Ves 127; Re *Walpole Public Trustee v Canterbury,* [1933] Ch 431 : [1933] All ER Rep 988.
879. Re *Thornber, Crabtree v Thornber,* [1937] Ch 29 : [1936] 2 All ER 1594.
880. *Vine v Raleigh,* [1891] 2 Ch 13.
881. Re *Bewick Ryle v Ryle,* [1911] 1 Ch 116.

indebted can at any time discharge the debt.[882] A trust or direction to pay a debt is, therefore, if possible, construed as a charge for the payment of debts, and the transferee is considered as taking a vested interest subject to the charge.[883] Thus, on an assignment of a lease for 99 years, a trust to accumulate half the rent for the whole term, for the payment of the debts of the transferor, would be valid as creating a charge on the lessee's interest. A direction for the payment of debts has been held to be valid even when it is annexed to and forms part of a series of limitations, all or some of which infringe the rule against perpetuities.

The debts may be existing debts, or contingent liabilities to arise in future.[884] If the debts are paid not out of income, but out of capital, the exception ceases to apply and the trust for accumulation of income to recoup capital is valid for one of the statutory periods.[885] If the provision is not made in good faith the exception will not apply.[886] So a provision to accumulate income against a liability that is not likely to become a debt,[887] or to retain and set apart income to create a reserve fund against future liabilities in business[888] is subject to the statutory periods. In order, however, that such a provision falls within the exception, the provision must not be a provision which might or might not be used for the payment of such debts at the discretion of some third person; it ought to be a provision which must be applied for that purpose.[889]

The English exception is wider for it includes the debts of the grantor, settlor, testator or any person and it has been held that the other person may be a stranger.[890]

Exception (ii)—Provision of portions

The word portion ordinarily means a share and points to the raising of something out of something else for the benefit of some children or class of children.[891] It does not apply to the making of additions of income to capital in order to increase the capital for the person to whom it is given.[892] The exception only applies to provisions which must be applied for the provision of portions; and cannot save provisions which may or may not be so applied at the discretion of some third person.[893]

Exception (iii)—Preservation and maintenance

The third exception is not in the English Act, but it has, no doubt, been suggested by the case of *Vine v Raleigh*,[894] where a trust out of income to maintain houses in good repair was held to be outside the Thellusson Act. A fund provided to meet dilapidations at the end of a

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882. *Briggs v Oxford, (Earl)* [1852] 1 De GM and G 363, p 370; *Bateman v Hotchkin*, [1847] 10 Beav 426, p 434; *Southampton Lord v Hertford (Marquis)*, [1813] 2 Ves & B 54, p 65; Re *Stamford and Warrington (Earl), Payne v Grey*, [1912] 1 Ch 343 (CA).
883. *Bacon v Proctor*, [1822] Turn & R 31, p 40.
884. *Varlo v Faden*, [1859] 1 Deg F & J 211, p 224.
885. Re *Heathcote, Heathcote v Trench*, [1904] 1 Ch 224.
886. *Mathews v Keble*, [1868] 3 Ch App 691.
887. Re *Mason, Mason v Mason*, [1891] 3 Ch 467.
888. Re *Cox, Cox v Edwards*, [1900] WN 89.
889. Re *Bourne's Settlement Trusts* [1946] 1 All ER 411 : 117 LT 281 : 62 TLR 269 (CA).
890. *Barrington (Viscount) v Liddell*, [1852] 2 Deg M & G 480, p 497.
891. *Eyre v Marsden*, [1838] 2 Keen 564.
892. Re *Elliot, Public Trustee v Pinder*, [1918] 2 Ch 150 : [1918-9] All ER Rep 1151 dissenting from *Middleton v Losh*, [1852] 1 Sm & Griff 61.
893. Re *Bourne's Settlement Trusts*, [1946] 1 All ER 411.
894. *Vine v Raleigh*, [1891] 2 Ch 13.

lease is within the exception.[895] A direction which simply keeps the property at its prese value is not affected by the rule restricting accumulation of income.[896]

(11) Indian Succession Act

A similar amendment has been made in the corresponding section 117 of Indi Succession Act, 1925.

(12) Hindu law

As stated above, a direction for accumulation for the benefit of the donee was und Hindu law repugnant to an absolute gift.[897] The section is not inconsistent with any rule Hindu law, and is made applicable to Hindus by the amendment of section 2.

The direction is valid, unless the conditions are so unreasonable as to be against pub policy, or unless it is given for an illegal object or its effect is inconsistent with Hindu law Thus, in *Krishnaramani v Ananda Krishna*[899] there was a trust of surplus income to accumulated, and every time the accumulations amounted to three lakhs, they were to divided among the sons and descendants per stripes. Justice Macpherson said that t direction was part and parcel of a perpetuity and was wholly bad. This is always the ca when the trust for accumulation is not accompanied with any disposition of the corpus of t property.[900] A direction to accumulate surplus income for the benefit of a son to adopted,[901] or for the payment of debts or the benefit of the minor donee,[902] or for t marriage expenses of the testator's son,[903] has been held to be valid.

In *Amrito Lall v Surnomoye*,[903a] J Jenkins said that for the period of accumulation unc Hindu law "the limit must be that which determines the period during which the course devolution of property can be directed and controlled by the testator". In *Gosavi Shivga Rivett-Carnac*,[905] where the devise was to a minor disciple for whom a portion of the inco was to be accumulated until he was of the age of 30, it was held that he was entitled to all t income after he attained majority. In the absence of any direction to the contrary, the rule Hindu Law is that accumulations of income go with the capital.[906]

Registration is mandatory for documents mentioned in section 17.[907]

[[908]**18. Transfer in perpetuity for benefit of public.**—The restrictions sections 14, 16 and 17 shall not apply in the case of a transfer of property

benefit of the public in the advancement of religion, knowledge, mmerce, health, safety or any other object beneficial to mankind.]

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Amendment

This section was amended by the amending Act 20 of 1929.

Principle

The rules restricting remoteness and perpetuity and against accumulations of income vent fetters being put upon the free circulation and enjoyment of property. However, n property is given for an object beneficial to the public, it is withdrawn from commerce, it is generally necessary that it should be kept intact, and its use restricted to the object an indefinite period.

Some Points of Difference Between English and Indian Law Relating to Perpetuities

(i) The English rule against perpetuities deals with both interests created *in praesenti* and interests to arise in future; but the rule incorporated in the TP Act (section 14) and the Indian Succession Act, 1925 (section 114) deals with interests to arise *in futuro* only, and there is no express provision prohibiting or dealing with interests *in praesenti* which are sought to be made of indefinite duration.

(ii) There is a difference in the period during which vesting may be delayed, the English law allowing 21 years in gross after life or lives in being, the Indian law allowing only the period of majority after a life or lives in being.[909]

(iii) Some interests created *in praesenti,* eg charitable trusts and unfettered present gifts

of such transfers *inter vivos* may be delayed beyond the period mentioned in section 14. There is no similar relaxation of the rule against perpetuities laid down in section 114 of the Indian Succession Act, 1925. On the contrary, section 118 of that Act imposes an additional restriction on charitable or religious bequests by a person who has near relations.

(4) Charitable Trusts

The exception enacted in this section is based on the English law as to charitable trusts. Charitable trusts are trusts for purposes enumerated in the Statute of Charitable Trusts 43 Elix c 4, and those so far analogous as to be within the spirit and intendment of the statute. These purposes have been classified by Lord Macnaghten in the leading case of *CIT v Pemsel*[911] as (1) for the relief of poverty; (2) for the advancement of education; (3) for the advancement of religion; and (4) other purposes beneficial to the community not falling under any of the preceding heads. A gift merely for the encouragement of sport is not a charity.[912] However, sport may be beneficial to the community and so a gift of playing fields, parks and gymnasiums to promote the health and welfare of the working classes is a charity.[913] So also is a gift for the constitution of a regimental fund for the promotion of outdoor sport, as tending to increase the physical efficiency of the army;[914] or a gift to maintain a library for an officers mess, as tending to increase the mental efficiency of the army[915] or to buy a site for building a public hall,[916] but not so a gift for maintenance of property for the benefit of distinguished visitors to neighbourhood.[917] A bequest for relief to the infirm, sick and aged Roman Catholic priests[918] or for the benefit of the choir[919] has been upheld as a charitable bequest as tending to advance religion. However, a gift to "such charitable institution or institutions or other charitable or benevolent object or objects in England" has been held void for uncertainty by the House of Lords.[920] A gift for the benefit of a volunteer corps has been held to be a charity.[921] A gift for feeding poor pilgrims, distribution of oil among them and saying prayers has also been held in India to be for the benefit of the public within the meaning of this section.[922] A bequest to two charities and to the respective vicars and wardens of two named churches for "parish work" has been held by the House of Lords as not charitable.[923]

(5) Indian Succession Act

Illustration of religious or charitable uses

The word "charitable" does not occur in this section, but the transfers to which it refers are the same as those described in section 92 of the Code of Civil Procedure 1908, as trusts created for a public purpose of a charitable or religious nature. The illustration to section 118

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911. *CIT v Pemsel*, [1891] AC 531, p 583 following Sir Samuel Romilly's arguendo in *Morice v Bishop of Durham*, [1805] 10 Ves 522, p 531; *Dologovinda Sethi v Kanika Museum*, AIR 1989 Ori 60, p 63.
912. Re *Nottage Jones v Palmer*, [1895] 2 Ch 649 : [1895–9] All ER Rep 1203.
913. Re *Hadden, Public Trustee v More*, [1932] 1 Ch 133, p 142 : [1931] All ER Rep 539.
914. Re *Gray Todd v Taylor*, [1925] Ch 362 : [1925] All ER Rep 250; Re *Mariette, Mariette v Governing Body of Aldenham School*, [1915] 2 Ch 284 : [1914-5] All ER Rep 794.
915. Re *Good Harington v Watts*, [1905] 2 Ch 60 : [1904-7] All ER Rep 476.
916. Re *Spence* [1938] Ch 96 : [1937] 3 All ER 684.
917. Re *Corelli* [1943] 1 Ch 332 : [1943] 2 All ER 509.
918. Re *Forster* [1939] 1 Ch 22 : [1938] 3 All ER 767.
919. Re *Royce* [1940] 1 Ch 514 : [1940] 2 All ER 291.
920. *Chichester Diocesan Fund v Simpson*, [1944] AC 341 : [1944] 2 All ER 60.
921. Re *Lord Stratheden and Campbell*, [1894] 3 Ch 265.
922. *RMS Firm v Muthu Swami*, (1940) 2 Mad LJ 803 : 52 Mad LW 793 : (1940) Mad WN 1180 : AIR 1941 Mad 188.
923. *Farley v Westminister Bank*, [1939] AC 430 : [1939] 3 All ER 491.

of the Indian Succession Act, 1925, gives the following list of bequests for religious or charitable uses; the relief of poor people; the maintenance of sick soldiers; the erection or support of a hospital, the education and preferment of orphans; the support of scholars; the erection or support of a school; the building and repair of a bridge; the making of roads, the erection or support of a church; the repairs of a church, the benefit of ministers of religion, and the formation or support of a public garden.

Gifts for charitable uses have been the subject of restrictive legislation in England, i.e., the Mortmain Act, 1736, and the Mortmain and Charitable Uses Acts of 1888 and 1891. These Acts do not apply in India:[924] but there is a respective provision in section 118 of the Indian Succession Act, 1925, designed to prevent deathbed gifts by will to religious or charitable uses by persons having near relations.[925] It is rather anomalous, as pointed out by ACJ Ameer Ali in *MAF Halfhyde v CA Saldanha*,[926] that no protection is given to the near relations against death-bed gifts to non- religious or non-charitable uses. *inter vivos* Thus, in *John Vallamattom v UOI*,[927] the Supreme Court has declared that section 118 of the Indian Succession Act, 1925 as unconstitutional and violative of Article 14 of the Constitution of India.

Charitable trusts which create interest *in praesenti* are not subject to the rule against perpetuity in England in the sense that property may be tied up for an indefinite period for a charitable purpose.[928] In England property may also be tied up indefinitely for even a non-charitable purpose, eg where there is an unfettered gift *in praesenti* to a perpetual institution so that the corpus and income may be used by the institution as and when it pleases.[929]

In England, these are exceptions to the rule against perpetuities in so far as it deals with estates or interests *in praesenti*. But charitable trusts to arise *in futuro* are no exceptions to the English rule which deals with estates or interests *in futuro*. Therefore, a gift to charity upon a remote event is void,[930] except in the one case of a gift over from one charity to another.[931] This last mentioned exception in English law was followed by a judge of Calcutta High Court in the case of a will where there was a bequest to a charity, and a bequest over upon a remote event to another charity.[932] But in later case,[933] a division bench of the same High Court while construing the same will, held that the positive language of the Indian Succession Act, 1925 precluded the application of that exception in English law, and that the rule against remoteness of vesting in section 101 of the Indian Succession Act, 1865 (section 114 of the 1925 Act) applied to charitable bequests. The court further observed that as to gifts *inter vivos*, the TP Act had relaxed the rule against remoteness of vesting in the case of charities. This is undoubtedly correct. Not only is a gift *inter vivos*, to charity upon a remote event valid, but as the rule in section 16 is also relaxed, a gift to charity after prior interests which fails under sections 13 and 14 would be valid. Thus, *A* settles property on his son and his son's intended wife successively for their lives, and then on their eldest son for his life, and then on the eldest son of such eldest son for his life and then to a charity. The gift to charity would be valid though, if the ultimate beneficiary were not a charity, the gift would fail under section 16 as the prior interests of the son and grandson are void under sections 13 and 14.

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924. *Mayor of Lyons v East-India Co*, [1837] 1 Mad IA 175; *Broughton v Mercer*, (1875) 14 Beng LR 442.
925. *Mariana v Rt Rev F Provost*, (1941) ILR Rang 410.
926. *MAF Halfhyde v CA Saldanha*, (1944) 49 Cal WN 145.
927. *John Vallamattom v UOI*, (2003) 6 SCC 611 : AIR 2003 SC 2902.
928. *Goodman v Saltash Corporation*, [1882] 7 App Ca 633; Re *Christchurch Inclosure Act* [1888] 38 Ch D 520.
929. See note under section 14 "Rule against perpetuity in its primary sense."
930. Re *Lord Stratheden and Champbell* [1894] 3 Ch 265.
931. *Christ's Hospital v Grainger*, (1849) 1 Mac and G 560; Re *Tyler, Tyler v Tyler*, [1891] 3 Ch 252.
932. *Administrator General v Hughes*, (1913) ILR 40 Cal 192 : 21 IC 183.
933. *Jones v Administrator-General*, (1919) ILR 46 Cal 485 : 47 IC 383.

(6) Religion

A gift for the advancement of religion is recognized in the section as entitled to the exemption. A gift in perpetuity for the performance of masses for the soul of the donor was held to be bad in one case,[934] and good in another.[935]

A permanent bequest by a Parsi for the performance of *muktad* ceremonies is valid, for such ceremonies include prayers for the spiritual welfare of all Zoroastrians, and tend to the advancement of Zoroastrain religion.[936]

The dedication of the properties which are gifted in contravention of the rule against perpetuities, in cases where properties are given away partly by way of religious endowments, and partly for the benefit of certain individuals for their use, may be stated thus:

> If the terms of the document under which the properties or their income are gifted, amount to their complete dedication for religious or charitable purposes, then any part thereof which is given by way of gift to any person contrary to the rules against perpetuities enures to the benefit of the endowment and becomes part of properties endowed. But on the other hand, if the dedication is partial, such part which is hit by the rule against perpetuities reverts to the donor or his heirs.[937]

(7) Health

A bequest by an Englishman to a hospital was held to be exempt from the rule against perpetuity.[938]

(8) Beneficial to mankind

The question whether any particular object is for the benefit of the public so as to exempt it from the rule against perpetuity, must be determined with reference to the terms of this section. It is submitted that the words "beneficial to mankind" must be construed *ejusdem generis*, and as referring to objects of a nature analogous to those specified.

(9) Hindu law

Since the amending Act of 1929, the section applies to Hindus, but the Hindu law has always regarded gifts for religious or charitable purposes as exempt from the rule against perpetuity.[939] Section 18, recognises that the rule against perpetuity under the Act, does not apply to transfer of property for the benefit of public and such exclusion is in-built in Hindu Law itself.[940] A Hindu can make a permanent endowment for maintaining a *sadavrat* for giving food to travellers;[941] or to Brahmins;[942] or for the performance of religious ceremonies;[943] or for the endowment of a university,[944] or of a hospital.[945] He may even make

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934. *Colgan v Administrator-General,* (1892) ILR 15 Mad 424.
935. *Andrews v Jaokim,* (1868) 2 Beng LR 148.
936. *Jamsed v Soonabai,* (1911) ILR 33 Bom 122, p 200 : 1 IC 834 dissenting from *Limji v Bapuji,* (1889) ILR 11 Bom 441.
937. *The Controller of Estate Duty—WB v Usha Kumar,* (1980) 1 SCC 315, p 320 : AIR 1980 SC 312.
938. *Broughton v Mercer,* (1875) 14 Beng LR 422.
939. *Bhuggobutty v Gooroo,* (1897) ILR 25 Cal 112; *Prafulla v Jogendra Nath,* (1905) 9 Cal WN 528; *Sookhmoy Chunder v Monoharri Dassi,* (1883) ILR 11 Cal 684 : 12 IA 103.
940. *Gopal Singh Visharad v Zahoor Ahmed,* 2011 (5) ADJ 281 : 2011 (86) ALR 646 : (2011) ILR 1 All 387 : [2011 (4) JCR 397 (All)].
941. *Jamnabai v Khimji,* (1890) ILR 14 Bom 1; *Jugal Kishore v Lakshmandas,* (1901) ILR 23 Bom 659, p 664; *Morarji v Neubai,* (1893) ILR 17 Bom 351.
942. *Dwarkanath v Burroda,* (1878) ILR 4 Cal 443; *Manorama v Kalicharan,* (1903) ILR 31 Cal 166; *Rajendra Lall v Raj Coomari,* (1906) ILR 34 Cal 5.
943. *Profulla v Jogendra Nath,* (1905) 9 Cal WN 528; *Lakshmishankar v Vaijnath,* (1881) ILR 6 Bom 24.
944. *Manorama v Kalicharan,* (1903) ILR 31 Cal 166.
945. *Fanindra v Administrator-General,* (1901) 6 Cal WN 321.

a permanent gift for the establishment and worship of an idol,[946] as the English law as to superstitious uses does not apply in India.[947] A gift in favour of an idol which would be invalid in English law is not only lawful,[948] but is highly commendable in Hindu law.[949] However, if the object of the gift is uncertain it cannot take effect; and so the Privy Council have held that a gift for *dharam* is void, the word meaning law, virtue, legal or moral duty.[950] For the same reason, a gift for the spread of the Hindu religion has been held to be void.[951] A direction for accumulation of income for charitable purposes is valid in Hindu law, although it infringes the rule against perpetuity.[952]

(10) Mahomedan law

The section does not apply to Mahomedans, but Mahomedan law allows property to be tied up in perpetuity for religious or charitable purposes. A permanent dedication of property to such objects is called a *wakf*. Instances of *wakf* are set out in Mulla's *Mahomedan Law*. Mahomedan law allows property to be tied up in perpetuity by family settlement, provided the ultimate gift after the extinction of the family is to charity. Such illusory *wakf* were held by the Privy Council to be invalid,[953] but the practice has received legislative sanction in the Mussalman Wakf Validating Act, 1913, to which retrospective effect has been given by Act 32 of 1930.[954] A direction for the accumulation of income infringing the law against perpetuity has been held valid in a *wakf*.[955]

19. Vested interest.—Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is post-poned, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

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946. *Bhupati Nath v Ram Lal,* (1909) ILR 37 Cal 128 : 3 IC 642; *Khusalchand v Mahadevgiri,* (1875) 12 Bom HC 214.
947. *Judah v Judah,* (1870) 5 Beng LR 433; *Advocate-General v Vishvanath,* (1870) 1 Bom HC 9; *Khusalchand v Mahadevgiri,* (1875) 12 Bom HC 214.
948. *Juggut Mohini v Sokheemoney,* (1871) 14 MIA 289.
949. *Bhupati Nath v Ram Lal,* (1909) ILR 37 Cal 128, p 134 : 3 IC 642.
950. *Runchordas v Parvatibai,* (1899) ILR 23 Bom 725 : 26 IA 71; *Parthasarathy v Thiruvengoda,* (1907) ILR 30 Mad 340; *Devshunker v Motiram,* (1894) ILR 18 Bom 136.
951. *Venkatanarasimha v Subba Rao,* (1923) ILR 46 Mad 300 : 73 IC 991 : AIR 1923 Mad 376.
952. *Rajendra Lall v Raj Coomari,* (1907) ILR 34 Cal 5; *Sarojini Dassi v Gnanendra Nath,* (1916) 23 Cal LJ 241 : 33 IC 102.
953. *Abdul Fata Mahomed v Rasamaya,* (1894) ILR 2 Cal 619 : 22 IA 76.
954. And see *Fazlul Rabbi v State of West Bengal,* [1965] 3 SCR 307, p 315 : AIR 1965 SC 1722 : [1965] 2 SCJ 833 : [1965] 2 SCA 137.
955. *Mutu Ramanandan v Vava,* (1914) ILR 40 Mad 116 : 44 IA 21 : 93 IC 235.

Synopsis

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(1) Vested Interest

Vested interests as defined in this section are to be distinguished from contingent interests as defined in section 21. Where an interest is vested, the transfer is complete, but when an interest is contingent, the transfer depends upon a condition precedent. When that condition is fulfilled, the transfer takes effect and the interest is vested. If the condition refers to an event, which is certain to occur, the interest dependent upon it is not contingent, but is vested. If it is an uncertain event, it is contingent, for the condition may never be fulfilled and the transfer may never take effect. Thus, a gift to *A* on the death of *B* creates a vested interest in *A* even during *B*'s lifetime, for there is nothing more certain than death. However, a gift to *A* on the marriage of *B* creates only a contingent interest, for *B* may never marry; but that contingent interest becomes vested if and when *B* marries.

The distinction between a vested and a contingent interest may seem simple, but in practice, it is not always easy to distinguish the one from the other. The difficulty arises from the fact that a vested interest is not necessarily in possession. An interest may be vested and not yet in possession in any one of the three cases referred to in the explanation, i.e., (1) by a provision postponing enjoyment; or (2) by the intervention of a prior interest; or (3) by a provision for accumulation. Again, an interest may be vested although, it is liable to be divested by a condition subsequent. The difference between a condition precedent and a condition subsequent is that when the condition is precedent, the estate is not in the grantee until the condition is performed, but when the condition is subsequent the estate vests immediately in the grantee, and remains in him till the condition is broken. Conditions subsequent are dealt with in sections 28 and 31. The question whether an interest is vested or contingent arises most frequently in wills, and is best explained by the illustrations to the corresponding section in the Indian Succession Act, 1925 quoted below.

(2) Indian Succession Act, 1925—Illustrations of Vested Interest

The corresponding section of the Indian Succession Act, 1925, is section 119. To it are appended the following illustrations:

(i) *A* bequeaths to *B* 100 rupees, to be paid to him at the death of *C*. On *A*'s death the legacy becomes vested in interest in B, and if he dies before *C*, his representatives are entitled to the legacy.

(ii) *A* bequeaths to *B* 100 rupees, to be paid upon his attaining the age of 18. On *A*'s death the legacy becomes vested in interest in *B*.

(iii) A fund is bequeathed to *A* for life, and after his death to *B*. On the testator's death, the legacy to *B* becomes vested in interest in *B*.

(iv) A fund is bequeathed to *A* until *B* attains the age of 18 and then to *B*. The legacy to *B* is vested in interest from the testator's death.

(v) *A* bequeaths the whole of his property to *B* upon trust to pay certain debts out of the income, and then to make over the fund to *C*. At *A*'s death the gift to *C* becomes vested in interest in him.

(vi) A fund is bequeathed to *A*, *B* and *C* in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon *D*. On the death of the testator, the shares vested in interest in *A*, *B* and C, subject to be divested in case *A*, *B* and *C* shall all die under 18, and, upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives.

In illustration (i), the interest of *B* takes effect on the happening of an event that this is certain, and so it is vested.

In illustration (ii), the interest is one of which the enjoyment is postponed. It illustrates the well-settled rule that the words "to be paid" or "payable" at a certain age do not render a bequest contingent.[956] On the other hand, a gift stating "at" a certain age, or "if" or "when" a certain age is attained, or upon attaining a certain age, is contingent,[957] as is shown by the second illustration to section 120 of the Indian Succession Act, 1925.[958]

In illustration (iii), a prior interest intervenes, but the legacy is vested as the determination of that prior interest is a certain event.

In illustration (iv), it might be supposed that *B*'s interest was contingent on his attaining the age of 18, but it is construed as a gift to *A* for a term of years with remainder to *B*. It rests on the principle that the law favours the vesting of estates. Re *Blackwell*,[959] MR Pollock quoted with approval the following passage from *Hawkins on Wills*:

> In the construction of devises of real estates, it has long been an established rule for the guidance of courts... that all estates are to be holden vested, except estates in the devise of which a condition precedent is so clearly expressed, that the court cannot treat them as vested without deciding in the direct opposition to the terms of the will.

In this matter the law in India makes no distinction between real and personal property. The rule applies here both to immovable and movable property. In illustration (v), there is a divestment after the payment of debts. Jarman says that such a devise confers an immediately vested interest, the payment of debt constituting only a charge.[960]

In illustration (vi), the words "to be paid" import as in illustration (ii) a vested interest, but that interest, is liable to be divested on the happening of the event specified and vested in another person. This is an instance of a conditional limitation, i.e. an interest liable to be divested by a condition subsequent and vested in someone else. Conditional limitations are the subject of section 28.

(3) Enjoyment Postponed

A condition postponing enjoyment does not prevent the interest vesting immediately; but it is itself void for repugnancy after the transferee has attained majority.[961] An unequivocal

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956. Re *Couturier, Couturier v Shew*, [1907] 1 Ch 470.
957. *Hanson v Graham*, [1801] 6 Ves 239; *Leake v Robinson* [1817] 2 Mer 363; *Davies v Fisher*, [1842] 5 Beav 201; Re *Blackwell* [1926] 1 Ch 223 : [1925] All ER Rep 498.
958. See Transfer of Property Act, 1882, section 21.
959. Re *Blackwell* [1926] 1 Ch 223, p 231 : [1925] All ER Rep 498; *Scott v Tyler*, [1788] 2 W & TLC 146; *Taylor v Graham*, (1878) 3 App Cas 1287.
960. *Jarman on Wills*, 8th Edn, p 1373.See also *Rajes Kanta Roy v Santi Debi*, [1957] 1 SCR 77 : AIR 1957 SC 255 : [1955] SCJ 197.
961. *Sewdayal v Official Trustee*, (1931) ILR 58 Cal 768 : 134 IC 436 : AIR 1931 Cal 651; *Chebrolu Thayaramma v South India Educational Trust*, AIR 2008 (NOC) 481 (Mad).

and irrevocable settlement conferring enjoyment rights over the property in present and each getting a specific share in it upon the death of the settlor would create a vested interest in favour of each of the beneficiary.[962]

ILLUSTRATION

A transfers property to *B* in trust for *C*, and directs *B* to give possession of the property to *C* when he attains the age of 25. *C* has a vested interest and is entitled to possession at the age of 18.

The appointment of an executor or guardian during the minority of the devisee with a direction to hand over the property on his attaining majority does not postpone the vesting of the bequest.[963] When the rights of an adopted son are curtailed by an agreement giving the widow of the adoptive father the right to enjoy the property during her lifetime, the interest of the son is a vested interest which he can dispose off.[964]

ILLUSTRATION

A executed a deed of gift in favour of *B*, but directed that *B* was not to take possession of a portion of the property until after the deaths of *A* and *A*'s wife. *B* has a vested interest, enjoyment only being postponed.[965]

(4) Prior interest

A condition postponing enjoyment[966] or creation of a prior interest does not postpone the vesting of the subsequent interest. This is the case put in illustration (iii) to section 119 of the Indian Succession Act, 1925: "A fund is bequeathed to *A* for life, and after his death to *B*. On the testator's death the legacy becomes vested in interest in *B*". The expression "after his death" refers to the time when the gift becomes reduced to possession, and not to the time when the interest vests. A bequest to *A* from and after his attaining the age of 18 is prima facie contingent, because it is postponed until the happening of an event which may never happen. But a bequest to *B* for life and then to *A* from and after the death of *B* vests immediately in *A*, for enjoyment is postponed until the termination of a life estate, an event which must happen.[967] In *Rewun Persad v Radha Beeby*[968] a case decided under Hindu law, the testator gave his wife a life estate, and after her death one moiety of the estate to his brother *B*, and the other moiety to his sons *C* and *D*. *B* and *C* died during the lifetime of the widow, but as their shares were vested, and as *C* and *D* took as tenants in common, *C*'s widow was entitled to succeed to *C*'s share. In *Bhagabati v Kali Charan*[969] the bequest was to the mother for life, then to the wife for her life, and then to the nephews, and it was held that the nephews took a vested and transmittable interest on the death of the testator. In *Chunilal v Bai Muli*[970] there was a bequest to a widow for life and then to a daughter, and the daughter took an immediate vested interest.

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962. *P K Mohan Ram v B N Ananthachary,* AIR 2010 SC 1725 : (2010) 4 SCC 161.
963. *Tarachurn Chatterji v Suresh Chunder,* (1890) ILR 17 Cal 122 : 16 IA 160; *Bachman v Bachman,* (1884) ILR 6 All 583.
964. *Batwant Singh v Joti Prasad,* (1918) ILR 40 All 692 : 47 IC 599; *Vithalbhai v Shivabhai,* (1950) 52 Bom LR 301 : AIR 1950 Bom 289.
965. *Lachman v Baldeo,* [1919] 21 OC 312 : 48 IC 396.
966. *Chebrolu Thayaramma v South India Educational Trust,* AIR 2008 (NOC) 481 (Mad).
967. *Helifax v Wilson,* [1829] 16 Ves 168.
968. *Rewun Persad v Radha Beeby,* [1846] 4 MIA 137.
969. *Bhagabati v Kali Charan,* (1911) ILR 38 Cal 468 : 38 IA 54 : 10 IC 641; *Bilaso v Munni Lal,* (1911) ILR 33 All 558 : 11 IC 516; *Badri Das v Sunder Das,* 90 IC 829 : AIR 1927 Lah 166; *Sree Chand Sarcar v Kasi Chetty,* (1933) 66 Mad LJ 170 : 147 IC 383 : AIR 1933 Mad 885.
970. *Chunilal v Bai Muli,* (1900) ILR 24 Bom 420; *Lallu v Jagmohan,* (1898) ILR 22 Bom 409.

ILLUSTRATION

Property is settled in trust for *A* for life with a direction to the trustees to pay *A* ₹2,000 a year out of rents and profits and to apply the balance to the discharge of a mortgage; and after *A*'s death to convey the land to *B*. Although *B* may not survive, yet *B*'s interest is vested in *A*'s lifetime.[971]

A question arose before the Supreme Court in *Rajes Kanta Roy v Santi Debi*[972] as to whether the interest which devolved upon two minor sons under a settlement made by the father was vested or contingent. The settlement provided in substance that the sons would obtain an absolute interest upon the death of the father, and after discharging the debts of the father. The court observed that the settlor clearly contemplated that there would be, as infact, there was, a surplus after the payment of the debts, and held:

> Now there can be no doubt about the rule that where the enjoyment of the property is postponed but the present income thereof is to be applied for the benefit of the donee, the gift is vested and not contingent...This rule operates normally where the entire income is applied for the benefit of the donee. The distinguishing feature in this case is that it is not the entire income that is available to the donees for their actual use but only a portion thereof. But it is to be observed that according to the scheme of the trust-deed, the reason for limiting the enjoyment of the income to a specified sum thereof, is obviously in order to facilitate and bring about the discharge of the debts. As already explained the underlying scheme of the trust-deed is that the enjoyment is to be restricted until the debts are discharged. Whatever may be said of such a provision where a donee is not himself a person who is under any legal obligation *aliunde* to discharge such debts, the position in this case is different. The two sons are themselves persons who, if the testator died intestate, would be under an obligation to discharge his debts out of the properties which devolve upon them. It is only the surplus which would be legally available for division between them. In such a case, the balance of the income which is meant to be applied for the discharge of the debts is also an application for the income for the benefit of the donees. These arrangements taken together clearly indicate that what is postponed is not the very vesting of the property in the lots themselves but that the enjoyment of the income thereof is burdened with certain monthly payments and with the obligation to discharge debts therefrom notionally *pro rata* all of which taken together constitute application of the income for his benefit.[973]

The court also relied on the provision that if either of the sons died before the discharge of the debts, his heirs were entitled to the share of the son, which was a further indication that the interest of the sons was a vested interest. Where *A* settled property in favour of *B* authorizing him to collect rent of his house, no vested interest is created in favour of *B*.[974]

(5) Accumulation of Income

A direction for accumulation of income if in excess of the period sanctioned by section 17 is invalid for the excess. Within the limits sanctioned by the section, it is a provision for the postponement of enjoyment; and as such it does not postpone the vesting of the interest.[975] The first illustration to section 56 of the Indian Trusts Act, 1882 shows that a direction for the accumulation of the income of a minor is ineffective after he attains majority.

(6) Conditional Limitation

A provision that if a particular event shall happen the interest shall pass to another person is what is called in English law a conditional limitation. A conditional limitation divests an

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971. *U Zoe v Ma Mya May,* 127 IC 170 : AIR 1930 Rang 184.
972. *Rajes Kanta Roy v Santi Debi,* [1957] 1 SCR 77 : AIR 1957 SC 255 : [1957] SCJ 197.
973. [1957] 1 SCR 77, pp 93–94.
974. *Kokilambal v N Raman,* AIR 2005 SC 2468; (2005) 11 SCC 234.
975. *Saunders v Vautier,* [1841] Cr and Ph 240.

estate which has vested, and vests it in another person. A condition subsequent divests an estate which has vested and revests it in the grantor. Section 28 deals with conditional limitations, while conditions subsequent are dealt with in section 31.

A conditional limitation, therefore, does not prevent an estate from vesting; on the contrary, the condition itself implies that the estate which preceded it had vested. This is explained in *Sundar Bibi v Rajendra Narain.*[976] In that case, the terms of a compromise provided that *L* should have an estate for life, and that after his death *R* was to be full owner of the estate, if he survived *L*; but that if he did not survive *L*, the estate would pass to lineal male descendants of *R* according to the rule of primogeniture. Before the death of *L* the question arose whether *R* had only a contingent interest, or a vested interest which could be attached. Now if the provision had been merely this that the estate would pass to *R*, if he survived *L* and nothing more had been said, there can be no doubt that *R* would have had an estate contingent on his surviving *L*. But the further provision of a gift over to another person was a conditional limitation, which had the effect of vesting the estate in *R*. The reason given by the court was that the condition affected the retention of the interest, and not in its acquisition. *R*, therefore, took a vested interest liable to be divested if he did not survive *L*. A very similar case is *Raja Lal Bahadur v Rajendra Narain.*[977] A compromise between two brothers *L* and *R* provided that *L* was to have a life interest and that if *R* survived *L*, *R* would be "permanent owner with power of transfer and transmitting inheritance", but that if *R* did not so survive, "his male descendants according to the rule of lineal primogeniture will be entitled to the said property". This was held to confer, not contingent, but an immediate vested interest in *R*, although the estate tail in the event of *R* not surviving *L* was probably invalid. A condition precedent followed by a gift over is generally construed as a conditional limitation so as to favour the vesting of the prior estate.

(7) Time of Vesting

As soon as the transfer is complete, the interest vests. Words are to be construed according to their ordinary meaning, and no particular form of words is necessary to effect a vesting.[978]

(8) Power of Appointment

A power of appointment confers upon the donee of the power, a right of disposition of the property of the creator of the power, i.e., the appointor. The power may be either general, to appoint to any one the donee pleases, or special, to appoint anyone of a specified class of persons. The appointee or person in whose favour the donee exercises the power derives title from the creator of the power, and not from the donee. However, the property vests when the power is exercised, and not when it is created.[979] Until the power is exercised the property does not vest in the donee of the power; but if there is an independent gift to a class with a power to apportion the shares of each member of the class, the property vests by virtue of the gift even though the power is not exercised.[980] Again, the power may be such that it is the duty of the donee to exercise it, and in that case if there is no gift over,[981] the court will imply a gift for the objects of the power.[982]

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976. *Sundar Bibi v Rajendra Narain,* (1925) ILR 47 All 496 : 86 IC 684 : AIR 1925 All 389.
977. *Raja Lal Bahadur v Rajendra Narain,* (1934) ILR 9 Luck 173 : AIR 1934 Oudh 454.
978. *Hurris v Brown,* (1901) ILR 28 Cal 621.
979. *Marlborough (Duke) v Godolphin (Lord),* [1750] 5 Vcs Sen 61.
980. *Lambert v Thwaites,* [1866] LR 2 Eq 151; *Bradly v Cartwright,* [1867] LR 2 CP 511; *Wilson v Duguid,* (1883) 24 Ch D 244; Re *Master's Settlement, Master v Master,* [1911] 1 Ch 321.
981. *Jenkins v Quinchant, (temp Hardwicke)* 5 Ves 596.
982. *Brown v Higgs,* [1799] 4 Ves 708; *Salisbury v Denton,* [1857] 3 K&J 529, p 535.

(9) Contrary Intention

The grantor may, however, specify the time of vesting;[983] for under section 5 a transfer may be not only in the present, but also in the future.[984] However, the time of vesting cannot be beyond the period allowed by the rule against perpetuity. A deed of settlement gave life estate to *X*, with remainder to his children not in existence at the time of settlement. It was held that the interest of the children was a contingent one. Unborn children could be beneficiaries under the trust, but they could claim a vested interest only after the death of the holder of the life estate if such an intention was expressed in the deed.[985]

(10) Death of Transferee

When an interest is vested, it becomes the property of the transferee and is, under section 6, transferable by him even before he has obtained possession; for a transfer of property not in possession is effective. If the transferee dies, his interest vests in his representatives, irrespective of whether he had obtained possession.[986] One of the factors for determining whether an interest is vested or contingent, is whether the property devolves on the heirs of the transferee or reverts to the estate.[987]

(11) Hindu Law

The amendment of section 2 makes section 19 applicable to Hindus. Section 106 of the Indian Succession Act, 1865, was applied to Hindu wills by the Hindu Wills Act, 1870; and section 119 of the Indian Succession Act, 1925 is applied to some Hindu wills by section 57, and Sch III of the same Act. The principle of the section has always been recognised by Hindu law, and some of the cases noted were decided under that law. The case of *Gosling v Gosling*[988] has been followed in cases decided under Hindu law. Thus, in *Gosavi Shivgar v Rivettcarnac*[989] there was a bequest of property to a minor with a direction that it should not be given to him till he attained the age of 30, but the direction was held to be inoperative after he attained majority. On the other hand, as there was a charge on the income for the maintenance of another disciple, the trustee was allowed to retain the *corpus* till the age of 30, paying the devisee the whole income subject to the charge. In *Ram Kaur v Atma Singh*,[990] the testator devised his estate to his sons and directed that the widow should manage it during her lifetime, but it had held that the estate vested immediately in the sons, and as the widow was given no prior interest, they were entitled to immediate possession. On the other hand, in *Srinivasa v Dandayudapani*,[991] there was a bequest to a daughter with a direction to enjoy the income and pass the corpus intact to her son. The daughter took a vested interest, but the direction was ineffective and the son who predeceased her took no interest at all. It has also been held under a Hindu law that the creation of partial trusts and charges will not postpone the vesting in possession.[992] When a testator made a provision for an allowance to his widow and directed the estate to be divided by the executors between themselves at her death, the executors took an immediate vested interest although they died before the

983. *Glanvill v Glanvill*, [1816] 2 Mer 38.
984. *Samsuddin v Abdul Husein*, (1906) ILR 31 Bom 165, p 172.
985. *Rukhamanbai v Shivaram*, AIR 1981 SC 881 : (1981) 4 SCC 262.
986. See Indian Succession Act, 1925, illustration (i) to section 119.
987. See *Rajes Kanta Roy v Santi Debi*, [1957] 1 SCR 77 : AIR 1957 SC 255 : [1957] SCJ 197.
988. *Gosling v Gosling*, (1859) Johns 265.
989. *Gosavi Shivgar v Rivettcarnac*, (1888) ILR 13 Bom 463; *Hussenbhoy v Ahmedbhoy*, (1901) ILR 26 Bom 319.
990. *Ram Kaur v Atma Singh*, (1927) ILR 8 Lah 181 : 103 IC 506 : AIR 1927 Lah 404.
991. *Srinivasa v Dandayudapani*, (1886) ILR 12 Mad 411.
992. *Cally Nath v Chunder Nath*, (1882) ILR 8 Cal 378; *Jatram v Kuverbai*, (1885) ILR 9 Bom 491 (vested interest subject to right of residence).

widow.[993] A bequest to a daughter of a house after the mortgage debt has been paid is not contingent, but creates a present vested interest.[994]

In *Palchuri Hanumayamma v Tadikamalla Kotlingam*,[995] the Supreme Court found section 19 to be inapplicable on facts due to enactment of section 14 of the Hindu Succession Act, 1956. In this case, as per the will, the testator's wife was to manage the property allotted to her daughters during her lifetime, and after her lifetime the properties identified as individual shares of the three daughters were to be inherited by the said daughters. However, during her lifetime, the testator's wife disposed of the entire property to the exclusion of one of the daughters. It was held that due to enactment of section 14 prior to the testator's wife's death, her right got enlarged into an absolute estate and she became an absolute owner of the property and, therefore, section 19 has no relevance.

(12) Mahomedan Law

Sunni law does not recognise an estate for life with a vested remainder.[996] There is some doubt as to whether the law on this point has been altered by the decision of the Privy Council in *Amjad Khan v Ashraf Khan*.[997] It led to a difference of opinion in a case decided by Bombay High Court.[998] Such estates are recognised in Shia law,[999] and in the case of a *talukdari* estate owned by a Mahomedan family in Oudh.[1000] A life estate with a vested remainder is recognised both for Shias and Sunnis by the Mussalman Wakf Validating Act, 1913, in the case of *wakfs*.

20. When unborn person acquires vested interest on transfer for his benefit.—Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

There is no ban on the transfer of interest in favour of an unborn person. Section 20 permits an interest being created for the benefit of an unborn person who acquires interest upon his birth.[1001]

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(1) When Unborn Person Acquires Vested Interest on Transfer for His Benefit

An interest created for the benefit of an unborn person vests as soon as that person is born. Thus, if *A* settles property on himself and his intended wife for their joint lives and then on the eldest son of their marriage, the son takes a vested interest as soon as he is born.

993. *Subramaniam v Subramaniam*, (1842) ILR 4 Mad 124.
994. *Ranganatha v Mohankrishna*, 93 IC 11 : AIR 1926 Mad 645; *Subramaniam v Subramaniam*, (1842) ILR 4 Mad 124; Indian Succession Act, 1925, illustration (v) to section 119.
995. *Palchuri Hanumayamma v Tadikamalla Kotlingam*, (2001) 8 SCC 552.
996. *Abdul Wahid v Narun Bibi*, (1885) ILR 11 Cal 597 : 12 IA 91.
997. *Amjad Khan v Ashraf Khan*, 56 IA 213 : 116 IC 405 : AIR 1929 PC 149.
998. *Rasoolbibi v Yusuf Ajam*, (1933) ILR 57 Bom 737 : 35 Bom LR 643 : 148 IC 82 : AIR 1933 Bom 324.
999. *Banoo Begam v Mir Abed Ali*, (1908) ILR 32 Bom 172; *Siraj Husain v Mushaf Husain*, 65 IC 132 : 24 OC 321 : AIR 1922 Oudh 93; *Muhammad Ahsan v Umardaraz*, (1906) ILR 28 All 633.
1000. *Abdul Qayum v Abdul Rahman*, 146 IC 710 : AIR 1933 Oudh 439.
1001. *F M Devaru Ganapathi Bhat v Prabhakar Ganapathi Bhat*, (2004) 2 SCC 504 : AIR 2004 SC 2665.

It does not matter that he is not entitled to possession during the lifetime of his parents. Nor will the vesting be affected by a provision that if his parents die during his minority, the trustees should not deliver possession to him until he attains majority.

Under section 13 it is necessary that the estate which vests in the unborn person must be the whole remainder. In English law, it is possible to limit an estate to *A* for life, then to *A*'s unborn eldest son for life, and then to *B*. In this case until *A*'s son is born the estate vests in *A* with a contingent remainder to his son, and with a vested remainder to *B*. But as soon as the son is born, the estate is in *A* with a vested remainder to the son, with a vested remainder to *B*. However, under this Act, the interest of the son fails by reason of section 13, and that of *B* fails under section 16. Where, however, a disposition by *A* is to his grandson *B*, and such of *C*'s sons as were born when *B* attained majority, the disposition is not hit by section 13. *C*'s son who was born after the disposition, but before *B* attained majority, obtains a vested interest under this section on his birth.[1002] A contrary intention that the estate shall not vest at birth may appear as when the interest is contingent, eg a transfer to *A* and *B* for their joint lives, and then to the son of their intended marriage who shall first attain the age of 18 years.

Under Hindu law as amended by statute, no transfer or bequest by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

21. Contingent interest.—Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

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(1) Contingent Interest

The distinction between a contingent interest and a vested interest has been explained in note (1) to section 19. If the transfer is subject to a condition precedent, there is no transfer at all until the condition is fulfilled. Till then the interest is contingent on the condition being fulfilled. When the condition is fulfilled, the transfer takes effect and the interest becomes vested.[1003]

1002. *Konahally Vasanthappa v Konahally Channabasappa*, AIR 1962 Mys 98.
1003. See *Cheena Reddy v Pajau Kesamma*, AIR 1954 Hyd 185; See also illustrations in note (2) below.

The specified uncertain event may be one which depends upon the will of the intended transferee, eg execution of a deed, or payment of a sum of money. The performance of such conditions is the subject of section 26.

(2) Indian Succession Act, 1925—Illustrations of Contingent Interest

The corresponding section of the Indian Succession Act, 1925, is section 120. The following are the illustrations to that section:

(i) A legacy is bequeathed to *D* in case *A*, *B* and *C* shall all die under the age of 18; *D* has a contingent interest in the legacy until *A*, *B* and *C* die under 18, or one of them attains that age.

(ii) A sum of money is bequeathed to *A* "in case he shall attain the age of 18" or "when he shall attain the age of 18". *A*'s interest in the legacy is contingent until the condition is fulfilled by his attaining that age.

(iii) An estate is bequeathed to *A* for life, and after his death to *B* if *B* shall then be living; but if *B* shall not then be living to *C*. *A*, *B* and *C* survive the testator, *B* and *C* each take a contingent interest in the estate until the event which is to vest it in one or in the other has happened.

(iv) An estate is bequeathed as in the last case supposed. *B* dies in the lifetime of *A* and *C*. Upon the death of *B*, *C* acquires a vested right to obtain possession of the estate upon *A*'s death.

(v) A legacy is bequeathed to *A* when she shall attain the age of 18, or shall marry under that age with the consent of *B*, with a proviso that, if she neither attains 18 nor marries under that age with *B*'s consent, the legacy shall go to *C*. *A* and *C* each take a contingent interest in the legacy. *A* on attaining the age of majority, becomes absolutely entitled to the legacy although she may have married under 18 without the consent of *B*.

(vi) An estate is bequeathed to *A* until he shall marry and after that event to *B*. *B*'s interest in the bequest is contingent until the condition is fulfilled by *A*'s marrying.

(vii) An estate is bequeathed to *A* until he shall take advantage of any law for the relief of insolvent debtors, and after that event, to *B*. *B*'s interest in the bequest is contingent until *A* takes advantage of such a law.

(viii) An estate is bequeathed to *A* if he shall pay 500 rupees to *B*. *A*'s interest in the bequest is contingent until he has paid 500 rupees to *B*.

(ix) *A* leaves his farm of Sultanpur Khurd to *B*, if *B* shall convey his own farm of Sultanpur Buzurg to *C*. *B*'s interest in the bequest is contingent until he has conveyed the latter farm to *C*.

(x) A fund is bequeathed to *A* if *B* shall not marry *C* within five years after the testator's death. *A*'s interest in the legacy is contingent until the condition is fulfilled by the expiration of the five years without *B*'s having married *C*, or by the occurrence within that period of an event which makes the fulfilment of the condition impossible.

(xi) A fund is bequeathed to *A* if *B* shall not make any provision for him by will. The legacy is contingent until *B*'s death.

(xii) *A* bequeaths to *B* 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a component part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(xiii) *A* bequeaths to *B* 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

In Illustration (ii), the instances that a bequest "at" a given age,[1004] or "upon attaining" or "as" the legatee shall attain, or "after" his attaining a given age is prima facie contingent.[1005]

1004. *Stapleton v Cheales*, [1711] Pre ch 315.
1005. *Leake v Robinson*, [1817] 2 Mer 363; *Hanson v Graham*, [1801] 6 Ves 239; *Davies v Fisher*, [1842] 5 Beav 201.

In illustration (v), the conditions are in the alternative and it is sufficient if one is fulfilled.[1006]

In illustration (vii), the condition of defeasance on insolvency is a condition subsequent as regards *A*, but a condition precedent as regards *B*. Such a condition is invalid in a transfer inter vivos.[1007]

In illustration (x), the condition is a negative condition which is discharged by the event becoming impossible. The marriage of *B* and *C* would be rendered impossible by the death of either party or by the marriage of *B* or *C* with another person.[1008]

In illustration (xii) and (xiii), the exception to the section is referred to.

In illustration (xiii), the income is of another fund, and so the exception does not apply.

(3) Additional Instances of Contingent Interest

The following are some of the decisions on contingent interest illustrating contingent interests occurring in wills:

(1) Bequest to a daughter for life and after her death to her lawful children who being a son shall attain the age of 21, or who being a daughter shall attain that age or marry—held that the interest of a son was contingent till he attained the age of 21 and then became vested.[1009]

(2) Bequests to five sons in equal shares with a condition that in the event of any son dying without sons or son's sons, his share will be taken by the surviving sons—held that each son gets a life-estate, but the absolute estate of each son was contingent on his leaving a son or a son's son upon death.[1010]

(3) Bequests to wife and son whom she was empowered to adopt, with a provision that if she died without adopting a son or if the son died in her lifetime, the estate should pass to a sister's son. Held that the nephew had a contingent interest which was vested when the adopted son died without issues in the lifetime of the widow.[1011]

(4) Condition Precedent Construed as a Condition Subsequent

A condition precedent, when followed by a gift over, is sometimes construed as a condition subsequent so that the interest dependent on it is not contingent, but vested. Thus, a devise to *A* "if" or "when" he attains the age of majority, with a gift over in the event of his dying under that age, has been held to be a condition subsequent so that *A* takes a vested interest liable to be divested by his death under the age specified. Similarly, a devise to *A* if or when he shall attain a given age, with a limitation over on his death under that age without issue, confers a vested estate on *A* defeasible only in the event of his death without

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1006. *Austen v Halsey,* [1842] 13 Ves 125.
1007. See section 12 and the note thereon.
1008. See in this connection illustration (ii) to section 136 of the Indian Succession Act, 1925, and the note on section 12 above.
1009. *Ernest William Adams v Gray,* (1925) 48 Mad LJ 707 : 90 IC 5 : AIR 1925 Mad 599.
1010. *Soorjeemoney Doossee v Denobundoo Mullick,* (1862) 9 Mad IA 123; *Gurusami v Sivakami,* (1895) ILR 18 Mad 347 : 22 IA 119 (life-estate to daughters, but absolute estate contingent on their having issue); *Bai Kamala v Rewashanker,* (1924) 26 Bom LR 249 : 80 IC 520 : AIR 1924 Bom 350.
1011. *Bhupendra v Amarendra,* (1915) ILR 43 Cal 432 : 43 IA 12 : 34 IC 892 : on app from (1913) ILR 41 Cal 642 : 24 IC 458.

issue under the specified age.[1012] The English Courts have adopted two rules of construction, namely: (1) that the gift of income of the same fund, until the contingency happens, to the very person who will on attaining a particular age take the fund makes the gift of the fund, apparently contingent upon the attainment of that age, a vested interest; and (2) that a gift over upon failure of a prior gift may have the effect of converting the prior gift apparently contingent upon attaining of a particular age into a vested interest, subject to be divested on the death before that age. The first of the above two rules of constructions have been adopted in India by the exception to section 21. The second rule has not been adopted in any section of TP Act or the Indian Succession Act, 1925. It is submitted that in such circumstances, there is no reason for importing here the second rule about which the English courts have taken divergent views. This opinion has been expressed in a case of Calcutta High Court.[1013]

(5) *Spes Successionis*

A mere *spes successionis* is neither a contingent interest, nor a vested interest.[1014]

(6) Exception

Illustrations of the exceptions are given in section 120 of the Indian Succession Act, 1925, and have already been quoted in note (2) above and illustration (xii) and illustration (xiii), and contrasted in illustration (xii) with illustration (xiii). Under the exception, there must be either a gift of the interest, or a direction to apply it. The gift of interest in a legacy involves an immediate gift, for the particular legacy has to be immediately separated from the bulk of the property in order to provide for the interest.[1015] If there is no gift of the income, there must be a direction to apply it for the benefit of the minor. However, in order that a case falls within the exception, it is necessary that the direction relates to the whole of the income.[1016]

The exception in the corresponding section of the Indian Succession Act, 1865, was considered in a case before the Privy Council.[1017] A Parsi by will appointed his brother his executor, and directed him to bring up and maintain the child which his wife was expecting, and to maintain himself and the family "out of my property and effects." If the child was a son, the will directed that he "shall be cherished and maintained and educated and when he comes of age my executor shall make over the whole of my remaining properties to my son". Their Lordships held that the case was not within the exception because, (1) there is no gift out of any ascertainable fund to the son; (2) the executor was to maintain not only the son, but also the whole family; and (3) he was entitled to spend not only the income, but also the corpus. It has been held that the exception applies only to the case where a fund is given to a person "on his attaining a particular age". It has no relation to any other contingency eg his surviving a named person.[1018]

The exception has no reference to gifts to a contingent class, and it is submitted that in India the principle of the exception cannot be extended to a gift to a contingent class.[1019]

1012. *Phips v Ackers,* (1835-42) 9 Cl & Fin 583.
1013. *Kanai Lal v Kumar Purendu Nath,* (1946) 51 Cal WN 227.
1014. *Samsuddin v Abdul Husein,* (1906) ILR 31 Bom 165.
1015. *Vawdry v Geddes,* (1830) 1 Russ & M 208 approved by J Buckley Re *Nunburnholme (Lord), Wilson v Nunburnholme,* [1912] 1 Ch 489, p 496; *Bolding v Strungell,* [1918] 43 LJ Ch 208.
1016. *Commr of W T v Ashok Kumar,* AIR 1967 Guj 161, relying on *Rajes Kanta Roy v Santi Debi,* [1957] 1 SCR 77 : AIR 1957 SC : [1957] SCJ 197 : [1957] SCA 440.
1017. *Dadachanji v Ratanbai,* (1925) ILR 49 Bom 167 : 52 IA 95 : 84 IC 892 : AIR 1925 PC 27; *Kanai Lal v Kumar Purnendu Nath,* (1946) 51 Cal WN 227.
1018. *Sopher v Administrator-General of Bengal,* 71 IA 93 : 216 IC 53 : 46 Bom LR 86 : AIR 1944 PC 67.
1019. See note under section 22.

22. Transfer to members of a class who attain a particular age.—Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

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(1) Contingent Class

The case dealt with in this section is a gift to a contingent class. This is not the same thing as a gift to a class on a contingency. Thus, a gift to the children of *A* in case *B* dies without issue, is a gift to a class on a contingency. However, a gift to such of the children of *A* who shall attain the age of 18, is a gift to a contingent class. No child of *A* has vested interest until he has attained that age,[1020] and until then he does not completely answer the description of the transferee.[1021] Until then his interest is contingent even though there may be a gift over.

(2) Ascertainment of Class

For the ascertainment of a class, the rule is that the objects of the testator's bounty should be ascertained as soon as possible. In the case of a gift to the children of *A* when they attain the age of 18, the class is ascertained when the first child of *A* attains 18, and no child born after that time can take.[1022] Similarly, if the gift is to *A* for life, and then to such of *B*'s children as attain the age of 18, then if a child of *B* has attained the age of 18 in *A*'s lifetime, the class is ascertained on the death of *A*, and no child born after *A*'s death can take.[1023] In the first case, the class consists of the children of *A* who are in existence when the first child of *A* attains the age of 18. In the second case, the class consists of the children of *B* in existence at the death of *A*, provided one of them has attained the age of 18 in the lifetime of *A*. If no child of *B* has attained the age of 18 in the lifetime of *A*, any child of *B* born before the first child of *B* reaches 18 becomes a member of the class subject to his attaining the age of 18 years.

(3) Not Contingent

If the gift is to the children of *A* to be divided among them when they attain the age of 18, there is no contingency at all, and the children take an immediate vested interest,[1024] and enjoyment only is postponed.

(4) Indian Succession Act, 1925

The corresponding section of the Indian Succession Act, 1925, is section 121. The illustration to that section is as follows:

> A fund is bequeathed to such of the children of *A* as shall attain the age of 18, with a direction that, while any child of *A* shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied to his

1020. *Bull v Pritchard,* (1826) 47 1 Russ 213; *Leake v Robinson,* [1817] 2 Mer 363; *Thomas v Wilberforce,* [1862] 31 Beav 299.
1021. *Duffield v Duffield,* (1825-29) 3 Bli 260.
1022. *Whitbread v Lord St John,* [1804] 10 Ves 152; *Andrews v Partington,* [1791] 3 Bro CC 401.
1023. *Re Mervin, Mervin v Crossman,* [1891] 3 Ch 197.
1024. *Williams v Clark,* [1851] 4 De G & Sm 472; *Maseyk v Fergusson,* (1877) ILR 4 Cal 304.

maintenance and education. No child of *A* who is under the age of 18 has a vested interest in the bequest.

(5) Exception to section 21 Not Applicable to Contingent Class

The above illustration under section 121 of the Indian Succession Act, 1925 can be compared with illustration (xii) under section 120 of that Act which explains the meaning of the exception to the last mentioned section. It is clear that the exception to section 120 does not apply in the case of a bequest to a contingent class, for despite the provision for maintenance, the interest is not vested. Although no illustrations are given under sections 21 or 22 of the TP Act, the meaning of those sections must be the same as those of the corresponding sections 120 and 121 of the Indian Succession Act, 1925 as explained by the illustrations. It follows, therefore, that the exception to section 21 does not apply in the case of a contingent class, for despite a provision for maintenance, the share is not vested. It has been so held in a case by Calcutta High Court.[1025] In *De Souza v Vaz*[1026] J Farran said—

> The same rule, however, does not apply where there is a gift of an entire fund payable to a *class* of persons equally upon their attaining a certain age. There a direction to apply the income of the whole fund, in the meantime, for their maintenance does not create a vested interest in a member of the class who does not attain that age.

23. Transfer contingent on happening of specified uncertain event.— Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

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(1) Subsequent Contingent Interest

The case put in this section is that of a prior interest followed by a subsequent contingent interest. The contingent interest cannot vest until the event on which it is contingent happens. If that happens sometime after the prior interest has determined, there is a gap or interval during which the estate would be in suspense and would be a *res nullius*. The section, therefore, enacts that the contingent interest will fail or cannot vest, unless the event happens before or at the same time as the prior interest ceases. Thus, if there is a gift for life to *A*, and then to *B* in case *B* gets called to the Bar, the gift to *B* fails, unless he is called to the Bar in the lifetime of *A* or at the same time as *A* dies.[1027]

The rule in this section corresponds to the English real property rule that every contingent remainder must vest during the continuance of the particular estate which supports it or *eo instanti* that such particular estate determines.

In a Madras case,[1028] the testator disinherited his son, and left his estate to the grandson or grandsons who might be born within 10 years after his death. Justice Ramesam said that the result was that there would be an interval of 10 years after the testator's death during which the estate is

1025. *Kanai Lal v Kumar Purnendu Nath*, (1946) 51 Cal WN 227.
1026. *De Souza v Vaz*, (1888) ILR 12 Bom 137, p 146; Re *Parker, Barker v Barker*, (1880) 16 Ch D 44.
1027. For further illustrations, see note (2) below.
1028. *Official Assignee of Madras v Vedavalli Thayarammal*, (1926) 51 Mad LJ 182, p 192 : 97 IC 163 : 192 : AIR 1926 Mad 936.

not vested in any person, and that for this reason the disposition was void. In *Gadadhar Mullick v Official Trustee of Bengal,*[1029] it was held that the artificial rule of English real property law that every contingent gift must be supported by a prior estate, and that it must vest at least *eo instanti* the determination of the particular estate which supports it, ought not to be imported to India for Hindu law. *Soorjeemony's* case[1030] and *Gadadhar Mullick's* case,[1031] though cases of contingent bequests in a will, are, it is submitted, applicable to contingent gifts inter vivos governed by Hindu law as unmodified by legislation.[1032]

(2) Indian Succession Act, 1925

The section corresponds to section 124 of the Indian Succession Act, 1925, according to which if no period is specified, a contingent bequest fails, unless the event on which it is contingent happens before the period of distribution.

The following are the illustrations to the section:

(i) A legacy is bequeathed to *A,* and in case of his death, to *B.* If *A* survives the testator, the legacy to *B* does not take effect.

(ii) A legacy is bequeathed to *A,* and in case of his death without children to *B.* If *A* survives the testator or dies in his lifetime leaving a child, the legacy to *B* does not take effect.

(iii) A legacy is bequeathed to *A* when and if he attains the age of 18 and, in case of his death, to *B. A* attains the age of 18. The legacy to *B* does not take effect.

(iv) A legacy is bequeathed to *A* for life, and, after his death to *B,* "in case of *B's* death without children" to *C.* The words "in case of *B's* death without children" are to be understood as meaning in case *B* dies without children during the lifetime of *A.*

(v) A legacy is bequeathed to *A* for life, and, after his death to *B,* and, "in case of *B's* death" to *C.* The words "in case of *B's* death" are to be considered as meaning "in case *B* dies in the lifetime of *A.*"

In *Chunilal v Bai Samrath,*[1033] where the testator bequeathed his property to his two sons with a proviso that in case of either dying without male issue, his share was to go to the survivor, the gift over to the surviving son was contingent on the death of the other son without male issue. The Privy Council held that the gift over was effective although the other son died two years after the testator. This was a case to which the Hindu Wills Act did not apply; but in other cases in which section 111 of the Indian Succession Act, 1865, was applicable, or was made applicable by the Hindu Wills Act, it was held that the prior gift was absolute and indefeasible on the death of the testator.[1034]

(3) Section to be Applied Only to Cases Strictly Coming Within its Scope

In *Bhupendra v Amarendra*[1035] the Judicial Committee observed, with reference to section 11 of the Succession Act, 1865, now reproduced in section 124 of the Succession Act, 1925, which corresponds to section 23 of this Act:

1029. *Gadadhar Mullick v Official Trustee of Bengal,* AIR 1940 PC 45.
1030. *Soorjeemony's* case (1862) 9 Mad IA 123.
1031. *Gadadhar Mullick v Official Trustee of Bengal,* AIR 1940 PC 45.
1032. *Kanai Lal v Kumar Purnendu Nath,* (1946) 51 Cal WN 227.
1033. *Chunilal v Bai Samrath,* (1914) ILR 38 Bom 399, p 413 : 23 IC 654 : AIR 1914 PC 60; *Bolo v Koklan,* (1930) ILR 11 Lah 657 : 57 IA 325 : 127 IC 737 : AIR 1930 PC 270.
1034. *Norendra Nath v Kamalbasini Dasi,* (1896) ILR 23 Cal 563 : 23 IA 18; *Lala Ramjewan v Dal Koer,* (1897) ILR 24 Cal 406; *Nawroji Pudumji v Putlibai,* (1913) ILR 37 Bom 644 : 19 IC 832; *Nistarini Debya v Behary Lal,* (1914) 19 Cal WN 52 : 27 IC 239.
1035. *Bhupendra v Amarendra,* (1915) ILR 43 Cal 432, p 440 : 43 IA 12.

> section 111 embodies the rule enunciated in *Edwards v Edwards.*[1036] The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given it statutory force...Their Lordships think that it should be applied only to cases strictly coming within its scope.

In that case, time was mentioned for the occurrence of the specified uncertain event and consequently, section 111 was not applied, for that section applied only when no time was mentioned for the occurrence of the event. It will be noticed that section 23 is concerned with a gift to a specified person upon certain contingency. Although in section 124 of the Succession Act, 1925, which corresponds to this section, the expression "specified person" is not used, the illustration to that section clearly indicates that the contingent bequest contemplated by that section is one to a specified person. Section 23 of TP Act and section 124 of the Indian Succession Act, 1925, therefore, like the exceptions to section 21 of TP Act and section 120 of the Indian Succession Act, 1925, have no reference to a gift or bequest to a contingent class. It has already been submitted that the exceptions to the last mentioned sections do not apply to a gift or bequest to a contingent class. On a parity of reasoning, section 23 of TP Act and section 124 of the Indian Succession Act, 1925 ought not to apply to a gift or bequest to a contingent class. A gift or bequest to a contingent class does not strictly come within the scope of section 23 of TP Act or section 124 of the Indian Succession Act, 1925, for those sections are concerned with gifts or bequests to specified persons and, on the authority of the observations of the Judicial Committee quoted above, those sections should not be applied to a gift or bequest to a contingent class.[1037]

24. Transfer to such of certain persons as survive at some period not specified.—Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

ILLUSTRATION

A transfers property to *B* for life, and after his death to *C* and *D*, equally to be divided between them, or to survivor of them. *C* dies during the life of *B*. *D* survives *B*. At *B*'s death the property passes to *D*.

Synopsis

(1) Gift to Survivor ..... 171 (2) Indian Succession Act, 1925..... 183

(1) Gift to Survivor

This section enacts a rule of construction and is best explained by the following passage from the judgment of LJ Turner in *White v Barker.*[1038]

> Where there is a bequest to *A* for life and after his death to *B* and *C* or the survivor of them, some meaning must of course be attached to the words "the survivor." They may refer to any one of three events—to one of the persons named surviving the other, or to one of them only surviving the testator, or to one of them only surviving the tenant for life, and in the absence of

1036. *Edwards v Edwards,* [1852] 15 Beav 357.
1037. *Kanai Lal v Kumar Purnendu Nath,* (1946) 51 Cal WN 227.
1038. *White v Barker,* [1860] 2 De GF & J 55, p 64.

any indication to the contrary, they are taken to refer to the latter event as being the more probable one to have been referred to.

(2) Indian Succession Act, 1925

The corresponding section in the Indian Succession Act, 1925, is section 125. Under that section, the period of survivorship is the time of payment or distribution, unless a contrary intention appears from the terms of the will. The general rule is established by the leading case of *Cripps v Wolcott,*[1039] where VC Leach stated the rule as follows:

> I consider it, however, to be well settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivor of them, and there is no special intent to be found in the will, that the survivorship is to be referred to the period of division. If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy...But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at his death will take the whole legacy.

The section in the Indian Succession Act, 1925 has the following illustrations:

(i) Property is bequeathed to *A* and *B* to be equally divided between them or to the survivor of them. If both, *A* and *B* survive the testator, the legacy is equally divided between them. If *A* dies before the testator, and *B* survives the testator, it goes to *B*.

(ii) Property is bequeathed to *A* for life, and, after his death, to *B* and *C*, to be equally divided between them, or to the survivor of them. *B* dies during the lifetime of *A*; *C* survives *A*. At *A*'s death the legacy goes to *C* (see the illustration to the present section 24).[1040]

(iii) Property is bequeathed to *A* for life, and, after his death, to *B* and *C*, or the survivor, with a direction that, if *B* should not survive the testator, his children are to stand in his place. *C* dies during the life of the testator; *B* survives the testator, but dies in the lifetime of *A*. The legacy goes to the representative of *B*.

(iv) Property is bequeathed to *A* for life, and, after his death, to *B* and *C*, with a direction that, in case either of them dies in the lifetime of *A*, the whole shall go to the survivor. *B* dies in the lifetime of *A*. Afterwards, *C* dies in the lifetime of *A*. The legacy goes to the representative of *C*.

In the first illustration, no antecedent interest precedes the gift, and the period of distribution is the death of the testator. In *Ellokassee Dassee v Durponarai,*[1041] the testator left his property to his two sons, an infant grandson, and a widow in equal shares, and directed that "if any of these four persons happen to die, the survivors of them will receive this estate in equal shares; but if there be a son or grandson surviving as heir and representatives of the party dying, such survivor shall succeed to his share;...so long as my infant grandson shall not have attained his majority the whole of my estate shall remain undivided." It was held that the period of distribution was the death of the testator; and if all four persons survived the testator they took vested interests from that date, but that the estate was not divisible until the grandson attained majority.

In the second illustration, the period of division is the death of the life tenant *A*.[1042]

1039. *Cripps v Wolcott,* (1819) ILR 4 Mad 11, p 15; *Neathway v Reed,* [1853] 3 De GM & G 18; *Heani v Baker,* [1864] 2 K & J 383; Re *Gregson's Trust Estate* [1864] 2 De GJ & Sm 428.
1040. *Ramchandra v Jagdeshwari Prasad,* 168 IC 605 : AIR 1937 Pat 247.
1041. *Ellokassee Dassee v Durponarai,* (1880) ILR 5 Cal 59.
1042. *Cripps v Wolcott,* (1819) ILR 4 Mad 11.

The third illustration is of the "contrary intention" for although there is a prior interest, the time of distribution is the death of the testator.

The fourth illustration is another instance of "contrary intention," for the time of distribution is that of one legatee surviving the other. In the passage already quoted from the judgment in *White v Baker,*[1043] the Lordship continued:

> But where, as in the present case, the bequest is to *A* for life and after his death to *B* and *C*, and in case either of them dies in the lifetime of *A*, the whole to the survivor, it is plain that the words in their natural import refer to one surviving the other.

25. Conditional transfer.—An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

ILLUSTRATIONS

(a) A lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) A gives ₹500 to *B* on condition that he shall marry *A*'s daughter *C*. At the date of the transfer *C* was dead. The transfer is void.

(c) A transfers ₹500 to *B* on condition that she shall murder *C*. The transfer is void.

(d) A transfers ₹500 to his niece *C*, if she will desert her husband. The transfer is void.

Synopsis

(1) Void Condition Precedent..... 184 (2) Indian Succession Act, 1925..... 185

(1) Void Condition Precedent

The expression "dependent upon a condition" shows that the section refers to conditions precedent. If the condition precedent to a transfer is of the nature described in this section, the transfer fails. Under section 6(h)(2) of TP Act, no transfer can be made for an object or consideration which is unlawful within the meaning of section 23 of the Indian Contract Act, 1872.

A condition the fulfilment of which is impossible may refer to an act which is impossible in itself, as in the first two illustrations. The conditions, the fulfilment of which becomes impossible by the act of the party benefited by the non-fulfilment is dealt with in section 34.

The conditions referred to in this section are conditions which as agreements would be void.

Void conditions subsequent are the subject of section 32. If a condition subsequent is void, the condition fails, but the interest created by the transfer is not affected; while if a condition precedent is void, the transfer fails. *A* makes a gift of his field to *B* on condition that he sets fire to *C*'s haystack. This is a void condition precedent, and the gift fails. *A* makes a gift of his field to *B* with a proviso that if he does not within a year's time set fire to *C*'s haystack the gift shall be void. This is a void condition subsequent. The gift is a good gift, and is not affected by the void condition.

1043. *White v Baker,* [1860] 2 De GF & J 55, p 64; see also *Scurheld v Howes,* [1790] 3 Bro CC 90.

A gift to which an immoral condition is attached is a good gift, but the condition is void;[1044] but a transfer in consideration of future immoral relations is void.[1045]

Illustration (d) to the section recalls the case of *Wilkinson v Wilkinson*[1046] where it was held that a gift on a condition that a woman should cease to live with her husband is void, as the condition is void as against public policy. In a Bombay case,[1047] *N* advanced money to *V*, a married woman, to enable her to divorce her husband and marry *N*. He then sued to recover the advances. The court held that the agreement was against public policy and void.

(2) Indian Succession Act, 1925

The section corresponds to sections 126 and 127 of the Indian Succession Act, 1925. A condition in partial restraint of marriage is valid in English law,[1048] and this would apparently be so under the Indian Succession Act, 1925.[1049] A condition in a will that the testator's sons daughter should not take any interest under the will, if she married before the death of the son, was upheld by the Calcutta High Court as not being intended to penalise her marriage, but as being a reasonable disposition having regard to the son's duty to see to his daughter's marriage during his life time.[1050] A condition precedent involving a breach of public duty,[1051] or in restraint of trade,[1052] invalidates a bequest.

An instance of an impossible condition is the case of *Rajendra Lal v Mrinalini Dasi.*[1053] The testator left a legacy on condition that the legatee should excavate a tank, but as he had himself excavated the tank before his death the bequest failed. Justice Mookerjee said that the performance of the condition was the motive of the bequest, and the impracticability of performance barred the claim of the legatee.

26. Fulfilment of condition precedent.—Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

ILLUSTRATIONS

(a) *A* transfers ₹5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *E* dies. *B* marries with the consent of C and D. *B* is deemed to have fulfilled the condition.

(b) A transfers ₹5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *B* marries without the consent of C, *D* and *E* but obtains their consent after the marriage. *B* has not fulfilled the condition.

Synopsis

(1) Performance of Condition Precedent..... 174 (2) Indian Succession Act 186

1044. *Ram Sarup v Bela,* (1884) ILR 6 All 313 : 11 IA 44.
1045. *Thasi Muthukannu v Shunmugavelu,* (1905) ILR 28 Mad 413; *Ghumna v Ramchandra,* (1925) ILR 47 All 619 : 88 IC 411 : AIR 1925 All 437.
1046. *Wilkinson v Wilkinson,* [1871] 12 Eq 604; *Bai Vijli v Nansa Nagar,* (1886) ILR 10 Bom 152.
1047. *Bai Vijli v Nansa Nagar,* (1886) ILR 10 Bom 152.
1048. *Jarman on Wills,* 8th Edn, p 1513.
1049. See illustration (x) to section 120 of the Indian Succession Act, 1925.
1050. *Cohen v Cohen,* (1932) ILR 59 Cal 102 : 137 IC 482 : AIR 1932 Cal 350.
1051. *Brannegan v Mirbby,* [1896] 1 Ir R 418.
1052. *Cooke v Turner,* (1846) 15 M & W 727, p 736; *Mitchell v Reynolds,* [1711] 1 P Wms 181.
1053. *Rajendra Lal v Mrinalini Dasi,* (1921) ILR 48 Cal 1100 : 64 IC 977 : AIR 1922 Cal 116.

(1) Performance of Condition Precedent

The law favours the early vesting of estates,[1054] and so a condition precedent may be carried out *cy pres,* and is fulfilled if it is substantially carried out. A contract stipulating the fulfilment of a condition precedent may be a contingent contract under section 26.[1055] For the same reason, section 29 enacts that a condition subsequent must be strictly fulfilled in order to prevent the divesting of an estate which was vested. This is well illustrated by a comparison of illustration (a) to this section with illustration (1) to section 132 of the Indian Succession Act, 1925, where the same illustration is put in the form of a condition subsequent thus:

> A legacy is bequeathed to *A,* with a proviso that, if he marries without the consent of *B, C* and *D,* the legacy shall go to *E. D* dies. Even if *A* marries without the consent of *B* and *C,* the gift to *E* does not take effect.

The condition in the above illustration, being a condition subsequent, is strictly construed to prevent the legacy to *A* being divested; so on the death of *D,* the condition becomes impossible and void. Therefore, *A* may neglect it and marry without the consent of *B* and *C.* If it were so construed in the illustration (a) to section 26 where it is a condition precedent, *A* would take nothing, for performance of the condition would be impossible. Therefore, the condition is treated as fulfilled by substantial compliance and the transfer to *A* takes effect, if he marries with the consent of the survivors *B* and *C.*

Illustration (a) recalls the case of *Dawson v Oliver-Massey,*[1056] where the condition was marriage with the consent of parents, and the consent of a surviving parent was held to suffice.

Illustration (b) shows that if the condition is clear it cannot be evaded. Where the condition was marriage with the consent of guardians, and the sole guardian appointed by the will had died, and no guardian was appointed, the condition was not complied with, for the court could have on application appointed a guardian.[1057]

A condition of residence is valid,[1058] and when no manner of residence is prescribed, is complied with by occasional residence.[1059] In an Allahabad case,[1060] a dispute as to succession between a Mohammedan mother and cousins was compromised on terms that the mother should have an estate for life with power of alienation with the consent of the cousins who were to be the reversionary heirs. After the death of two cousins, the mother effected an alienation with the consent of the survivor. The judges differed as to whether this was a substantial compliance within the meaning of this section. It is submitted, however, that this was not a case of a condition precedent to the vesting of an estate, but merely a condition affecting the mother's authority to alienate, and the section had no application.

(2) Indian Succession Act

The corresponding section of the Indian Succession Act, 1925, is section 128. The following are the illustrations to the section:

1054. Re *Blackwell* [1926] 1 Ch 223, p 231 : [1925] All ER Rep 498; *Scott v Tyler,* [1788] 2 W&TLC 146; *Taylor v Graham,* [1878] 3 App Cas 1287.
1055. *Gian Chand v York Exports Ltd,* (2015) 5 SCC 609 : 2014 (6) SCALE 35 : AIR 2014 SC 3584.
1056. *Dawson v Oliver-Massey,* (1876) 2 Ch D 753.
1057. Re *Brown's Will,* (1881) 18 Ch D 1; See also note (2) below for further illustrations.
1058. *Wynne v Fletcher,* [1857] 24 Beav 430.
1059. *Ganendro Mohun Tagore v Rajah Juttendro Mohun Tagore,* 1 IA 387 : 22 WR 377; Re *Moir Warner v Moir,* (1884) 25 Ch D 605.
1060. *Beni Chand v Ekram Ahmad,* 90 IC 887 : AIR 1926 All 181.

(i) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B, C, D* and *E. A* marries with the written consent of *B, C* is present at the marriage. *D* sends a present to *A* previous to the marriage. *E* has been personally informed by *A* of his intentions, and has made no objections. *A* has fulfilled the condition.

(ii) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B, C* and *D. D* dies, and *A* marries with the consent of *B* and *C. A* has fulfilled the condition.

(iii) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B, C* and *D. A* marries in the lifetime of *B, C* and *D,* with the consent of *B* and *C* only. *A* has not fulfilled the condition.

(iv) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B, C* and *D. A* obtains the unconditional assent of *B, C* and *D* to his marriage with *E.* Afterwards, *B, C* and *D* capriciously retract their consent. *A* marries *E. A* has fulfilled the condition.

(v) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B, C* and *D. A* marries without the consent of *B, C* and *D,* but obtains their consent after the marriage. *A* has not fulfilled the condition.

(vi) *A* makes a will whereby he bequeaths a sum of money to *B* if *B* shall marry with the consent of *A*'s executors *B* marries during the lifetime of *A,* and *A* afterwards expresses his approbation of the marriage. *A* dies The bequest to *B* takes effect.

(vii) A legacy is bequeathed to *A* if he executed a certain document within a time specified in the will. The document is executed by *A* within a reasonable time, but not within the time specified in the will. *A* has not performed the condition, and is not entitled to receive the legacy.

Illustrations (ii) and (v) are the same as those in section 26 of the TP Act. Illustration (vii), like illustration (v) shows that if the condition is clear it is not to be evaded. In a case decided by the Privy Council, a legacy was bequeathed on condition that the legatee should "humbly apply for subsistence". However, as the legatee claimed as of right maintenance suitable to his rank and position, it was held that there was no substantial compliance with the condition and that the legacy failed.[1061]

27. Conditional transfer to one person coupled with transfer to another on failure of prior disposition.—Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

ILLUSTRATIONS

(a) A transfers ₹500 to *B* on condition that he shall execute a certain lease within three months after *A*'s death, and, if he should neglect to do so, to *C. B* dies in *A*'s life-time. The disposition in favour of *C* takes effect.

1061. *Veerabhadra v Chiranjivi,* (1905) ILR 28 Mad 173 : 32 IA 105.

(b) A transfers property to his wife; but, in case she should die in his life-time, transfers to *B* that which he had transferred to her. *A* and his wife perish together under circumstances which make it impossible to prove that she died before him. The disposition in favour of *B* does not take effect.

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(1) Shall fail 188
(2) Acceleration 188
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(4) Indian Succession Act 189
(5) Indian Cases 189

(1) Shall fail

These words are important for they indicate that the prior interest is valid, and fails subsequently by reason of the valid condition not being fulfilled. If the prior interest is invalid under section 13 or section 14, the subsequent interest fails also under section 16. If the prior interest is invalid under section 25, the subsequent interest fails also under that section or under the combined effect of section 25 and section 28. This has been explained and illustrated in note (3) under section 16.

(2) Acceleration

In other cases, i.e., where the prior interest is valid and fails as the valid condition on which it rests has not been fulfilled,[1062] this section is applicable. The law favouring the vesting of estates says that the subsequent interest takes effect as if the prior interest has never been in the way. This results in an acceleration of the subsequent interest. In *Jull v Jacobs,*[1063] there was a bequest to *A* for life and then to his children. The gift to *A* failed as he had attested the will; but VC Malins held that the life estate being out of the way, the gift to the children took effect. This case was followed by the Privy Council in a case where there was a bequest to a wife for life, and then to her children.[1064] The gift of the wife failed under a local Act for want of registration, but the effect was to accelerate the gift of the children. In *Eavestaff v Austin,*[1065] Lord Romilly decided that the rule applied not only to reality, but to personality. The principle of the section was applied in the following case which occurred in Oudh.[1066] In that case, the right to manage a Hindu religious endowment was declared by an award to be vested for successive periods of 21 years, first in *D,* then in *R,* then in *S,* then in *D*'s eldest son, then in *R*'s eldest son, and then in *S*'s eldest son. *R* and *S* both died in the second period of 21 years which belonged to *R.* The court held that the turn of management of *D*'s eldest son was accelerated.

The rule has been justified on the ground that it gives effect to the intention of the grantor. In *Lainson v Lainson*[1067] Lord Romily said—

> Although the expression used was that the estate to the son of John Lainson is only to take effect from and after John Lainson's decease, I am of opinion that the meaning is "from and after the determination of his estate by death or otherwise". In deciding thus I fulfil the intention of the testator.

A failure of a prior gift does not accelerate a subsequent transfer not taking effect on the determination of the prior interest; thus a subsequent gift cannot be accelerated, where the

1062. *Ismail Haji v Umar Abdulla,* (1942) ILR Bom 441 : 44 Bom LR 256 : 201 IC 34 : AIR 1942 Bom 155.
1063. *Dawson v Oliver-Massey,* (1876) 3 Ch D 703.
1064. *Ajudhia v Rakhman Kuar,* (1883) ILR 10 Cal 482 : 11 IA 1.
1065. *Eavestaff v Austin,* [1854] 19 Beav 591.
1066. *Debi Shankar v Nand Kishore,* 135 IC 395 : AIR 1932 Oudh 161.
1067. *Lainson v Lainson,* (1853) 18 Beav 16, on app [1854] 5 De GM & G 754 (prior bequest revoked by codicil).

persons who are to take under it are only ascertainable at a future date. It also cannot take effect unless two gifts are dependent on each other.[1068]

(3) Exception

The second clause refers to the exceptional case where the intention has been expressed that the gift over shall not take the effect, unless the prior gift fails in the particular manner stated.

(4) Indian Succession Act

The rule of acceleration is enacted in section 129 of the Indian Succession Act, 1925. Two illustrations are annexed, one of which is the same as illustration (a) to section 27 of the TP Act, and the other is as follows:

> *A* bequeaths a sum of money to his own children surviving him, and if they all die under 18, to *B*. *A* dies without having even had a child. The bequest to *B* takes effect.

The exception to the rule of acceleration is enacted in section 130 of the Indian Succession Act, 1925. The section has one illustration which is the same as illustration (b) to section 27 of the TP Act. An instance of the exception is the case of *Official Assignee of Madras v Thayarammal.*[1069] In that case, the testator wished to disinherit his son, and left his property to any grandson or grandsons who might be born in his lifetime or within ten years of his death, and "if there shall be no such grandsons to be born as aforesaid" the whole estate to his granddaughters. A grandson was born within ten years of his death, but the gift to the grandson failed not only under the rule in the *Tagore* case, but also because the estate could not be left in suspense. The question then arose whether the gift having failed in a different manner from that contemplated, the granddaughters could take. It was held that they could not, because the testator's intention was that they should not take if there was a grandson in existence.

(5) Indian Cases

The following are some Indian instances of the rule:

(1) The testator's wife was enceinte and the testator left his property to the expected son and made a provision for the maintenance of the daughter should the expected child prove to be a daughter. There was a gift over in case the son died before attaining majority. On the birth of a daughter, the court held that the gift over took effect, although the failure of the gift to the son not in the manner contemplated by the testator.[1070]

(2) The testator made a gift to a son to be adopted by his wife and, in case of his death without issue, to his daughters. The power of adoption to be invalid, but although the prior bequest failed the gift over to the daughters took effect.[1071]

(3) *A* made a bequest to a minor son, and on his death before attaining majority to the widow for life, and then to the daughters. It was held that the daughters were not deprived of this legacy by the death of the widow before the minor son.[1072]

1068. *Gopaldas v Hemandas,* AIR 1942 Sau 145.
1069. *Official Assignee of Madras v Thayarammal.* (1926) 51 Mad LJ 182, p 191 : 97 IC 163 : AIR 1926 Mad 936.
1070. *Okhoymoney Dasee v Nilmoney,* (1888) ILR 15 Cal 282.
1071. *Radha Prasad v Rani Mani,* (1906) ILR 33 Cal 947, but decided on another ground on app (1908) ILR 35 Cal 896 : 35 IA 188.
1072. *Durga Pershad v Raghunandan Lal,* (1915) 19 Cal WN 439 : 23 IC 597.

A case decided by Bombay High Court may perhaps be cited here, although it was not decided under the Indian Succession Act, 1925. The bequest was to the widow *W* for life, and on her death, to the daughter *D*'s sons, but in case *D* had no sons, then to *D* for life, and on her death to the testator's cousin. *W* died in April 1907 and *D* had a son born in December 1907. The son could not take under Hindu law as he was not in existence at the death of the testator. The court said that although the intention of the testator to give his property to his daughter's son's son was defeated, yet as his next intention was to keep the property in the family, the gift over to the cousin took effect.[1073]

28. Ulterior transfer conditional on happening or not happening of specified event.—On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

Synopsis

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(1) Conditional Limitation

The ulterior transfer, as it is called in the marginal note to this section, or ulterior disposition, as it is called in sections 27, 29 and 30, is effected by a conditional limitation. A conditional limitation, is one containing a condition which divests an estate that has vested and vests it in another person. As regards the prior interest, it is a condition subsequent, but as regards the ulterior interest, it is a condition precedent.

ILLUSTRATIONS

(1) *A* settled property on his second wife for her life, and then on her son if she should have a son; but if she should not have a son, then on the sons by his first wife. The Privy Council held that the sons by the first wife took a vested interest liable to be divested by the birth of a son to the second wife.[1074]

(2) The terms of a compromise provided that *L* should have an estate for life, and after her death, *R* should be full owner if he survived *L*, and if he did not, the estate would pass to *R*'s, lineal male descendent according to the rule of primogenitur. The court held that the condition affected the retention of the estate and not in acquisition, and construed the compromise as conferring on *R* a vested interest liable to be divested if he did not survive *L*.[1075]

(2) Specified Sections

The ulterior transfer or conditional limitation, is subject to the rules contained in the sections specified in this section. The application of these sections is best explained by following illustrations:

1073. *Narandas v Bai Saraswati,* (1914) ILR 38 Bom 697 : 16 Bom LR 577 : 28 IC 130. See the criticism of this case in *Official Assignee of Madras v Dedavalli Thayarammal,* (1926) 51 Mad LJ 182, p 191 : 97 IC 163 : AIR 1926 Mad 936.

1074. *Umes Chunder v Zahoor Fatin,* (1891) ILR 18 Cal 164 : 17 IA 201.

1075. *L Sunder Bibi v Lal Rajendra,* (1925) ILR 47 All 496 : 86 IC 684 : AIR 1925 All 389; *Jitendra Nath v Banku,* 96 IC 565 : AIR 1926 Cal 496, p 1177. For other instances, see note (3) below.

section 10— *A* transfers his field to *B* without power of alienation and in case of *B*'s death without issue, to *C* also without power of alienation. The restriction is void in both cases.

section 12— *A* transfers his field to *B*, and if *B* becomes insolvent, to *C*. *B* becomes insolvent. The field vests not in *C* but in the Official Receiver of the Official Assignee as the case may be.

section 21— *A* transfers his field to *B*, and in case of *B*'s death without issue, to *C*. *C* has a contingent interest which becomes vested on *B*'s death without issue.

section 22— *A* transfers his field to *B* and on B's death to such of the children of *C* as shall attain the age of 18. All the children of *C* who are alive at *B*'s death have an interest, which vests when they attain the age of 18.

section 23— *A* transfers his field to *B* for life and then to *C*, if *C* goes to England. *C* does not go to England until a year after *B*'s death. *C*'s interest fails.

section 24— *A* transfers his field to *B* and on *B*'s death without issue to the sons of *C* or the survivor of them. The sons of *C* who survive *B* take the field.

section 25— *A* transfers his field to *B* on condition that he murders *C* with a proviso that on *B*'s death without issue the field shall belong to *D*. The interest both of *B* and of *D* fails.

(3) Indian Succession Act

The corresponding section of the Indian Succession Act, 1925, is section 131. The following illustrations are annexed to the section:

(i) A sum of money is bequeathed to *A*, to be paid to him at the age of 18 and if he shall die before he attains that age, to *B*. *A* takes a vested interest in the legacy, subject to be divested and to go to *B* in case *A* dies under 18.

(ii) An estate is bequeathed to *A* with the proviso that if *A* shall dispute the competency of the testator to make a will, the estate shall go to *B*. *A* disputes the competency of the testator to make a will. The estate goes to *B*.

(iii) A sum of money is bequeathed to *A* for life, and after his death to *B* but if *B* shall then be dead, leaving a son, such son is to stand in the place of *B*. *B* takes a vested interest in the legacy, subject to be divested if he dies leaving a son in *A*'s life-time.

(iv) A sum of money is bequeathed to *A* and *B*, and if either should die during the life of *C*, then to the survivor living at the death of *C*. *A* and *B* die before *C*. The gift over cannot take effect, but the representative of *A* takes one-half of the money, and the representative of *B* takes the other half.

(v) *A* bequeaths to *B* the interest of a fund for life, and directs the fund to be divided at her death equally among her three children, or such of them as shall be living at her death. All the children of *B* die in *B*'s lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

In the reported cases, divesting conditions in wills have generally been on account of death without issue,[1076] or non-residence.[1077] In *Gooroo Das v Sarat Chunder*[1078] there was a

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1076. *Soorjemoney Dossey v Denobundoo Mullick*, (1862) 9 Moo IA 123; *Ram Lal Mukerjee v Secretary of State*, (1881) ILR 7 Cal 304 : 8 IA 46: *Kumur Tarakeswar Roy v Kumar Shoshi Shikhareswar*, (1883) ILR 9 Cal 952 : 10 IA 51; *Raikishori v Debendranath*, (1888) ILR 15 Cal 409 : 15 IA 37; *Chunilal v Bai Samarath*, (1914) ILR 38 Bom 399 : 23 IC 645 : AIR 1914 PC 60; *Bhupendra v Amarendra*, (1915) ILR 43 Cal 432 : 43 IA 12 : 34 IC 892.

1077. *Ganendro Mohun Tagore v Rajah Juttendro Mohun Tagore*, 1 IA 387 : 22 WR 377; *Tin Cowri Dassee v Krishna*, (1893) ILR 20 Cal 15; *Shyama Charan v Naba Charan*, (1912) 17 Cal WN 39 : 14 IC 708.

1078. *Gooroo Das v Sarat Chunder*, (1902) ILR 29 Cal 699.

gift for life to the widow and then an absolute estate of inheritance to the brothers liable to be divested, if the widow adopted a son; it was held to be a valid conditional limitation.

In *Bachman v Bachman,*[1079] the testator directed his trustees and executors to sell his estate and divide the proceeds between the legatees in certain proportions, but that if any legatee should die in his lifetime or before the division leaving lawful issue, such issue should be entitled to the share his deceased parent would have taken. One legatee died five months after the testator, but before the division had been made, leaving lawful issue. The court held that this legatee took a vested interest which was divested by his death before the division and the gift over to the legatee's issue took effect. The court followed the decision in *Johnson v Crook.*[1080] However, the authority of *Johnson's* case is very doubtful, for the House of Lords in *Minors v Battison*[1081] seem to have held that a divesting condition which depends upon the dilatoriness or caprice of a trustee, is void.[1082]

In a Madras case,[1083] there was a curious proviso which was held not to operate as a condition of defeasance. The bequest was to a daughter for life and then to her children, and if the daughter should die "leaving no child living at her death" such property "as shall not have become *vested*" was to go to the testator's son. The daughter had only one child, a son who predeceased her. The son's interest was vested, but it was not divested because the condition subsequent did not on the terms of the will apply to an interest which was vested.

(4) Repugnancy

A conditional limitation is a condition of defeasance, which terminates the interest of one person and invests another person with it. However, if an estate is given to a named donee in terms which confer an absolute estate, and then a further interest is given merely after or on termination of that donee's interest, and not in defeasance of it; the further interest will be void for repugnancy. Thus, when a testator gave an absolute estate to his wife with power of alienation, and then added a clause that "if, at the time of the death of my widow, there be no adopted son or if no son or wife of the adopted son be alive, then, my heir according to the Hindu shastras who shall be alive at the time shall get the properties which shall remain after disposal by my wife by way of gift or sale of the same"—the gift over was invalid.[1084] Similarly, in *Anandrao Vinayak v Administrator General of Bombay,*[1085] the testator made an absolute gift to his son *G,* and then added "and when the sons of my son *G* shall attain the age of twenty-one years, the same shall be divided and duly received by *G* and his sons in equal shares." The gift to the grandsons was void for repugnancy, and the absolute estate of *G* was not divested. In a Bombay case,[1086] however, where the testator gave an absolute estate to *R* and then added "should *R* die and should he then leave a son, such his son shall afterwards be the owner"—it was held that *R* took only a life-estate.

1079. *Bachman v Bachman,* (1884) ILR 6 All 583.
1080. *Johnson v Crook,* (1879) 12 Ch D 639.
1081. *Minors v Battison,* (1876) 1 App Cas 428.
1082. See, for a fuller discussion, *Jarman on Wills,* 8th Edn, p 2050.
1083. *Ernest William Adams v Gray,* (1925) 48 Mad LJ 707 : 90 IC 5 : AIR 1925 Mad 599.
1084. *Sures Chandra v Lalit Mohan,* (1916) 20 Cal WN 463, p 465 : 31 IC 405; *Thakur Jagmohan v Sheoraj,* (1928) ILR 3 Luck 19 : 106 IC 593 : AIR 1928 Oudh 49; *Karam Singh v Rupwanti,* (1924) 6 Lah LJ 412 : 85 IC 296 : AIR 1925 Lah 122; *Mohah Lal v Niranjan Das,* (1921) ILR 2 Lah 175 : 60 IC 619 : AIR 1921 Lah 11.
1085. *Anandrao Vinayak v Administrator General of Bombay,* (1896) ILR 20 Bom 450, p 453.
1086. *Gulabaji & Co v Rustomji,* (1925) ILR 49 Bom 478, p 483 : 95 IC 299 : AIR 1925 Bom 282.

(5) Hindu Law

The section applies to Hindus, and conditional limitations or grants subject to defeasance with a gift over have always been recognised in Hindu law.

(6) Mahomedan Law

A gift cannot be made so as to take effect on the happening of a contingency. It follows that, conditional limitations are not recognised in Mahomedan law.

29. Fulfilment of condition subsequent.—An ulterior disposition of the kind contemplated by the last preceding section cannot, take effect unless the condition is strictly fulfilled.

ILLUSTRATION

A transfers ₹500 to *B*, to be paid to him on his attaining his majority or marrying, with a proviso that, if *B* dies as minor or marries without C's consent, the ₹500 shall go to *D*. *B* marries when only 17 years of age, without C's consent. The transfer of *D* takes effect.

Synopsis

(1) Performance of a Condition Subsequent 193
(2) Indian Succession Act 194

(1) Performance of a Condition Subsequent

It follows from the principle that the law favours the vesting of estates, that a condition subsequent, which has the effect of divesting an estate is subject to the rule of strict construction, and that a condition precedent to an estate vesting is deemed to have been fulfilled, if it is substantially complied with. This has been explained in note (1) under section 26 where illustration (a) to section 26 has been contrasted with illustration (i) to section 132 of the Indian Succession Act, 1925.

If the interest has become vested, it is not to be taken away except by clear words.[1087] In a case where a Hindu widow was authorised to adopt a son, with a direction that if the first adopted son died before the age of 20, she was to adopt another son to take the place of the deceased adopted son, the Calcutta High Court said that a clause of defeasance in order to be operative, must contain express words or words necessary implication of a gift over to a definite person or persons.[1088] The implication of a gift over to the second adopted son was not sufficient to prevent the widow of the first adopted son from inheriting her husband's share.[1089]

Where the words of the condition are clear, they must be clearly fulfilled. If there is any ambiguity in the condition subsequent, it will be read in the sense most favourable to the vested interest. Accordingly, a gift to *A* for life and then to his children with a gift over in the event of *A*'s death without leaving children, is construed as a gift over in the event of *A*'s death without having had a child.[1090]

Ignorance of a condition is no excuse for non-compliance,[1091] for a person who takes under an instrument, cannot plead want of knowledge of its contents.[1092] Similarly, a condition

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1087. *Govindraju v Mangalam Pillai,* (1933) 63 Mad LJ 911 : 139 IC 867 : AIR 1933 Mad 80, p 81.
1088. Re *Cobbold, Cobbold v Lawton,* [1903] 2 Ch 299; *Mussorie Bank v Raynor,* (1882) ILR 4 All 500 : 9 IA 70, p 80; *Tripurari Pal v Jagat Tarini,* (1913) ILR 40 Cal 274 : 40 IA 37 : 17 IC 696; *Amulya v Kalidas,* (1905) ILR 32 Cal 861; *Sures Chandra v Lait Mohan,* (1916) 20 Cal WN 463 : 31 IC 405; *DeSouza v Vaz,* (1887) ILR 12 Bom 137, p 147. See *Yacob Yohannan v Rebecca Maria,* AIR 1973 Ker 96.
1089. *Amulya v Kalidas,* (1905) ILR 32 Cal 861.
1090. *Maitland v Chalie,* (1882) Mad & G 243.
1091. Re *Hodges Legacy* (1873) 16 Eq 92, p 96; *Astley v Essex, (Earl)* (1874) 18 Eq 290.

violated under duress will not forfeit the bequest, and a condition requiring residence in a holy place is not broken when the devisee was forcibly removed to another place.[1093]

(2) Indian Succession Act

The corresponding section of the Indian Succession Act, 1925, is section 132. The third illustration to that section is the same as that to section 29 of the TP Act.

The other illustrations are as follows:

(i) A legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, *C* and *D*, the legacy will go to *E*. *D* dies. Even if *A* marries without the consent of *B* and C, the gift to *E* does not take effect.

(ii) A legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, the legacy shall go to *C*. *A* marries with the consent of *B*. He afterwards becomes a widower and marries again without the consent of *B*. The bequest to *C* does not take effect.

Illustration (i) imports the same condition as illustration (a) to section 26 of the TP Act, or illustration (ii) to section 128 of the Indian Succession Act, 1925, but as it is here a condition subsequent, it is subject to strict construction, and is discharged by the death of one of the parties whose consent is required. In the second illustration, the condition once fulfilled is discharged.

30. Prior disposition not affected by invalidity of ulterior disposition.— If the ulterior disposition is not valid, the prior disposition is not affected by it.

ILLUSTRATION

A transfers a farm to *B* for her life, and, if she does not desert her husband to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

Synopsis

(1) Subsequent Interest Invalid..... 194
(2) Indian Succession Act, 1925..... 195
(3) Hindu Law..... 195

(1) Subsequent Interest Invalid

When a prior interest is invalid either as offending against the rule against perpetuity, or as being illegal or impossible under section 25, the subsequent interest also fails. This has been explained in the note (2) under section 16. However, if the subsequent interest is invalid, then the prior interest is not affected.

ILLUSTRATIONS

(1) *A* transfers his field to *B* with a proviso that on the death of *B*'s last lineal male descendant the field shall belong to the lineal descendant of *C*. The ulterior disposition to *C* is invalid under the rule against perpetuity, but the estate of *B* is not affected.

(2) *A* transfers his field to *B* with a proviso that if *R* does not within a year set fire to *C*'s haystack, the field shall belong to *D*. The ulterior disposition to *D* is invalid under section 25, but the interest of *B* is not affected.

In *Saraju Bala v Jyotirmoyee,*[1094] there was a gift of an absolute estate to a daughter, with a defeasance clause whereby the property was to revert to the heirs of the grantor in case of the failure of her descendants. The Privy Council held that as the defeasance clause was void, the

1092. *Porter v Fry,* (1868) 1 Vent 199.
1093. *Tin Cowri Dassee v Krishna,* (1893) ILR 20 Cal 15; See also, Transfer of Property Act, 1882, section 34.
1094. *Saraju Bala v Jyotirmoyee,* 58 IA 270 : (1931) 35 Cal WN 903 : 134 IC 648 : AIR 1931 PC 179.

daughter was entitled to dispose of the property by will. Re *Beard, Reversionary & General Securities Ltd v Hall,*[1095] there was a devise with a condition of defeasance in case the devisee entered the naval or military forces of the Crown, but as the condition was void as opposed to public policy, the devisee took an absolute interest.

(2) Indian Succession Act, 1925

The same rule is enacted in section 133 of the Indian Succession Act, 1925. Three illustrations are annexed to the section of which the second is the same as that in this section. The other two illustrations are as follows:

> (i) An estate is bequeathed to *A* for his life with condition superadded that, if he shall not on a given day walk 100 miles in an hour, the estate shall go to *B*. The condition being void. *A* retains his estate as if no condition had been inserted in the will.
>
> (ii) An estate is bequeathed to *A* for life, and, if he marries, to the eldest son of *B* for life. *B*, at the date of the testator's death, had not had a son. The bequest over is void under section 105, and *A* is entitled to the estate during his life.

In *Bai Dhanlaxmi v Hari Prasad,*[1096] there was an absolute bequest to the eldest son with a superadded condition of defeasance in case of failure of male issue, and an attempt to create an estate of inheritance not known to Hindu law. The court held that the original bequest to the son was not affected by the failure of the gift over. In *Narsingh Rao v Mahalakshmi,*[1097] the settlor, whose son was in prison, made a gift in 1875 of his property to his widow with a condition of defeasance in case his son should have a son within 16 years, in which case the property was to go to the grandson. The condition was void under Hindu law as it then was, being in favour of an unborn person, and the widow took an absolute and indefeasible estate. The Privy Council said that:

> it is a well settled principle of law, which has now been embodied in sections 28 and 30 of the Transfer of Property Act, 1882, that in such a case if the ulterior disposition is not valid, the prior disposition is not affected by it.

(3) Hindu Law

The section now applies to Hindus, and the section of the Indian Succession Act, 1925 applies to wills governed by the Hindu Wills Act. However, the principle of the sections has always been applied to Hindus. Thus, in *Tagore v Tagore,*[1098] where there was a gift to *A* for life, and after him to his heirs in tail male, the subsequent disposition was invalid, but A's life-estate was not affected. Similarly, in *Khetter Mohan Mullick v Gunga Narain,*[1099] it was held that specific trusts of specific estates good in themselves were not invalidated by a subsequent illegal disposition of the remainder. The case of *Saraju Bala v Jyotirmoyee,*[1100] referred to in note (1) was decided under Hindu law.

31. Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.—Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the

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1095. *Beard, Reversionary & General Securities Ltd v Hall,* [1908] 1 Ch 383.
1096. *Bai Dhanlaxmi v Hari Prasad,* (1921) ILR 45 Bom 1038 : 62 IC 37 : AIR 1921 Bom 262.
1097. *Narsingh Rao v Mahalakshmi,* (1928) ILR 50 All 375, p 392 : 55 IA 180 : 109 IC 703 : AIR 1928 PC 156.
1098. *Tagore v Tagore,* (1872) 9 Beng LR 377, *Kristoromoni v Narendro,* (1888) ILR 16 Cal 383 : 16 IA 29; *Kumar Tarakeswar Roy v Kumar Shoshi Shikhareswar,* (1883) ILR 9 Cal 952 : 10 IA 51.
1099. *Khetter Mohan Mullick v Gunga Narain,* (1899) 4 Cal WN 671.
1100. *Saraju Bala v Jyotirmoyee,* 58 IA 270 : 134 IC 648 : AIR 1931 PC 179.

condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

ILLUSTRATIONS

(a) *A* transfers a farm to *B* for his life, with a proviso that, in case *B* cuts down a certain wood, the transfer shall cease to have any effect. *B* cuts down the wood. He loses his life-interest in the farm.

(b) *A* transfers a farm to *B*, provided that, if *B* shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. *B* does not go to England within the term prescribed. His interest in the farm ceases.

Synopsis

(1) Condition Subsequent..... 196
(2) Condition Subsequent a Penalty..... 197
(3) Indian Succession Act, 1925..... 197

(1) Condition Subsequent

The condition referred to in this section is a condition subsequent which terminates an interest and revests it in the grantor. It is not a conditional limitation, which creates an interest in a third person. The next section requires that the condition subsequent should be valid, otherwise it will not have the effect of terminating the interest to which it is attached. As the section is subject to section 12, it follows that a condition subsequent divesting an estate on the ground of insolvency or of attempted alienation would be void.

ILLUSTRATIONS

(1) *A* is under sentence of transportation for life and transfers his field to *B* with a proviso that in case he returns from Port Blair, *B*'s interest shall cease. *A* returns from Port Blair. *B*'s interest in the field ceases.[1101]

(2) *A* transfers his field to *B* with proviso that if *B* becomes insolvent, *B*'s interest in the field shall cease. *B* is adjudged insolvent. The field vests in the Official Receiver or the Official Assignee as the case may be.

A condition subsequent requiring residence in a particular house has been held to be valid.[1102] A condition requiring residence in a holy place was not broken when the devisee was forcibly detained in another place.[1103] A gift which is revocable under section 126 is an instance of a transfer subject to a condition subsequent.[1104]

This section applies only to a completed transfer of property creating an interest therein with a condition superadded for its cessor on a certain contingency, but has no application to a contract for transfer with a condition superadded thereto. Thus, where in a sale deed it was provided that if the vendee did not pay the amount of the price retained by him to the creditor of the vendor within a certain time, the sale deed would be deemed to have been cancelled, and the vendee failed to pay the price to the creditor within time and the court gave him further time to pay, it was held that the contract of sale and the act of transfer were embodied in the same deed, and the condition was to be regarded as an integral condition of the contract for sale providing the date for completion of the contract by satisfaction of the balance of the contract price, and not as a condition superadded to the transfer itself, and, therefore, the transfer was not defeated. It was held that there was nothing in section 31,

1101. *Venkatarama v Aiyasami,* (1922) 43 Mad LJ 340 : 69 IC 673 : AIR 1923 Mad 67.
1102. *Ambika Charan v Sasitara,* (1915) 22 Cal LJ 61 : 30 IC 868; *Bhoba v Peary Lal,* (1897) ILR 24 Cal 646; *Sirish Chandra v Kadambini,* (1926) 44 Cal LJ 18 : 97 IC 685 : AIR 1926 Cal 1175.
1103. *Tin Cowri Dassee v Krishna,* (1893) ILR 20 Cal 15; Re *Hewett* [1918] 1 Ch 458 : [1918-9] All ER Rep 530; Re *Whitfiled* [1911] 1 Ch 310.
1104. *Venkatarama v Aiyasami,* (1922) 43 Mad LJ 340 : 69 IC 673 : AIR 1923 Mad 67.

which merely declared that a limitation upon a condition subsequent is a lawful method of grant, to exclude the right of the court to give relief to the vendee who failed to make payment of the price by the date agreed upon in the contract of sale.[1105] In a case before the Orissa High Court,[1106] the court was considering a lease to the defendants for the manufacture of salt which provided, inter alia, that the lease stood cancelled if the lessee did "any other business or manufacture of any other kind" on the land. The lessee used the lands for fishing, and the lessor purported to cancel the lease. The court held, relying on the illustrations to section 31, that:

> a specified event contemplated under section 31 must be definite and specific and a wide and vague clause of the nature of "any other business" cannot be taken to be a specified event... . We may be inclined to agree if the condition was of the nature that if the lessee carry on business in fish or business in timber, it may come within the operation of the provisions of section 31. But the provisions of the lease being to the effect that if the lessees carry on any other business or manufacture, it cannot be taken to be a specified event[1107] is *Sed quaere,* for the section does not prescribe a specific event, but merely specified events, i.e., the section requires that the uncertain event should be definitely and fully set out. In any event, it is difficult to see how the wide, but definite negative concept "any other business" is less specific than the positive examples mentioned.

(2) Condition Subsequent a Penalty

It has been held that if a condition subsequent involving forfeiture of an estate is in the nature of a penalty, it may be relieved against, and pecuniary compensation may be awarded for non-performance.[1108]

(3) Indian Succession Act, 1925

This section corresponds to section 134 of the Indian Succession Act, 1925. Five illustrations are annexed to the section in the Indian Succession Act, 1925, of which the first and third are the same as those in this section. The others are:

> (ii) An estate is bequeathed to *A,* provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. *A* marries under 25 without the consent of the executors. The estate ceases to belong to him.
>
> (iv) An estate is bequeathed to *A,* with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. *A* becomes a nun. She loses her interest under the will.
>
> (v) A fund is bequeathed to *A* for life, after his death, to *B,* if *B* shall then be living, with a proviso that, if *B* shall become a nun, the bequest to her shall cease to have any effect. *B* becomes a nun in the life-time of *A.* She thereby loses her contingent interest in the fund.

32. Such condition must not be invalid.—In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Synopsis

(1) Invalid Condition ..... 185 (2) Indian Succession Act 198

1105. *Devendra Prasad Sukul v Surendra Prasad Sukul,* 63 IA 26 : AIR 1936 PC 24.
1106. *Krishna Chandra v National Chemical & Salt Works,* AIR 1957 Ori 35.
1107. Ibid, p 37.
1108. *Munshi Lal v Ahmed Mirza Beg,* (1933) ILR 8 Luck 707 : 144 IC 756 : AIR 1933 Oudh 291.

(1) Invalid Condition

If the condition is invalid, it cannot be set up as a condition precedent for crystallisation of the interest created.[1109] This section is analogous to section 30. Under section 30, an invalid ulterior disposition will not affect a prior interest; and so under this section, an invalid condition subsequent will not divest the interest to which it is attached. A condition which is void as a condition precedent is also void as a condition subsequent.

ILLUSTRATION

A transfers his field to *B* with a proviso that if *B* does not within a year set fire to *C*'s haystack his interest shall cease. The condition subsequent is invalid and *B*'s interest is not affected.

Instances of conditions subsequently void as contrary to public policy, are a condition divesting the interest of a devisee if he enters the naval or military forces of his country;[1110] or a condition requiring the donee to obtain a title.[1111]

A condition that a person shall not become a Christian is valid.[1112]

(2) Indian Succession Act

The corresponding section of the Indian Succession Act is section 135 of the Indian Succession Act, 1925. If the condition is invalid, failure to comply with it does not involve forfeiture. Where a testator bequeathed an annuity to his wife which would, according to the terms of the will, be forfeited if she did not live in the family house which he intended to build, but died without building, the condition was void for impossibility and the widow was held to be entitled to the annuity, although she lived in her father's house.[1113]

33. Transfer conditional on performance of act, no time being specified for performance.—Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Synopsis

(1) Time for Performance..... 198 (2) Indian Succession Act, 1925..... 198

(1) Time for Performance

When no time is fixed for the performance of a condition subsequent, it is broken not only when the person does an act which renders performance impossible, but also when he does an act by which performance is indefinitely postponed. This is explained by the second illustration to section 136 of the Indian Succession Act, 1925, set out in the next paragraph.

(2) Indian Succession Act, 1925

The corresponding provision is section 136 of the Indian Succession Act, 1925. The following illustrations are annexed to the section:

1109. *Indu Kakkar v Haryana State Industrial Development Corporation Ltd*, (1999) 2 SCC 37 : AIR 1999 SC 296.
1110. Re *Beard, Reversionary & General Securities Ltd v Hall*, [1908] 1 Ch 383.
1111. *Egenon v Brownlow, (Earl)* (1854) 4 HL Cas 1.
1112. *Hodgson v Halford*, (1879) 11 Ch D 959.
1113. *Satish Chandra v Sarat Subdari*, 38 IC 103.

(i) A bequest is made to *A*, with a proviso that, unless he enters the Army, the legacy shall go over to *B*. *A* takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. *B* is entitled to receive the legacy.

(ii) A bequest is made to *A*, with a proviso that it shall cease to have any effect if he does not marry *B*'s daughter. *A* marries a stranger and thereby indefinitely postpones the fulfilment of the conditions. The bequest ceases to have effect.

The second illustration corresponds to the illustration to section 34 of the Indian Contract Act, 1872.

A testator bequeathed his property to his daughter's son, in the event of his widow dying without adopting a son, but the interest was conditional on the daughter's son residing in the family house. The daughter's son joined the widow in selling the house. This was a breach of the condition, and he was deprived of the interest given by the will.[1114]

34. Transfer conditional on performance of act, time being specified.—Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Synopsis

(1) Principle..... 199 (2) Indian Succession Act, 1925..... 199

(1) Principle

The principle underlying this section is that no party can take advantage of his own fraud. If performance of a condition, whether subsequent or precedent, is prevented by a person interested in its non-fulfilment, the delay is excused, and the condition is discharged.

(2) Indian Succession Act, 1925

The corresponding section is section 137 of the Indian Succession Act, 1925.

In a case decided by Calcutta High Court,[1115] the testator directed that if any of the female members of his family lived for more than three months at any place other than a holy place, they would forfeit their interest under his will. The forfeiture was not incurred when they were forcibly removed by their relations.

1114. *Shyama Charan v Naba Chandra,* (1912) 17 Cal WN 39 : 14 IC 708.
1115. *Tin Cowri Dassee v Krishna,* (1893) ILR 20 Cal 15.

ELECTION

35. **Election when necessary.**—Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject, nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

ILLUSTRATIONS

The farm of Sultanpur is the property of *C* and worth ₹800. *A* by an instrument of gift professes to transfer it to *B*, giving by the same instrument ₹1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of ₹1,000.

In the same case, *A* dies before the election. His representative must out of the ₹1,000 pay ₹800 to *B*.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes the transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claims the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

ILLUSTRATION

A transfers to *B* an estate to which *C* is entitled, and as part of the same transaction gives *C* a coal-mine. *C* takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to *B*.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

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(1) Election

The foundation of the doctrine of election is that a person taking the benefit of an instrument must also bear the burden,[1116] and that he cannot take under and against the same instrument.[1117] It is, therefore, a branch of the general rule that no one may approbate and reprobate.[1118] However, there must be a will or a deed which conveys title to a person in properties other than those belonging to himself, before he can be put to election. A surrender by a Hindu widow to her immediate reversioner does not amount to such conveyance, for on a surrender taking place the widow, by a legal fiction is assumed as dead and the reversioner takes the estate as the heir of the last full owner, and not as a transferee from the widow.[1119]

1116. *Codrington v Lindsay,* (1873) 8 Ch 578; *Pickersgill v Rodger,* (1876) 5 Ch D 163.
1117. *Beepathumma (C) v V S Kadambolithaya,* [1964] 5 SCR 836, p 850 : AIR 1965 SC 241; *Dillon v Parker,* (1818) 1 Swan 359, p 394.
1118. *Beepathumma (C) v VS Kadambolithaya,* [1964] 5 SCR 836; *Codrington v Codrington,* (1875) 7 HL 854, p 861.
1119. *Venkatarayudu v Narayana,* (1941) ILR Mad 551 : (1941) Mad LJ 309 : 53 Mad LW 264 : (1941) Mad WN 208 : AIR 1941 Mad 430.

The doctrine is based on intention to this extent that the law presumes that the author of an instrument intended to give effect to every part of it.[1120]

(2) Indian Succession Act, 1925

The rule of election as applied to wills is enacted in sections 180 to 190 of the Indian Succession Act, 1925. The following illustrations under section 182 are instances of election:

(i) The farm of Sultanpur was the property of *C*. *A* bequeathed it to *B*, giving a legacy of 1,000 rupees to *C*. *C* has elected to retain his farm of Sultanpur, which is worth 800 rupees. *C* forfeits his legacy of 1,000 rupees, of which 800 rupees goes to *B*, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(ii) *A* bequeaths an estate to *B* in case *B*'s elder brother (who is married and has children) shall leave no issue living at his death. *A* also bequeaths to *C* a jewel, which belongs to *B*. *B* must elect to give up the jewel or to lose the estate.

(iii) *A* bequeaths to *B* 1,000 rupees, and to *C* an estate which will, under a settlement, belong to *B* if his elder brother (who is married and has children) shall leave no issue living at his death. *B* must elect to give up the estate or to lose the legacy.

(iv) *A*, a person of the age of 18, domiciled in British India but owning real property in England, to which *C* is heir at law, bequeaths a legacy to *C* and, subject thereto, devises and bequeaths to *B* "all my property whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. *C* may claim his legacy without giving up the real property in England.

The first illustration is almost identical with a Madras case,[1121] in which the testator bequeathed a field which belonged to his niece, to his grandson, and at the same time left his niece a legacy of ₹800. The court held that she must elect between the land or the legacy. The second and third illustrations show that the principle applies to all interests whether vested or contingent, immediate or remote.[1122]

(3) Proprietary Interest

A person is not put to his election, unless he has a proprietary interest in the property disposed of in derogation of his rights.[1123] A creditor is not put to his election, for he has only a personal claim for payment by his debtor.[1124] A bequest in the will of a Hindu that "my elder brother *V*'s self-acquisition to the extent of ₹10,000 is with me, so, that money should be given to him" was treated as a legacy in satisfaction of the debt, and *V* was not estopped from claiming it by the fact that he had tried and failed to recover the money as a debt.[1125] In another case, the testator disposed of his property in favour of his wife and daughter, and then gave away "my own and my wife's ornaments," but the court held that this did not raise a question of election as the *stridhan* ornaments in which his wife had a proprietary interest were not included in the bequest.[1126] If the

1120. Re *Vardon's Trusts* (1885) 31 Ch D 275, p 279.
1121. *Ammalu Achi v Ponammal,* (1919) Mad WN 144 : 36 Mad LJ 507 : 49 IC 527.
1122. *Wilson v Townshend, (Lord)* (1794) 2 Ves 693, p 697; *Cooper v Cooper,* (1871) 6 Ch 15, p 21.
1123. *Dhanpatti v Devi Prasad,* (1970) 3 SCC 779; *Mahomed Ali v Nissar Ali,* 109 IC 835 : AIR 1928 Oudh 67, p 82.
1124. *Cooper v Cooper,* (1874) 7 HL 53, pp 66, 72.
1125. *Rajamannar v Venkata Krishnayya,* (1902) ILR 25 Mad 361, p 363.
1126. *Mamubai v Dossa,* (1891) ILR 15 Bom 443.

property which the testator professes to dispose of does not belong to the other legatee, no question of election can of course, arise.[1127]

(4) Same Transaction

The equity of election does not apply, unless the two donations are part of the same transaction, for if the two are independent, the one which is in the power of the transferor will stand, while the other will fail. In *Muhammad Afzal v Ghulam Kasim,*[1128] government on the death of the Nawab of Tank, when transferring the chiefship to the eldest son, transferred a portion of the cash allowance of the late Nawab to the second son on whom the late Nawab had already made a grant of two villages for maintenance. The Privy Council said that the second son was not put to his election, as the two grants came from independent sources. In another case, a Hindu widow made a gift in excess of her powers and subsequently left a will in the following terms: "Excluding the properties which I have already given away, I will make the following dispositions". The Madras High Court held that the plaintiff taking under the will was not precluded by the doctrine of election from disputing the prior gift which was not the subject of the will at all.[1129]

Election may arise when the two donations are conferred by two different instruments, if the two instruments are used to carry out one transaction.[1130]

(5) Benefit

The doctrine can only apply if a benefit in the real sense is conferred by the instrument. Where by a will the testator purports to bequeath to his coparcener joint family property, such coparcener who would in any case have been entitled to such property, cannot be said to have derived any benefit under the will, and is not put to election.[1131]

(6) Doctrine of Election not Available to Cure an Illegality

The doctrine of election cannot be resorted to in order to cure an illegality, and a gift which infringes the rule against perpetuities cannot be used to raise a case for election. A purported release by a Muslim daughter, which was void under section 6(a), cannot be saved by the doctrine of election, for that would amount to curing a manifest illegality.[1132] Illustration (iv) to section 182 of the Indian Succession Act, 1925, cited in note 2 above, appears to be based on the supposition that a devise by an infant would in English law be a breach of the law, but it may be doubted whether in English law it would be considered as more than a case of incapacity to dispose of the land, in which case the heir would be put to his election. Not only will the doctrine of election not cure an illegality, but as election is a doctrine of equity it will not be applied so as to lead to inequitable results.[1133]

(7) Revert to the Transferor

The doctrine in India rests on forfeiture, and the disappointed donee looks to the transferor to compensate him by a charge on the property that has reverted to him. There is no occasion for a charge if the transferor survives and the transfer is gratuitous, for it is open to the transferor to make a substituted gift.

1127. *Kamal Kumari v Narendra Nath,* (1909) 9 Cal LJ 19 : 1 IC 573.
1128. *Muhammad Afzal v Ghulam Kasim,* (1903) ILR 30 Cal 843 : 30 IA 190.
1129. *Ramayyar v Mahalaxmi,* (1921) Mad WN 434 : 64 IC 481 : AIR 1922 Mad 357, p 358.
1130. *Bacon v Cosby,* (1851) 4 De G & Sm 261.
1131. *Valliammai v Nagappa,* [1967] 2 SCR 448 : AIR 1967 SC 1153 : [1968] 1 SCJ 347.
1132. *Abdul Kafoor v Abdul Razack,* (1958) 2 Mad LJ 492 : AIR 1959 Mad 131.
1133. *Brown v Gregson,* [1920] AC 860 : [1920] All ER Rep 730.

(8) Belief of the Transferor

The second para corresponds to section 182 of the Indian Succession Act, 1925. As already stated, the principle may refer to the implied intention of the testator, but it is not necessary that he should have had in mind the equitable principle of election.[1134] It does not matter whether the transferor thought he had the power to convey, or knowing the extent of his authority, intended by an arbitrary execution of power to exceed it.[1135] To quote the words of Lord Alvanley "nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another".[1136] It is not, therefore, necessary that the author of the instrument should have known that the property did not belong to him or that he intended to put the donee to an election. However, this intention may be expressed, and then the condition is a condition precedent which must be literally performed. This is the case in the exception discussed in note (11) below.

(9) Indirect Benefit

The third para corresponds to section 184 of the Indian Succession Act, 1925 (section 171, Indian Succession Act, 1865).

The section is explained by the following illustration:

> The lands of Sultanpur are settled upon *C* for life, and after his death upon *D*, his only child. *A* bequeaths the lands of Sultanpur to *B*, and 1,000 rupees to *C*. *C* dies intestate shortly after the testator, and without having made any election. *D* takes out administration to *C*, and as administrator elects on behalf of *C*'s estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to *B* for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of *C*. In his individual character he retains the lands of Sultanpur in opposition to the will.

On the same principle, it has been held in England that a man may be tenant by courtesy of an estate tail held by his wife in opposition to a will under which he accepts a legacy.[1137] The interest which the husband takes in such a case is an incident of the property of his wife, and not a benefit conferred by the transferor so as to raise a case for election.

(10) Different Capacity

The fourth para corresponds with the first part of section 185 of the Indian Succession Act, 1925, which is explained by the following illustration:

> The estate of Sultanpur is settled upon *A* for life, and after his death, upon *B*. *A* leaves the estate of Sultanpur to *D*, and 2,000 rupees to *B*, and 1,000 rupees to *C*, who is *B*'s only child. *B* dies intestate, shortly after the testator, without having made an election. *C* takes out administration to *B*, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. *C* may do this, and yet claim the legacy of 1,000 rupees under the will.

An administrator or trustee may take a benefit qua administrator for the benefit of the estate, or of the beneficiary, and take a benefit for himself without being put to an election. No question of election can arise merely because owing to circumstances two capacities have merged in one person.[1138]

1134. *Cooper v Cooper*, (1874) 7 HL 53, p 67.
1135. *Thellusson v Woodford*, [1806] 13 Ves 209; *Parker v Sowerby*, (1854) 4 De GM & G 321.
1136. *Whistler v Webster*, [1794] 2 Ves 367, p 370.
1137. *Cavan v Puleny*, [1795] 2 Ves 544; *Grissel v Swinhoe*, (1869) 7 Eq 291, explained in *Cooper v Cooper*, (1874) 7 HL 53.
1138. *Deputy Commr of Partabgarh v Ram Sarup*, (1917) 20 OC 243 : 42 IC 18.

(11) Exception

The exception corresponds to the second part of section 186 of the Indian Succession Act, 1925, where it is explained by the following illustration:

> Under *A*'s marriage settlement, his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. *A*, by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu other interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1,000 rupees.

Section 172 of the Indian Succession Act, 1865, (corresponding to section 186 of the 1925 Act) was referred to in a Calcutta case,[1139] in which a testator bequeathed to his nephew all his property including the share of his brother's widow, and made a provision for the widow's maintenance. The widow recovered the maintenance allowance by suit, and it was held that a subsequent suit for her share of the property was barred by section 172, as she must have known that the allowance was given to her in lieu of other share of the property.

(12) Acceptance

The fifth para corresponds to section 187 of the Indian Succession Act, 1925, which is explained by the following illustrations:

> (i) *A* is the owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son *B* will be absolutely entitled. The will of *A* gives the estate of Sultanpur Khurd to *B*, and the estate of Sultanpur Buzurg to *C*. *B*, in ignorance of his own right to the estate of Sultanpur Buzurg, allows *C* to take possession of it, and enters into possession of the estate of Sultanpur Khurd. *B* has not confirmed the bequest of Sultanpur Buzurg to *C*.
>
> (ii) *B*, the eldest son of *A*, is the possessor of an estate called Sultanpur, *A* bequeaths Sultanpur to *C*, and to *B* the residue of *A*'s property. *B* having been informed by *A*'s executors that the residue will amount to 5,000 rupees, allows *C* to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. *B* has not confirmed the bequest of the estate of Sultanpur to *C*.

Acceptance of a benefit implies an election,[1140] but as in English law, there is no implied election except by a party who has full knowledge of the circumstances that would influence the judgment of a reasonable man making the election, and with that knowledge determines to elect.[1141] He waives the inquiry into the circumstances if he wilfully abstains from inquiring into them so that he is affected with constructive notice of them. An election made with full knowledge is final;[1142] but an election made without such knowledge may be revoked by the representatives of the electing party.[1143] Cases have arisen in India in connection with bequests to *pardanashin* women, and it has been held that it must be proved that they were fully aware of their rights when the acts were done which are said to constitute an election.[1144] In *Sadik Husain v Hashim Ali,*[1145] a Mahomedan executed a voluntary trust deed settling property on his wife in satisfaction

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1139. *Pramada Dasi v Lakhi Narain Mitter,* (1888) ILR 12 Cal 60.
1140. *Beepathumma (C) v VS Kadambolithaya,* [1964] 5 SCR 836 : AIR 1965 SC 241.
1141. *Dillon v Parker,* (1819) 1 Swan 359, p 382; *Worthington v Wiginton,* (1885) 20 Beav 67; *Wilson v Thornbury,* (1875) 10 Ch D 239.
1142. *Dewar v Maitland,* [1866] 2 Eq 834.
1143. *Kidney v Coussmaker,* (1806) 12 Ves 136.
1144. *Triguna Sundari v Radharani,* (1923) 37 Cal LJ 20; *Indubala v Manmatha,* (1925) 41 Cal LJ 258 : 87 IC 404 : AIR 1925 Cal 724.
1145. *Sadik Husain v Hashim Ali,* 43 IA 212, p 230 : (1916) ILR 38 All 627 : 36 IC 104.

of her claim for dower, and the Privy Council observed that "if she was never fully informed of its purport and contents, any election by her to accept the provision made for herself and her children by it in discharge of the unpaid balance of her dower would, of course, be of no avail."

(13) Two Years' Enjoyment

The sixth para corresponds to section 188(1) of the Indian Succession Act, 1925. The presumption may be rebutted. A widow who enjoyed a provision made for her under a will in ignorance of her right of dower was held entitled to elect after a lapse of 16 years.[1146] When the person who has to elect is in possession of both estates, no presumption can be drawn.[1147]

(14) Status Quo cannot be Restored

The seventh para corresponds with section 188(2) of the Indian Succession Act, 1925. It is sufficiently explained by the illustration to the exception. The section permits an inference of knowledge which may be rebutted by circumstances.

(15) Time for Election

The eighth para corresponds with section 189 of the Indian Succession Act, 1925. If a time is fixed by the instrument, and the party makes default, he is deemed to have elected against the instrument.[1148]

(16) Disability

The ninth para corresponds with section 190 of the Indian Succession Act, 1925. A minor's election may be postponed until his majority, or his guardian may elect for him.

(17) Ratification

Cases of ratification must be distinguished from cases of election. For, ratification properly speaking, refers to acts done on behalf of the ratifier. If done without authority, the principal may elect either to ratify, or to disown them. This has been laid down in section 196 of the Indian Contract Act, 1872. The doctrine of ratification rests, however, on the same principle that a man cannot both affirm and disaffirm the same transaction. Thus, when a widow who had a life-estate for maintenance granted a permanent lease, the reversioner could elect either to ratify it, or to set it aside; and it was held that he was not bound by the lease when he accepted rent for three years in ignorance of the circumstances under which the lease was granted or the terms on which it was held.[1149] A converse case is *Modhu Sudan v Rooke*[1150] where the reversioner accepted rent with full knowledge that the widow had granted a *patni* lease, and he was held to have elected to ratify the lease.

(18) Hindu Law

The section now applies to Hindus, but the principle has always applied. In *Rungama v Atchama,*[1151] the Privy Council referred to the "principle not peculiar to English law, but common to all law which is based on the rules of justice, viz, the principle that a party shall

1146. *Sopwith v Maughan,* (1861) 30 Beav 235.
1147. *Padbury v Clark,* (1850) 2 Mac & G 298.
1148. *Dillon v Parker,* (1818) 1 Swan, 359, p 385.
1149. *Gopi Koeri v Raj Roop,* 78 IC 191 : AIR 1925 All 190.
1150. *Modhu Sudan v Rooke,* (1898) ILR 25 Cal 1 : 24 IA 164.
1151. *Rungama v Atchama,* (1858) 4 Mad IA 1 : 7 WR 57.

not at the same time affirm and disaffirm the same transaction—affirm it as far as it is for his benefit and disaffirm it as far as it is to his prejudice."

In *Shah Mukhun Lal v Sree Kishen Singh,*[1152] the Privy Council said that the principle that you cannot both approbate and reprobate the same transaction was a "maxim founded, not so much on any positive law, as on the broad and universally applicable principles of justice". The doctrine was directly applied in the case of *Mangaldas v Runchhoddas.*[1153] A Hindu widow devised to *K* immovable property of her husband and gave the plaintiff, a reversionary heir, a legacy of ₹2000. The plaintiff claimed the legacy under the will and the immovable property as heir. The court said that the doctrine of election applied, and that he must elect to take the one or the other.

(19) Mahomedan Law

The doctrine of election was applied to Mahomedans by the Privy Council in the case of *Sadik Husain v Hashim Ali.*[1154]

Apportionment

36. Apportionment of periodical payments on determination of interest of person entitled.—In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

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(1) Apportionment by Time

This section refers to apportionment by time, while the whole of section 37 refers to apportionment by estate.

ILLUSTRATIONS

(1) *A* has let his house at a rent of ₹100 payable on the last day of each month. *A* sells the house to *B* on 15 June. On 30 June, *A* is entitled to ₹50 rent from the 1st to 15th and *B* is entitled to ₹50 rent from 15th to 30th June. This is apportionment by time.

(2) *A* has let his house at a rent of ₹100. *A* sells half the house to *B*. The tenant having notice of the sale must pay from the date of the sale, rent at the rate of ₹50 to *A* and ₹50 to *B*. This is apportionment by estate.

On a transfer of property yielding income, section 8 provides that the transferee is entitled to the interest or income accruing after the transfer takes effect. The interest has in such cases to be divided between the transferor and the transferee. There is no difficulty in respect of

1152. *Shah Mukhun Lal v Sree Kishen Singh,* (1869) 12 Mad IA 157, p 186 : 2 Beng LR 44 : 11 WR 19.
1153. *Mangaldas v Runchhoddas,* (1890) ILR 14 Bom 438.
1154. *Sadik Husain v Hashim Ali,* (1916) ILR 38 All 627 : 43 IA 212 : 36 IC 104.

interest, for that accrues from day to day. But as to income which does not accrue *de die in diem,* the rule in section 8 might lead to anomalous results. For instance, rents do not accrue from day to day, but at stated periods,[1155] and if the rent for the year was payable the day after the transfer, the transferee would be entitled to the whole year's rent. To remove this anomaly, the section enacts that all periodical payments in the nature of rent, annuities, dividends and pensions shall be deemed to accrue from day to day, and be apportioned between the transferor and transferee on that basis.

(2) Scope of the Indian Rule

The Indian rule is limited, for it is restricted to transfer inter vivos, and does not apply to liabilities. The apportionment which the section contemplates is one following the transfer of the interest of the person entitled to receive the rent, and not the transfer of the interest of the person bound to pay it.[1156] A lessor transferring his interest to the assignee of the lessee is entitled to an apportionment of rent upto the date of the merger.[1157] When a decree is passed for the redemption of a mortgage, the apportionment of the rents of the mortgaged property is made as from the date when money is paid for redemption, and not from the date of the decree.[1158]

The section does not apply to transfers by operation of law as these are excluded by section 2(d). A purchaser at an execution sale acquires title by operation of law, and the rule of apportionment does not apply to execution sales.[1159]

ILLUSTRATION

A mortgage brought the mortgaged property to sale and bought the property himself at the court sale in November 1922. The rent for the year was payable on 1 April 1923. The mortgagor claimed that the rent should be apportioned and that he should receive the rent from 1 April 1922 till November 1922. But as it was an execution sale section 36 did not apply, and the mortgagee was held to be entitled to the whole year's rent payable on 1 April 1923.[1160]

Similarly, it has been held that section 36 does not apply to cases of partition, for a partition is not a "transfer";[1161] nor can the principle of the section be applied to such cases as, unlike cases of execution sales or succession where the transferee acquires a right to the property by the transaction, in the case of a partition, the person to whom a particular portion is allotted always had a right in that portion.[1162]

Prepaid rent is not rent, but a loan.[1163]

The section is applicable only between the transferor and transferee.[1164]

(3) No rule of Apportionment in the Act Apart from Section

These limitations on the section have not always been observed. In one case[1165] the lessor had only a life interest, and died a month before the rent of the half year was

1155. *Satyendra Nath v Nilkantha,* (1894) ILR 21 Cal 383.
1156. *Satyendra Nath v Nilkantha,* (1894) ILR 21 Cal 383.
1157. *Mikram Mumar v Mohit Krishna,* 64 IC 178.
1158. *Lala Ganga Ram v Mewa Ram,* AIR 1922 All 275.
1159. *Subbaraju v Seetharamaraju,* (1916) ILR 39 Mad 283 : 28 IC 232; *Satyendra Nath v Nilkantha,* (1894) ILR 21 Cal 383.
1160. *U Kyaw Zan v Ah Doe,* 84 IC 77 : AIR 1924 Rang 365; *Subbaraju v Seetharamaraju,* (1916) ILR 39 Mad 283.
1161. See note under section 5.
1162. *Manmad Kunhi v Ibrayni Haji,* AIR 1959 Ker 208.
1163. *De Nicholls v Saunders,* (1870) LR 5 CP 589; See also note under section 50 "Rent paid in advance".
1164. *Satyabhamadevi v Ram Kishore,* AIR 1975 MP 115.
1165. *Lakshminaranappa v Melothraman,* (1903) ILR 26 Mad 540.

payable. Here there was no question of a transfer, and yet the assignee of the lessor was held to be entitled to an apportionment of rent for the period up to the death of the lessor. Again, in another case[1166] the liability to pay rent was apportioned between the lessee and his assignee, and in a third case[1167] the rule of apportionment was applied between a lessor and the purchaser of his interest at an execution sale. This decision has been followed by the Madras High Court.[1168] The rule has also been applied in the case of devolution of interest on succession.[1169] In all these cases the rule was applied as an equity. It is submitted, however, that this is erroneous, and that there is no such equity. A general rule of apportionment by time was then introduced by statute. The Indian rule is limited to transfers inter vivos.

(4) Maintenance

A Hindu widow's right to maintenance accrues from day to day. Therefore, on the death of a Hindu widow, her heirs are entitled to recover the maintenance allowance upto the day of her death, although the allowance has, for the convenience of the parties, been expressed to be payable on a fixed date.[1170]

(5) "Other Periodical Payment"

The same expression is used in the English Apportionment Act, 1870 and as to it, Lord Selbourne said—"They must be payments which are made periodically, recurring at fixed times, not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and, further, they must be in the nature of income; that is, coming in from some kind of investment".[1171] The expression does not, therefore, include the profits of a partnership which accrue only after the adjustment of accounts,[1172] nor the profits in a share of a village.[1173]

Whenever there are periodical payments accruing, and the event which calls for apportionment occurs, the TP Act is at once brought into operation and must be applied, and when subsequently the accruing payments become due and payable, they must be distributed in accordance with the TP Act.[1174]

(6) Sums Due Before the Event

Sums due in advance and due before the event which calls for apportionment are not apportioned. So where rent was payable quarterly in advance, and the landlord re-entered for non-payment of rent during the quarter, he was entitled to recover the whole rent.[1175]

(7) Payable

The section makes it clear that the apportionment does not affect the date when the payment is to be made by the person liable. Thus, if under a lease, rent is payable at the end

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1166. *Kunhi Sou v Mulloli Chathu,* (1915) ILR 38 Mad 86 : 17 IC 933.
1167. *Rangiah Chetty v Vajravelu,* (1918) ILR 41 Mad 370 : 43 IC 78; *Poongavanam v Subramanya,* (1951) 1 Mad LJ 69 : AIR 1951 Mad 601.
1168. *Sendattikalai Pandia v Sanjili Veerappa,* (1937) ILR Mad 589; *YS David v Bangarth Rangaraju,* AIR 1944 Mad 568.
1169. *Aparna Debi v Sree Sree Shiba Prasad,* (1924) ILR 3 Pat 367 : 83 IC 623 : AIR 1924 Pat 451; *Mahomed Ashkar v Mahomed Abdul,* 101 IC 91 : AIR 1927 Oudh 605; *Shivaprasad v Prayag Kumari,* (1934) ILR 61 Cal 711 : 154 IC 479 : AIR 1935 Cal 39.
1170. *Rangappa v Shiva,* (1933) 65 Mad LJ 410 : 145 IC 961 : AIR 1933 Mad 699.
1171. *Jones v Ogle,* (1872) 8 Ch App 192, p 198.
1172. Ibid; *Cox's Trusts,* (1878) 9 Ch D 159.
1173. *Gobind Rao v Bhagirathi,* (1901) 14 CP LR 84.
1174. Re *Muirhead Muirhead v Hill,* [1916] 2 Ch 181 : [1917] All ER Rep 771.
1175. *Ellis v Rowbotham,* [1900] 1 QB 740 : [1900-3] All ER Rep 299.

of the year, an assignment by the lessor of his interest in the middle of the year will result in the transferor and the transferee being each entitled to half the rent, but the lessee still remains liable to pay only at the end of the year.[1176]

(8) Contract or Local Usage

The rule may be excluded by contract or local usage. Similarly, where a managing agent assigned his entire interest in the agency, the court inferred a contract to the contrary, and the transferor had no right to the commission for the period prior to the date of transfer.[1177]

In the case of agricultural rents, the Allahabad High Court makes the apportionment with reference not to the rent of the whole year, but with reference to the rent of the season in which the crop was reaped.[1178] In a Rangoon case,[1179] the court observed that agricultural rents are not apportionable as they accrue once and for all when the crops are reaped, and do not accrue from day to day. This, it would appear, is not correct, for it is precisely because rents do not accrue from day to day that the rule of apportionment has been applied to them by this section. A similar observation as to agricultural rents occurs in a Calcutta case,[1180] but there the apportionment was by estate, and the reference to section 36 seems to have been a mistake. Agricultural rents are excepted from the operation of section 37, but are subject to apportionment by time under section 36.

Under section 225 of the Agra Tenancy Act (Uttar Pradesh Act 3 of 1936) agricultural profits were divisible on fixed dates between the co-sharers. However, on the principle of this section it has been held that the co-sharer's right accrues from day to day. Therefore, his suit for a share of the profits is not premature if filed before the fixed date, and the amount due at the date of suit can be ascertained by apportionment.[1181]

37. Apportionment of benefit of obligation on severance.—When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in a manner provided by this section, unless and until he has had reasonable notice of the severance.

1176. *Lala Ganga Ram v Mewa Ram,* AIR 1922 All 275; *Satyabhamadevi v Ram Kishore,* AIR 1975 MP 115.
1177. *ED Sassoon & Co v CIT,* [1955] 1 SCR 313, p 358 : AIR 1954 SC 470 : [1954] SCJ 771.
1178. *Nand Kishore v Ram Sarup,* (1928) ILR 50 All 18 : 102 IC 144 : AIR 1927 All 569.
1179. *Ma Hawa Bi v Sein Ko,* (1927) ILR 5 Rang 803 : 109 IC 151 : AIR 1928 Rang 67.
1180. *Satva Bhupal v Rajnandini,* (1924) 28 Cal WN 1039 : 83 IC 144 : AIR 1924 Cal 1069.
1181. *Mahommad Abdul Jalil Khan v Mahommed Abdul Salem Khan,* (1932) All LJ 93 : 137 IC 166 : AIR 1932 All 178.

Nothing in this section applies to leases for agricultural purposes unless and until the State Government by notification in the Official Gazette so directs.

ILLUSTRATIONS

(a) *A* sells to *B*, *C* and *D* a house situated in a village and leased to *E* at an annual rent of ₹30 and delivery of one fat sheep, *B* having provided half the purchase-money, and *C* and *D* one quarter each. *E*, having notice of this, must pay ₹15 to *B*, ₹7.50 to C, and ₹7.50; to *D*, and must deliver the sheep according to the joint direction of *B*, *C* and *D*.

(b) In the same case, each house in the village being bound to provide 10 days' labour each year on a dyke to prevent inundation, *E* had agreed as a term of his lease to perform this work for *A*. *B*, *C* and *D* severally require *E* to perform the 10 days' work due on account of the house of each. *E* is not bound to do more than 10 days' work in all, according to such directions as *B*, *C* and *D* may join in giving.

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(1) Apportionment by Estate

This section refers to apportionment by estate, while the last section dealt with apportionment by time.

Prior to the TP Act, when a tenure was severed by the sale of shares in the reversion, the tenant was still obliged to pay the rent to all the sharers jointly, unless an apportionment had been agreed to by all the parties, or had been ordered in a suit to which all concerned were parties.[1182] If such an agreement had been arrived at, it was binding on the tenant.[1183]

However, under the present section, notice to the tenant is sufficient to convert the single obligation to pay rent to all into a several obligation to pay rent to each co-sharer. On receipt of the notice, the tenant is under an obligation to pay each sharer his proportionate part of the rent;[1184] but if a suit is necessary to enforce this obligation, it is still necessary to join all the sharers as parties.[1185] If no apportionment is made, the obligation remains single, and the lessor will not be allowed to split the tenancy by recovering the rent of a part only;[1186] nor can a purchaser of a part insist on payment of rent of his part only.[1187]

If a *putnidar* pays the land revenue payable to the *zamindar* direct to the treasury, that is a payment which can be apportioned between the co-sharers in the *zamindari*.[1188] If an estate consisting of several villages is apportioned, the division should be made according to the existing rents, and not those at the creation of the original tenure.[1189] Provision is also made

1182. *Ishwar Chunder v Ram Krishna Dass,* (1890) ILR 5 Cal 902; *Guni Mahomed v Moran,* (1879) ILR 4 Cal 96; *Sreenath v Mohesh,* (1878) 1 Cal LR 453.
1183. *Lootfulhuck v Gopee Chunder,* (1880) ILR 5 Cal 941.
1184. *Sri Raja Simhadri v Prattipatti Ramayya,* (1908) ILR 29 Mad 29.
1185. *Prem Chand v Mokshoda Debi,* (1887) ILR 14 Cal 201; *Pergash Lal v Akhowri,* (1892) ILR 19 Cal 735; *Rajnarain v Ekadasi Bag,* (1900) ILR 27 Cal 479.
1186. *Satyesh v Jillar Rahman,* (1918) 27 Cal LJ 438 : 45 IC 721.
1187. *Maharaja Keshava Prasad v Mathura Kuar,* 69 IC 704 : AIR 1922 Pat 608.
1188. *Gour Gopal v Gosta Behari,* (1917) 21 Cal WN 214 : 34 IC 409.
1189. *Hari Kishun v Tilukdhari,* (1903) 7 Cal WN 453.

in section 109 for apportionment of rent by agreement between all parties. Payment of rent by a tenant in good faith and without notice of a transfer is protected by section 50.

(2) Benefit of any Obligation

Rent is not the only instance of the benefit of an obligation attached to property, which is capable of being apportioned. When the lessor sells portions of the property leased, the covenants which run with the land run with the severed portions. The lessee is bound to perform the various obligations imposed upon him in favour of each sharer in the reversion, so far as such obligations are capable of severance, and such performance will not be to his prejudice.[1190]

(3) Does not Substantially Increase the Burden

This condition is the subject of the second illustration. There is a similar provision in section 30 of the Easements Act, 1882, that the severance into shares of the dominant heritage should not increase the burden on the servient heritage. The principle may be illustrated by a case which is not, however, within the section. An agricultural holding fell to be divided so that the fields were allotted to one co-owner and the appurtenant farmhouse in the *abadi* to another. The tenant was still entitled to continue to occupy the farmhouse, rent free.[1191]

(4) Provided that the Duty can be Severed

It must of course be possible to perform the duty separately, otherwise it must be performed jointly. This is explained in the first illustration where the duty to deliver a sheep cannot be severed.

(5) Notice

Notice may be given by the assignor or by the assignee.[1192] The notice has of course no bearing on the title of the assignee.

(6) Section not Applicable

The section is subject to section 2(d) and is, therefore, not applicable to involuntary transfers or to cases of succession. The heirs of deceased creditors are only jointly entitled to enforce the right which the deceased, if alive, could singly enforce.[1193]

(7) Agricultural Tenancies

These tenancies have been exempted, as the severance of the obligation to pay rent would cause much harassment to agriculturists.[1194]

(B) TRANSFER OF IMMOVABLE PROPERTY

38. Transfer by person authorised only under certain circumstances to transfer.—Where any person, authorised only under circumstances in their nature variable to dispose off immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as

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1190. *Sri Raja Simhadri v Prattipatti,* (1908) ILR 29 Mad 29, p 36; *Godai Mahto v Debu,* 145 IC 287 : AIR 1933 Pat 248.
1191. *Saddu v Bihari,* (1908) ILR 30 All 282.
1192. *Peary Lal v Madhoji,* (1913) 17 Cal LJ 372 : 19 IC 865.
1193. *Kandhiya Lal v Chandar,* (1885) ILR 7 All 313; *Ahinsa v Abdul Kader,* (1902) ILR 25 Mad 26, p 34.
1194. *Alimuddin v Hira Lall,* (1896) ILR 23 Cal 87.

between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

ILLUSTRATION

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A*'s maintenance, and that the sale of the field is necessary, and acting in good faith, buys the field from *A*. As between *B* on the one part and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

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(1) Rest of Chapter II Applies to Immovable Property only

This group of sections, i.e., sections 38 to 53, applies to immovable property only. The preceding group, i.e., sections 33 to 37, applies both to immovable and movable property.

(2) Limited Power of Transfer

The scope of this section is very restricted. It does not apply to cases falling under section 41 of *benamidars* or ostensible owners who can give no title except by estoppel; nor to cases under section 64 of the Indian Trusts Act, 1882, of persons purchasing in good faith for consideration without notice of a trust. However, it refers to cases such as those arising under Hindu law where the power of transfer of the person representing the estate depends upon circumstances in their nature variable. Thus, a Hindu widow under the classical Hindu law had no power to dispose of immovable property except for purposes which the Hindu law recognises as constituting legal necessity. The manager of a joint Hindu family has power to sell or mortgage joint family property only for purposes of legal necessity, or for debts incurred in the family business, or for the benefit of the estate. The father of a joint Hindu family may sell or mortgage joint family property to discharge his own antecedent debt not incurred for an immoral or an illegal purpose. So also, the natural guardian of a Hindu minor has power to sell or mortgage any part of the minor's estate in case of necessity or for the benefit of the estate. A transfer in excess of such limited power is voidable, but the transferee is protected if he has made inquiries with reasonable care, and has acted honestly in the real belief that there were justifying circumstances.

The section would appear to be based on the leading case of *Hunnooman Persaud v Babooe,*[1195] and particularly the following passage:

> The power of a manager for an infant heir to charge an estate not his own, is under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate...The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded...Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the

1195. *Hunnooman Persaud v Babooe,* (1856) 6 Mad IA 393, p 423.

validity of his charge, and they do not think that under such circumstances, he is bound to see to the application of the money.

This principle applies not only to the case of a manager for an infant, but also to alienations by a Hindu widow under the classical Hindu law, or other limited heir,[1196] and to transactions in which a father in derogation of the rights of his son under Mitakshara law has made an alienation of an ancestral family estate.[1197] Thus, where upon a settlement made by a Hindu widow, she retained a portion of land for her maintenance in which she had only a life interest and transferred the rest of the property, a sale by her during her lifetime of the life interest would be void.[1198] It also applies to alienations by a *mohunt* or shebait of debtor property.[1199] An executor under pure Hindu law has no greater powers than the manager of a minor's estate.[1200]

(3) Circumstances in their Nature Variable

This expression refers, in cases of Hindu alienations, to the facts that constitute legal necessity in Hindu law. These vary according to the facts of each case, and the status of the transferor. A stepmother purporting to act on behalf of a minor stepson is a person authorized "only under circumstances in their nature variable to dispose off immovable property".[1201] The transaction must be judged in the circumstances prevailing at the time it took place, and not by subsequent events.[1202]

(4) Before Transfer

The section has no application before transfer where the transaction is still incomplete.[1203]

(5) Onus of Proof

The onus of proving justifying circumstances is on the transferee. Where a mortgagee from a Hindu widow seeks to enforce his mortgage, the onus is on him to prove that the money was borrowed for a legitimate purpose.[1204] One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to proving not only the genuineness of his conveyance, but the full comprehension by the limited owners of the nature of the alienation she was making, and also that the alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity.[1205] Actual proof of the necessity which justified the deed is not essential to its validity; it is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper inquiry to satisfy himself of its truth.[1206] If the alienation is by a father for payment of

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1196. *Debi Prasad v Golap Bhagat,* (1913) ILR 40 Cal 721 : 19 IC 273; *Rangaswami v Nachiappa,* (1919) ILR 42 Mad 523 : 46 IA 72 : 50 IC 498.
1197. *Kameshwar Pershad v Run Bahadoor,* (1881) ILR 6 Cal 843 : 8 IA 8; *Sahu Ram v Bhup Singh,* (1917) ILR 39 All 437, p 443 : 44 IA 126, p 130 : 39 IC 280.
1198. *Sri Siddaraju v Sri Gangadhara,* AIR 2012 Kant 143.
1199. *Prasunno Kumari v Golab Chand,* (1875) 14 Bom LR 450 : 2 IA 145; *Kunwar Doorganath v Ram Chunder Sen,* (1876) ILR 2 Cal 341 : 4 IA 52; *Niladri Sahu v Mahant Chaturbhuj Das,* (1926) ILR 6 Pat 139 : 53 IA 253 : 98 IC 576 : AIR 1926 PC 112.
1200. *Jugmohandas v Pallonjee,* (1898) ILR 22 Bom 1; *Kherodemoney v Doorgamoney,* (1879) ILR 4 Cal 455, p 468; *Sarat Chandra v Bhupendra Nath,* (1898) ILR 25 Cal 103; *Amulya v Kalidas,* (1905) ILR 32 Cal 861.
1201. *Balappa v Chenvasappa,* (1915) 17 Bom LR 1134, p 1136 : 33 IC 444.
1202. *Nagamali v Varada Kondar,* (1950) 1 Mad LJ 505 : AIR 1950 Mad 606.
1203. *Jamsetji v Kashinath,* (1901) ILR 26 Bom 326, p 336.
1204. *Maheshwar v Ratan Singh,* (1896) ILR 23 Cal 766 : 23 IA 57.
1205. *Bhagwat Dayal v Debi Dayal Sahu,* (1908) ILR 35 Cal 420 : 35 IA 48; *Ravaneshwar v Chandi Prasad,* (1911) ILR 38 Cal 721 : 12 IC 931 : on app (1915) ILR 43 Cal 417 : 36 IC 499 : AIR 1915 PC 57.
1206. *Banga Chandra v Jagat Kishore,* (1916) ILR 44 Cal 186 : 43 IA 249 : 36 IC 420; *Maharaj Singh v Balwant Singh,* (1906) ILR 28 All 508.

antecedent debts, the burden is on the transferee to prove that the debt existed, or that after proper inquiry he honestly believed that it existed.[1207] The burden is then shifted on the son to show that the debt was contracted for an immoral purpose, and that the transferee had actual or constructive notice of the nature of the debt.[1208] It has been stated in a Madras case[1209] that whereas in the case of an alienation for necessities, the transferee need not actually prove the existence of the necessity, and that he can claim the benefit of section 38 if he shows that he had made reasonable inquiries, in the case of an alienation for an antecedent debt, the transferee must show the existence of the debt as otherwise "it would not be held that the enquiry was full or bona fide". This distinction would appear to be unsound, for it would be a question of fact whether the transferee had used reasonable care and acted in good faith in the circumstances of each case.

Recitals by the transferor are not generally sufficient proof of necessity,[1210] for they may only have been inserted at the instance of the transferee.[1211] They must, therefore, be supplemented by evidence *aliunde*.[1212] A sale deed executed by a Hindu widow recited the payment of family debts as the necessity justifying the sale. But the purchaser made no inquiry of the creditors named in the deed and was, therefore, not protected by this section.[1213] However, as time goes by and the original parties to the transaction and all those who could have given evidence have passed away, recitals assume greater importance, and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed their truth, they would be sufficient to support the deed.[1214] In such cases presumptions are admissible to fill in details which have been obliterated by time.[1215]

The lender is not bound to see to the application of the money.[1216] In the judgment in *Hunooman Persaud's* case LJ Knight Bruce said:

> The purposes for which a loan is wanted are often future, as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

Accordingly, a sale or mortgage may be justified by legal necessity although as to part of the consideration, such necessity has not been established.[1217] The Allahabad High Court has held that this was so only when the unaccounted part was small, but not if it was

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1207. *Chandradeo v Mata Prasad,* (1909) ILR 31 All 176, p 198 : 1 IC 479; *Sahib Singh v Girdhari Lal,* (1923) ILR 45 All 576 : 73 IC 1024 : AIR 1924 All 24; *Jamna v Nain Sukh,* (1887) ILR 9 All 493; *Subramanya v Sadusiva,* (1884) ILR 8 Mad 75.
1208. *Girdhari Lal v Kantoo Lall,* (1874) 14 Beng LR 187 : 1 IC 321; *Suraj Bunsi Koer v Sheo Proshad,* (1878) ILR 5 Cal 148 : 6 IA 88; *Joharmal v Eknath,* (1899) ILR 24 Bom 343.
1209. *Meenakshi Achi v Manikkam Chettiar,* (1959) ILR Mad 1046 : 1960 1 Mad LJ 89 : AIR 1960 Mad 99.
1210. *Maharaja of Bobbili v Zamindar of Chundi,* (1912) ILR 35 Mad 108 : 8 IC 860.
1211. *Muhammad v Brij Bihari,* (1924) ILR 46 All 656 : 82 IC 5 : AIR 1924 All 939.
1212. *Brij Lal v Inda Kunwar,* (1914) ILR 36 All 187 : 23 IC 715 (PC).
1213. *Junhabi v Balbhadra,* (1910) 15 Cal WN 793 : 10 IC 350.
1214. *Banga Chandra v Jagat Kishore,* (1916) ILR 44 Cal 186 : 36 IC 420 : 43 IC 249.
1215. *Chintamanibhatala v Rani of Wadhwan,* (1920) ILR 43 Mad 541 : 55 IC 538 : 47 IA 6; *Ravaneshwar v Chandi Prasad,* (1911) ILR 38 Cal 721 : 12 IC 931 : on app (1916) ILR 43 Cal 417 : 36 IC 499 : AIR 1915 PC 57.
1216. *Hunooman Persaud v Babooe,* (1856) 6 MIA 393, p 424; *Uday Chunder v Asutosh,* (1894) ILR 21 Cal 190; *Dalibai v Gopibai,* (1901) ILR 26 Bom 433. See also *Radhakrishan Das v Kaluram,* AIR 1967 SC 574 : [1963] 1 SCR 648; but see *A Subramaniam v Jayadevan,* AIR 1985 Mad 372 : 1985-98-LW 215, wherein it was held that in exceptional cases, he may be required to see actual application of money.
1217. *Krishn Das v Nathu Ram,* (1927) ILR 49 All 149 : 54 IA 79 : 100 IC 130 : AIR 1927 PC 37 overruling *Gobind Singh v Baldeo Singh,* (1903) ILR 25 All 330 and *Ram Dei v Abu Jafar,* (1905) ILR 27 All 494 and *Dwarka Ram v Jhulai,* (1923) ILR 45 All 429 : 72 IC 134 : AIR 1923 All 248.

considerable.[1218] However, this view was disapproved by the Privy Council, and it was held that if the sale itself is justified by legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been applied to the purposes of necessity does not invalidate the sale, and the sale should be upheld unconditionally, irrespective of whether the part proved to have been applied to the purposes of necessity is considerable or small.[1219]

39. Transfer where third person is entitled to maintenance.—Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred, [1220][***] the right may be enforced against the transferee, if he has notice [1221][thereof] or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

[1222][***]

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(1) Amendment

The original section was amended by the amending Act 20 of 1929.

(2) Maintenance not a Charge

The right of maintenance, even of a Hindu widow, is an indefinite right which falls short of a charge.[1223] It is not a charge unless it has been made a charge by decree or agreement,[1224] or unless the widow is in possession of specific property allotted for her maintenance.[1225] In such cases, notice of the charge is sufficient to bind the transferee. However, in some cases it

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1218. *Lal Bahadur v Kamleshar,* (1926) ILR 48 All 183 : 90 IC 988 : AIR 1925 All 624; *Daulat v Sankhata,* (1925) ILR 47 All 355 : 86 IC 91 : AIR 1925 All 324; *Ghansham v Badiya,* (1902) ILR 24 All 547.
1219. *Niamat Rai v Din Dayal,* (1927) ILR 8 Lah 597 : 54 IA 211 : 101 IC 373 : AIR 1927 PC 121.
1220. The words "with the intention of defeating such right" omitted by Act 20 of 1929, sec. 11.
1221. Subs. by Act 20 of 1929, sec. 11, for "of such intention".
1222. The illustration omitted by Act 20 of 1929, sec. 11.
1223. *Lakshman v Satyabhamabai,* (1877) ILR 2 Bom 494; *Bhatpur State v Gopal,* (1901) ILR 24 All 160; *Ram Kunwar v Ram Dai,* (1900) ILR 22 All 326; *Somasundaram v Unnamalai,* (1920) ILR 43 Mad 800 : 59 IC 398; *Ramanandan v Rangammal,* (1889) ILR 12 Mad 260; *Sorolah v Bhoobun,* (1888) ILR 15 Cal 292, p 307.
1224. *Ram Kunwar v Ram Dai,* (1900) ILR 22 All 326; *Jamnabai v Balakrishna,* (1927) 53 Mad LJ 176 : 102 IC 101 : AIR 1927 Mad 1092; *Prosonno v Barbosa,* (1866) 6 WR 253 (charge created by will); *Gajadhar v Khula Kunwar,* (1908) 12 OC 37 : 1 IC 690; *Sowbagia v Manicka,* (1918) 33 Mad LJ 601 : 42 IC 975; *Bharatpur State v Gopal,* (1901) ILR 24 All 160, p 163; *Nagi v Rajkunwar,* (1956) ILR Nag 181 : AIR 1956 Nag 138.
1225. *Rachawa v Shivayogapa,* (1893) ILR 18 Bom 679; *Imam v Balamma,* (1889) ILR 12 Mad 334; *Ram Kunwar v Amar Nath,* (1932) ILR 54 All 472 : (1932) All LJ 267 : 138 IC 363 : AIR 1932 All 361.

had been held that a charge for maintenance created by a decree was binding on a transferee irrespective of whether he had notice of the charge.[1226] Those decisions proceeded on the view that the effect of a charge was similar to that of a mortgage, in that it placed a limitation on the ownership of the property.[1227] Those decisions, however, were not correct, for even before the Amending Act of 1929 it was clear that a charge did not, like a mortgage, create an interest in property,[1228] and the amended section 100 expressly enacts that a charge cannot be enforced against a transferee for consideration without notice. This section purports to deal with a right of maintenance or the like which, not having been made a charge by decree or agreement, falls short of a charge.[1229]

(3) Right under the Amended Section

Under the amended section, the right of the widow is more effectively protected. It is not necessary that the transferee should be aware of an intention to defraud the widow or to defeat her right to maintenance.[1230] If he is a transferee for consideration, he takes subject to the right if he has notice of it. If he is a gratuitous transferee, he takes subject to the right, irrespective of whether he has notice of it. The amended section is not intended to create a charge where none existed. The effect of the amendment is to make it unnecessary for the widow to prove that the transfer was made with the intention of defeating her right.[1231]

(4) Enhanced Maintenance

It has been held[1232] that the right to receive maintenance protected by the section is not merely the right to receive such maintenance in the first instance, but also the right to receive enhanced maintenance in the future if there has been a material change in the circumstances.

(5) Right of Residence

Where, by way of settlement of disputes between the husband and the wife, property is given to the wife by the husband for her separate residence during her lifetime, it is a part of the arrangement for the grant of maintenance. Subsequent alienation by the husband cannot divest her from her possession till her death, and the transferee (from the husband) is not entitled to possession till her death. Section 39 applies to such a situation. The word "maintenance" in the section covers residence also.[1233]

1226. *Maina v Bachchi,* (1906) ILR 28 All 655; *Bhoje Mahadev v Gangabai,* (1913) ILR 37 Bom 621 : 21 IC 54; *Kallapa v Balwant,* (1925) 27 Bom LR 434 : 87 IC 951 : AIR 1925 Bom 343; *Mahadev Prasad v Anandi Lal,* (1925) ILR 47 All 90 : 92 IC 348 : AIR 1925 All 60; *Chaudhri v Gobardhan,* (1930) ILR 5 Luck 172 : 117 IC 405 : AIR 1929 Oudh 316; *Kuloda Prasad v Jogeshwar,* (1900) ILR 27 Cal 194; *Hunter, Liquidator of Bank of Upper India v Nisar Ahmed Chawdhari,* (1932) ILR 8 Luck 168 : 143 IC 692 : AIR 1932 Oudh 336.
1227. *Kallapa v Balwant,* (1925) 26 Bom LR 434 : 87 IC 951 : AIR 1925 Bom 343.
1228. *Royzuddi v Kali Nath,* (1906) ILR 33 Cal 985; *Gobinda Chandra Pal v Dwarka Nath Pal,* (1908) ILR 35 Cal 837; *Jawahir Mal v Indomati,* (1914) ILR 36 All 201 : 22 IC 973; *Akhoy Kumar v Corporation of Calcutta,* (1915) ILR 42 Cal 625 : 27 IC 621.
1229. *Ghasiram v Kundanbai,* (1941) ILR Nag 513 : AIR 1940 Nag 163.
1230. *Dattatreya v Julsabai,* (1943) ILR Bom 646 : 45 Bom LR 802 : 210 IC 161 : AIR 1943 Bom 412; *Pranlal v Chapsey,* AIR 1945 Bom 34.
1231. *Ramamurthi v Kanakaratnam,* (1948) ILR Mad 335 : AIR 1948 Mad 205; *Manikyam v Venkayamma,* AIR 1957 AP 710; *Chandramma v Maniam Venkatareddi,* AIR 1958 AP 396; *Vellayammal v Srikumara Pillai,* AIR 1960 Mad 42 (disapproving *Parayyamal v Samiappa,* AIR 1947 Mad 376); *Kare Mors Sharabanna v Basappa,* AIR 1962 Mys 207. And see *Mahesh Prasad v Nunder,* (1953) ILR 1 All 284 : (1951) All LJ 39 : AIR 1951 All 141.
1232. *Kaveri v Parameswari,* AIR 1971 Ker 216. And see *Vedavathi Williams v Rama Bai,* AIR 1964 Mys 265.
1233. *Adiveppa v Tengawwa,* (1974) 2 Kant LJ 45.

(6) Maintenance not Secured by Decree

Under Hindu Law, the maintenance of a wife by her husband is, of course, a matter of personal obligation which attaches from the moment of marriage. From the date of marriage her home is necessarily in her husband's home. He is bound to maintain her in it if she is willing to reside with him and discharge her duties. The doctrine of maintenance of a wife can be traced to the *smritis,* and the principal Hindu commentaries upon them. These texts enjoin a mandatory duty upon the husband to maintain his wife. It imposes a personal obligation on him enforceable by the sovereign or state. However, this does not mean that the obligation is not referred at all to his property, and that he can alienate all his property and deprive his wife of the right to maintenance from the income of his property. The personal obligation on the part of the husband to maintain the wife is even wider, in the sense that his obligation will exist if he has no properties from which he could derive any income. Even according to the ancient texts, the wife was supposed to be a co-owner of her husband's property, though in a secondary sense. The Hindu female's right to maintenance is a tangible right against property flowing from the relationship between the husband and wife and is recognised, and has been strongly stressed even by the earlier Hindu jurists starting from *Yajnavalkya* to *Manu.* Even without a charge, the claim for maintenance is doubtless a pre-existing right enforceable against the property in the hands of alienee with notice of her claim.[1234]

It is not necessary that the right to maintenance should become crystallised in the form of a decree to enable the wife to proceed against the property in the hands of the husband or his transferees. Merely because, at the time when the settlement deed was executed, the wife had not obtained a decree for maintenance would not mean that she will not be entitled to enforce the right of maintenance against the property gratuitously transferred by the husband in favour of a transferee or a gratuitous transferee.[1235] If the husband gifted the properties in favour of the concubine without making provision for the maintenance of the wife, then the wife will be entitled to have a charge against the very properties, and enforce the same.[1236] It is not open to a husband to effect an alienation of his properties, when such alienation has the effect of depriving her and other dependants of their maintenance. A wife and children can, therefore, have a charge upon the properties of the husband, and can enforce the same against a gratuitous transferee.[1237] However, if the husband transfers the property with the knowledge of his wife and children the latter as such would have no claim of maintenance against the transferee.[1238]

(7) Notice

The provision as to notice marks the difference between the old section and the new. Under the old section, the transferee was not bound, unless he had notice of the intention to defeat the right of the widow. Under the new section, notice of the existence of the right is sufficient to bind the transferee.[1239] If he is a bona fide transferee for valuable consideration without notice, he is not bound.[1240] Under section 3, the notice may be either actual or constructive. Andhra Pradesh High Court has held that the expression "notice" used should

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1234. *Banda Manikyam v Banda Venkayamma,* AIR 1957 AP 710, p 714; *Chandramma v Maniam Vankatareddi,* AIR 1958 AP 396, p 401; *V Tulasamma v V Sesha Reddi,* AIR 1977 SC 1944, pp 1951, 1954, 1960 : (1977) 3 SCC 99; *Basudev Dey Sarkar v Chhaya Dey Sarkar,* AIR 1991 Cal 399, p 402.
1235. *Ramamurthi v Kanakaratnam,* (1948) ILR Mad 335 : AIR 1948 Mad 205.
1236. *Raghavan v Nagammal,* (1979) 1 Mad LJ 172.
1237. *Ramankutty Purushothaman v Amminikutty,* AIR 1997 Ker 306 : (1997) 1 KLJ 275.
1238. *Vijayan v Sobhana,* AIR 2007 Ker 177; *Sarwan Singh v Jagir Singh,* AIR 2006 P&H 171.
1239. *Radhabai v Gopal,* (1944) 45 Bom LR 980 : AIR 1944 Bom 50; *Vedavathi Williams v Rama Bai,* AIR 1964 Mys 265.
1240. *Kesho Prasad v Upper India Bank Ltd,* 141 IC 474 : AIR 1933 Oudh 76; *Sheodeni Kuero v Umashankar,* (1963) ILR AP 74.

have a broad connotation, and cannot be construed literally to mean an information given. Aptly, it should mean knowledge and awareness. It was held that as long as a right exists under the law, it is obvious notice to one and all.[1241] The Kerala High Court has held, on facts, that, when property was alienated to a member of the same family, it cannot be said that the transferee had no notice of the matrimonial dispute.[1242]

(8) Enforceability as Between the Mother and Son Irrespective of Notice

As a woman is entitled to maintenance not only from the husband, but also from sons who were members of a joint family, the wife has a right to ask for a charge on the entire family property irrespective of whether they had effected division between them. A son cannot plead want of notice about his mother being entitled to get maintenance from out of the income of the joint family property. Partition can have no impact whatsoever on the mother's right.[1243]

(9) Family Debts

Under the Hindu law, debts contracted for the benefit of the family take precedence over a widow's claim for maintenance,[1244] and if family property is alienated for the discharge of debts binding on the family, the right of the alienee overrides the right of the widow, even if he had notice of her claim for maintenance.[1245] However, when maintenance has been expressly charged on the property, it takes precedence over the right of an execution purchaser even though the decree was for a debt binding on the family.[1246] Although the husband's debts may override the widow's claim for maintenance, she has a right to challenge debts incurred by a coparcener, such as a son or a brother of her deceased husband, and to enforce her rights against the property sold to pay off those debts, unless it be proved that they had been incurred for family necessity.[1247]

(10) Advancement

Provisions for advancement are unknown among Indians.[1248] The rule of English law by which a child who has received an advancement, must bring the amount into hotchpot in the case the father's intestacy had been omitted in the Indian Succession Act, 1925; and has been held not to apply to Parsees.[1249] Among persons subject to English law, a purchase by a father in the name of a daughter is presumed to be an advancement, and not to be *benami* or colourable.[1250]

1241. *C Yemuna v P Manohna,* AIR 2004 AP 312.
1242. *Sathiyamma v Gayathri,* 2013 (3) KHC 322 : 2013 (4) KLJ 233.
1243. *S Periasami v Chellamal,* (1980) 1 Mad LJ 46.
1244. *Lakshman v Satyabhamabai,* (1877) ILR 2 Bom 494; *Ramanandan v Rangammal,* (1889) ILR 12 Mad 260; *Johurra v Sreegopal,* (1876) ILR 1 Cal 470; *Jamnabai v Balakrishna,* (1927) 53 Mad LJ 176 : 102 IC 101 : AIR 1927 Mad 1092; *Gur Dayal v Kaunsilla,* (1882) ILR 5 All 367; *Soorja Koer v Nath Baksh,* (1884) ILR 11 Cal 102, p 105; *Jayanti v Alamelu,* (1904) ILR 27 Mad 45; *Brij Raj Kier v Ram Dayal,* (1932) ILR 7 Luck 411 : 135 IC 369 : AIR 1932 Oudh 40.
1245. *Lakshman v Satyabhamabai,* (1877) ILR 2 Bom 494; *Ramanandan v Rangammal,* (1889) ILR 12 Mad 260; *Jamnabai v Balakrishna,* (1927) 53 Mad LJ 176.
1246. *Somasundaram v Unnamalai,* (1920) ILR 43 Mad 800 : 59 IC 398.
1247. *Malkarjun v Sarubai,* AIR 1943 Bom 187.
1248. *Kerwick v Kerwick,* (1921) ILR 48 Cal 260 : 47 IA 275 : 57 IC 834 : AIR 1921 PC 56; *Guran Ditto v Ram Ditto,* (1928) ILR 55 Cal 944 : 55 IA 235 : 109 IC 723 : AIR 1928 PC 172; *Dharwar Bank v Mahomed Hayat,* (1931) 33 Bom LR 250 : 133 IC 241 : AIR 1931 Bom 269; *Paul v Nathaniel,* (1931) 29 All LJ 417 : 132 IC 573 : AIR 1931 All 596; *Sura Lakshmiah v Kothendarana,* (1925) ILR 48 Mad 605 : 52 IA 286 : 88 IC 327 : AIR 1925 PC 181; *Sahdeo Karan Singh v Usman Ali Khan,* 184 IC 113.
1249. *Dhanjibhai v Navajbai,* (1878) ILR 2 Bom 75.
1250. *Kerwick v Kerwick,* (1921) ILR 48 Cal 260 : 47 IA 275 : 57 IC 834 : AIR 1921 PC 56; *Paschaud v Paschoud Nixon,* 128 IC 721 : AIR 1930 Oudh 441; *Gopee Krist Gosain v Gunga Pershad,* (1854) 6 MIA 53; *Johnstone v Gopal Singh,* (1931) ILR 12 Lah 546 : 133 IC 628 : AIR 1931 Lah 419.

(11) Marriage

Under Mitakshara law, joint family property is liable for the legitimate marriage expenses of male members of the family,[1251] and their daughters,[1252] but not for the marriage of minors.[1253] Under this section as amended, a transferee having notice of such liability at the time of transfer would take subject to it section 40.

40. Burden of obligation imposing restriction on use of land.—Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment [1254][in a particular manner of the latter property,] or

Or of obligation annexed to ownership but not amounting to interest or easement.—Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

ILLUSTRATION

A contracts to sell Sultanpur to *B*. While the contract is still in force he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*.

Synopsis

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(1) Amendment

This section was amended by the amending Act of 1929.

1251. *Sundrabai v Shivnarayana,* (1907) ILR 32 Bom 81; *Bhagirathi v Jokhu Ram,* (1910) ILR 32 All 575 : 6 IC 5; *Gopal Krishna v Venkatarasa,* (1914) ILR 37 Mad 273 : 17 IC 308; *Debi Lal v Nand Kishore,* (1922) ILR 1 Pat 266 : 65 IC 315 : AIR 1922 Pat 22.

1252. *Vaikuntam v Kallapiram,* (1900) ILR 23 Mad 512; *Runganaiki v Ramanuja,* (1912) ILR 35 Mad 728 : 11 IC 570; *Srinivasa v Thiruvengadathaiyangar,* (1915) ILR 38 Mad 556 : 23 IC 264.

1253. *Dev Kishan v Ram Kishan,* AIR 2002 Raj 370 : RLW 2003 (2) Raj 1250 : (2002) 4 WLC 130 : (2002) 4 WLN 481.

1254. Subs. by Act 20 of 1929, sec. 12, for "of the latter property or to compel its enjoyment in a particular manner".

(2) First Paragraph—Right of Transferor Against Purchaser from Transferee

The second para of section 11 relates to right of transferor as against the transferee to (1) enforce the performance of an affirmative covenant; (2) restrain breach of a negative covenant. The first para of present section relates to the right of transferor as against a purchaser from a transferee to restrain the breach of a negative covenant. This paragraph, before it was amended, also recognised the right of the transferor to compel the performance of an affirmative covenant as against a purchaser from the transferee. It contained the words "to compel its enjoyment," but those words have now been omitted. The effect of the omission is that an affirmative covenant can no longer be enforced against a purchaser from a transferee. The reason for the amendment is explained under section 11.

The "third person" spoken of in the first paragraph is either the original covenantee, or his transferee. For instance, if *A* owns two properties *X* and *Y*, and sells *X* to *B*, he may impose a restriction on *B* that he shall, for the more beneficial enjoyment of *Y*, keep open a portion of *X* adjoining *Y* and not build on it. The "third person" may be *A* who has no longer any interest in *X* or any easement thereon, or he may be a purchaser of *Y* from *A* whom we shall call *C*. If *B* sells *X* to *D*, and *D* has notice of the covenant and *D* threatens to build on the whole of *X*, *A* or *C* may restrain *D* from doing so.

(3) Restrictive Covenants

In English law, a covenant may be something more than a mere agreement. A covenant may (1) amount to the grant or reservation of an equitable interest in land or an easement; or (2) it may be a personal contract. If the covenant creates or reserves a legal easement, the transferee takes subject to the easement; if it creates or reserves an equitable interest in land, the transferee takes subject to that interest, unless he acquires a legal estate without notice or is protected by want of registration. If the covenant is only a personal contract, the general rule of English common law is that all contracts are personal and the covenant does not bind the transferee. To this general rule that contracts are personal there are two exceptions—(1) leases; and (2) covenants annexed to the land.

The law in India closely follows the law of England as to covenants. The benefit of a covenant for quiet enjoyment in a lease may be enforced by the assignee of the lessee under section 108(c), while the rights and liabilities of the lessor's transferee are dealt with in section 109.

The principle that a covenant is annexed to the land, if it binds the land in its inception or affects the nature, quality or value of the land, was adopted by the Calcutta High Court in *Mathewson v Ram Kanai Singh.*[1255] Such covenants are referred to in sections 55(2) (sale), 65 (mortgage), and 108(c) (lease), where it is expressly enacted that the benefit of such covenants runs with the interest of the covenantee.

The equitable rule that the burden of a covenant runs with the land is enacted in this section.[1256] The amendment of the section by Act 20 of 1929 represents the English rule which limits the doctrine to restrictive covenants, for a positive covenant never runs with the land either in law, or in equity.[1257] Even before the amendment, the Bombay High Court doubted if the section applied to affirmative covenants involving the expenditure of money. In *Chaturbhuj v Mansukhram,*[1258] the owner of four houses and a *chowk* or

1255. *Mathewson v Ram Kanai Singh,* (1909) ILR 36 Cal 675 : 1 IC 626; *Kali Charan Chakraborty v Durga Charan Banerjee,* AIR 1985 Cal 180 (NOC).
1256. *Princy v Jose,* AIR 2010 Ker 1 : (2009) 2 KLJ 335 : (2009) 2 KLT 426.
1257. *Jogesh Chandra v Asalia Khatun,* (1926) 44 Cal LJ 220 : 98 IC 46 : AIR 1927 Cal 41.
1258. *Chaturbhuj v Mansukhram,* (1925) 27 Bom LR 73 : 86 IC 19 : AIR 1925 Bom 183.

courtyard sold three houses and the *chowk* to the plaintiff, and covenanted to close the window of the fourth house overlooking the *chowk*, and to slope the eaves so as to prevent rain water falling onto the *chowk*. The owner then sold the fourth house to the defendant. The plaintiff sued the defendant to enforce the covenants, but the suit was dismissed on the ground that even if the covenants were restrictive covenants (which the court held they were not), the defendant had purchased without notice of the covenants. In this case the vendor was the covenantor, but the more usual case is for the vendor to be the covenantee as in *Tulk v Moxhay,*[1259] wherein it was held that in equity, a restrictive covenant imposed for the benefit of land retained by the lessor or grantor was binding on a purchaser with notice. In other words, a covenant restricting the user of land runs with the land in equity. This doctrine applies only to restrictive or negative covenants. The doctrine cannot be extended to affirmative covenants such as a covenant compelling a man to lay out money, or to do an act of an active character. The covenant must be one restricting or affecting the user of the land, and the remedy is not the remedy at law by way of specific performance under a specific or implied penalty, but merely in equity by injunction against the violation of the covenant.[1260]

The case law in India as to restrictive covenants is meagre, and it has not yet been decided whether a restrictive covenant would be binding on a trespasser, or a mere occupier. The section expressly says that the right of the covenantee is not an interest in the land bound by the covenant, nor an easement. It is not an interest because the TP Act does not recognise equitable estates,[1261] and it cannot be said as Sir George Jessel said that if the covenant "binds the land it creates an equitable interest in the land."[1262] But although the section says that the right is not an easement, it would probably be held that the covenantee had a paramount right analogous to an easement and, therefore, binding on an occupier or trespasser.

(4) Building Schemes

A covenantor may sometimes be entitled to the benefit of a restrictive covenant as against other covenantors. This may occur when land is sold in plots under a building scheme. The conditions of sale prescribed restrictive covenants to be entered into by the purchasers of each lot, and the presumption is that the covenant is for their mutual benefit.[1263] In *Torbay Hotel v Jenkins,*[1264] the court said—

> Where an owner of land deals with his land on the footing of imposing restrictive obligations on the use of the various portions of it and as when he alienates them for the common benefit of himself (so far as he retains any land) and of the various purchasers *inter se,* a court of Equity will give effect to this common intention, notwithstanding the absence of mutual covenants, provided that the intention that there should be a mutual obligation is efficiently established.

If no such intention is established, the benefit of the covenant will not pass, for it would be merely a personal covenant. This was the case in *Chambers v Randall,*[1265] where the vendor sold plots for building purposes with covenants restrictive of the nature of the building to be

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1259. *Tulk v Moxhay,* (1848) 2 Ph 774.
1260. *Jagdish Chandra v Mahammad Bhukhbiyar Shah,* AIR 1952 Pat 409.
1261. *Kempraj v Barton Son & Co,* [1970] 2 SCR 140 : AIR 1970 SC 1872 : [1970] 1 SCJ 905 : (1969) 2 SCC 594.
1262. *London & South-Western Rly v Gomm,* (1882) 20 Ch D 562, p 580.
1263. *Renals v Cowlishaw,* (1878) 9 Ch D 125 : 11 Ch D 866; *Drake v Gray,* [1936] 1 Ch 451 : [1936] 1 All ER 363; *Baxter v Four Oaks Properties Ltd,* [1965] Ch 816 : [1965] 1 All ER 906; Re *Dolphin's Conveyance,* [1970] Ch 654 : [1970] 2 All ER 664; *Eagling v Gardner,* [1970] 2 All ER 838; *Venkiah v Krishnamoorthy,* (1915) ILR 38 Mad 141 : 19 IC 80.
1264. *Torbay Hotel v Jenkins,* [1927] 2 Ch 225, p 240.
1265. *Chambers v Randall,* [1923] 1 Ch 149, p 156 : [1922] All ER Rep 565.

erected, and J Sargant said that "the object of the covenant was to enable the vendor to protect his property while he retained it, and to make the most of it when he disposed it off." On the other hand, if the intention is established, each purchaser or his assignee can enforce the covenant against the other purchasers.[1266] However, there must be reasonably clear definition as to the area within which the mutual obligations are intended to operate.[1267] A covenant by a purchaser not to use burdened property "for any purpose other than that of a single private dwelling house" does not mean that any number of dwelling houses may be erected on the land, provided that each is used only as a single private dwelling house. The contention that any number of private dwelling houses could be constructed was negatived by the court.[1268]

(5) Affirmative Covenants

Affirmative covenants are collateral; they are not annexed to the land and do not run with the land. Covenants to lay out money in building or repairs cannot be enforced against the purchaser from the covenantor.[1269] A positive covenant never runs with the land either in law, or in equity.[1270]

In *Halsall v Brizell,*[1271] however, J Upjohn was considering the case of a developed estate in which the developers retained the ownership of roads and sewers. Under certain covenants, the developers were obliged to permit purchasers of properties in the estate to use them, and the purchasers were obliged to contribute towards the cost. The question arose whether the successors of the original purchasers were bound to contribute to the cost of the roads and sewers. The court held that the successors could not be sued on the covenant for it was a positive covenant, which did not run with the land, but that it is "ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder". The court held that the successors had no right to use the roads and sewers except under the deed, and that as they desired to take its benefits, they were bound by the covenants contained in it.[1272]

A covenant of indemnity is a personal covenant, and is, therefore, not a covenant running with the land, and cannot be enforced by a purchaser of the land.[1273] A covenant in a sale deed by which the vendor retained a certain portion of the land free from payment of land revenue did not amount to a covenant by the vendors or their heirs and transferees to pay the land revenue in respect of the lands retained by the vendor, and that even if it did, it was not binding on the heirs or transferees for it was not a covenant running with land.[1274] A covenant for the reconveyance of a right of easement is also a personal covenant, and does not run with the land.[1275]

1266. *Nottingham Patent Brick & Tile Co v Butler,* (1886) 16 QBD 778; *Cooverji v Bhimji,* (1880) ILR 6 Bom 528.
1267. *Reid v Bickerstaff,* [1909] 2 Ch 305 : [1908-10] All ER Rep 298; *Torbay Hotel v Jenkins,* [1927] 2 Ch 225; Re *Wembley Part Estate Co's Transfer,* [1968] Ch 491 : [1968] 1 All ER 457.
1268. Re *Enderick's Conveyance; Porter v Fletcher,* [1973] 1 All ER 843.
1269. *Haywood v Brunswick Permanent Building Society,* (1881) 8 QBD 403; *Austerberry v Corporation of Oldham,* (1885) 29 Ch D 750; *Chaturbhuj v Mansukram,* (1925) ILR 27 Bom LR 73 : 86 IC 19 : AIR 1925 Bom 183; *Jones v Price,* [1965] 2 QB 618 : [1965] 2 All ER 625.
1270. *Jogesh Chandra v Asaha Khatun,* (1927) 44 Cal LJ 220 : 98 IC 46 : AIR 1927 Cal 41.
1271. *Halsall v Brizell,* [1957] Ch 169 : [1957] 1 All ER 371.
1272. See a note on the case (1957) 73 LQR 154.
1273. *Banti v Mandu,* (1928) ILR 9 Lah 659 : 110 IC 425 : AIR 1928 Lah 357; *Natesa Vanniyan v Gopalaswami,* (1928) ILR 51 Mad 688 : 110 IC 830 : AIR 1928 Mad 894; *Daughty v Bowman,* [1848] 11 QB 444, but see *Hanwant Rao v Chandi Prasad,* (1929) ILR 51 All 651 : 199 IC 243 : AIR 1929 All 293.
1274. *Harihar Singh v Kamla Prasad,* AIR 1944 Oudh 35.
1275. *Zal Rustomjee v Anjuman,* (1943) ILR Nag 736 : (1943) NLJ 392 : 203 IC 199 : AIR 1943 Nag 4.

ILLUSTRATION

A, a Hindu female, sold a plot of land in which she had only a limited interest (as a daughter under Hindu law as interpreted in Madras) to *B*. Her husband, *D* executed an agreement of indemnity agreeing to convey to *B* an equivalent plot of land, in case *B* should be dispossessed. *B* sold the land to *P* who after the death of *A* was dispossessed by *A*'s son. *P* then sued *D* on the agreement of indemnity to recover possession of the equivalent plot of land. The suit was dismissed, as an agreement of indemnity is a collateral agreement and not a covenant running with the land. There was, moreover, no privity of a contract between *P* and *D*.[1276]

In an Allahabad case,[1277] an affirmative covenant to pull down rooms on a passage was enforced against a transferee from the vendee, but the case was decided on the law as it stood before the amendment of the section.

Leases

Leases have always been an exception to this rule, and a covenant to pay rent is a covenant annexed to the land, and the benefit of it passes to the lessor's assignee—section 109. The lessee's assignee is liable by privity of estate.[1278] On the other hand, in the case of a sale, a covenant to pay money is purely a personal covenant, and cannot run with the land. Should a vendee covenant on behalf of himself, his heirs and assigns, that he or they would pay ₹20 annually for the *sheba* of a *thakur*, a subsequent purchaser is not bound by the covenant, for there is no such thing between a vendor and purchaser as a covenant to pay money running with the land.[1279] In an Allahabad case,[1280] a covenant that the vendee would pay the vendor *zarichaharam*, i.e., a fourth of the purchase money, in case he sold the land, was held not to run with the land. The court dissented from a previous decision,[1281] but omitted to notice that it was a case of lease. Between a head lessor and a sub-lessee, there is neither privity of contract, nor privity of estate. A sub-lessee, is therefore, not liable for a covenant in the lease to pay a specified rent, such covenant being an affirmative covenant.[1282]

(6) Covenant Running with the Land

This is an expression borrowed from English law of real property, where it describes a covenant "annexed to the land" and which is an exception to the general rule that all covenants are personal. A covenant may run with the land (i) at law; or (ii) in equity.

(i) A covenant runs with the land at law when the benefit of it passes to the assignee of the covenantee or when the burden of it passes to the assignee of the covenantor, and, in either case independently of notice. *A* grants subsoil rights below his surface land to a colliery company who covenants to pay damages if they cause a subsidence of the surface land. *A* sells his surface land to *B*. *B* can enforce the covenant because it is a covenant the benefit of which runs with the land at law.[1283] The burden of a covenant only runs at law in the case of an assignment of a lease.

1276. *Natesa Vanniyan v Gopalaswami*, (1928) ILR 51 Mad 688 : 110 IC 830 : AIR 1928 Mad 894.
1277. *Nand Gopal v Batuk Prasad*, (1932) ILR 54 All 17 : 133 IC 541 : (1932) All LJ 36 : AIR 1932 All 78.
1278. *Stevenson v Lombard*, (1802) 2 East 575; *Thethalan v Eralpad Rajah*, (1917) ILR 40 Mad 1111 : 40 IC 841.
1279. *Mohini Mohan Roy v Ramdas Paramhansa*, (1924) 28 Cal WN 271 : 80 IC 210 : AIR 1924 Cal 487; *Ramadin v Sheoratan*, (1903) 6 OC 184.
1280. *Abdus Shakur v Nandlal*, (1931) 29 All LJ 429 : 132 IC 543 : AIR 1931 All 552.
1281. *Parbhu Narain Singh v Ramzan*, (1919) ILR 41 All 417 : 49 IC 865 : AIR 1919 All 235.
1282. *Ganges Manufacturing Co v Radharani*, AIR 1945 Cal 89; *Rambriksh v Shyamsundar*, AIR 1962 Pat 193 reversing AIR 1958 Pat 467; and see *Madho Prasad v Raja Jwaleshwari*, (1960) All LJ 332 : AIR 1960 All 513.
1283. *Dyson v Foster*, [1909] AC 98 : [1908-10] All ER Rep 212.

(ii) A covenant runs with the land in equity when the burden of it can be enforced against the assignee of the covenantor under the rule in *Tulk v Moxhay*. *A* sells a park in front of his house to *B*, who covenants not to build upon it. *B* sells the park to *C* who has notice of the covenant. *A* can enforce the covenant against *C*, for it is a covenant running with the land in equity.

Indian law

Under the TP Act, covenants of which the benefit runs with the land at law are covenants for title implied in sales under section 55(2), the covenant implied in mortgages under section 65, and in respect of leases, the covenant for quiet enjoyment implied in section 108(c). A covenant to pay rents and taxes is a covenant that runs with the land;[1284] so also is a covenant in a lease that the lessee will pay the lessor a share of the purchase money if he should assign the lease;[1285] or a covenant in a *patni* lease that the covenantor shall submit year after year in the landlords' office *jamavahipatiaks* and *lawazama patika;*[1286] or a covenant granting to the lessor the right to use certain roads.[1287] As these covenants run with the land at law, they are enforceable by any person in whom the interest in the property of the covenantee is vested, irrespective of notice.

Under the TP Act, covenants that run with the land in equity are the restrictive covenants referred to in the first paragraph of this section where the rule in *Tulk v Moxhay* is followed. As these covenants run with the land in equity, they cannot be enforced against a purchaser for value without notice as stated in the last paragraph of the section.

Pre-emption

Covenants for pre-emption have been described as covenants running with the land.[1288] This use of the expression was deprecated by J Strachey,[1289] and it is altogether incorrect. Such covenants are personal and collateral covenants falling under the second paragraph of the section. This has now been clearly held by the Supreme Court,[1290] and the decisions referred to above to the contrary are no longer good law.

Illustration

A sells his field to *B* who covenants that if he wishes to sell it, he will give *A* the first refusal. *B* sells the field to *C* who has notice of the agreement for ₹1,00,000 *A* may require *C* to sell the field to him for ₹1,00,000. This illustration should be contrasted with the two preceding illustrations which were of covenants running with the land at law and in equity. The covenant in this illustration is not annexed to the land at all. It is purely a personal covenant and is enforceable for personal reasons. It was unconscionable of *B* to break his agreement and sell to *C* and, as *C* had notice of the agreement, it was equally unconscionable of him to buy.

1284. *Ardeshar v KD & Brothers,* (1925) 27 Bom LR 553 : 88 IC 79 : AIR 1925 Bom 330, following *South of England Dairies Ltd v Baker,* [1906] 2 Ch 631.
1285. *Saradakripa v Bepin Chandra,* (1923) 37 Cal LJ 538 : 74 IC 555 : AIR 1923 Cal 679; *Kumarchandra v Narendranath,* (1930) ILR 57 Cal 953 : 127 IC 76 : AIR 1930 Cal 357; *Parbhu Narain Singh v Ramzan,* (1919) ILR 41 All 417 : 49 IC 865; *Madho Prasad v Raja Jwaleshwri,* (1960) All LJ 332 : AIR 1960 All 513. But see *Rambriksh v Shyamsunder,* AIR 1962 Pat 193, *contra.*
1286. *Hoogly Bank v Mahendra Nath,* (1950) 54 Cal WN 327 : AIR 1950 Cal 195.
1287. *Rajpur Colliery Co v Pursottam,* (1959) ILR 38 Pat 443 : AIR 1959 Pat 463.
1288. *Karan Baksh v Phula Bibi,* (1896) ILR 8 All 102; *Kuar Dat Prasad v Nahar Singh,* (1888) ILR 11 All 257; *Ram Jiwan v Ratturaj Singh,* (1889) All WN 81; *Bahadur Singh v Ram Singh,* (1904) ILR 27 All 12.
1289. See *Dalganjan Singh v Kalka Singh,* (1899) ILR 22 All 1.
1290. *Rambaran v Ram Mohit,* [1967] 1 SCR 293 : AIR 1967 SC 744.

Agreement to pay commission on extraction of coal

An agreement to pay commission on coal extracted from a mine and sold, is not a covenant running with the land.[1291]

(7) Covenants in a Lease and Assignment

A covenant entered between a lessor and a lessee is personally binding between the two. However, upon an assignment of the reversion or a term, it may be binding on the assignee. Similarly, the benefit of the covenant may pass to them. If the covenant is by the lessor for the benefit of the lessee, and directly touches the land, it runs with the land in favour of the assignee. An option to renew the lease runs with the land. In the case in question both the covenants to put up a building and to renew the lease, run with the land. The liability to put up a building having been discharged by the original lessee, the right to exercise the option of renewing the lease passed to the assignee. The contention that every assignee of a part of the tenement is bound to put up a building on the parcel of the land assigned to him, is unreasonable and by the very nature of things is impossible of performance. The leasehold interest having been served by agreement of the parties, each of the assignees was entitled to enforce the term providing for the renewal so far as his separate part was concerned, irrespective of the others.[1292]

(8) Contractual Obligation

The right referred to in the first paragraph of the section has come into existence before the transfer, and presupposes ownership of property. The right referred to in the second paragraph has also come into existence before the transfer, but does not presuppose ownership of property. It is a purely personal right arising out of contract, and the person who has the right need not be the owner of any property at all. But the right though personal, must be annexed to the ownership of immovable property. The illustration shows that the purchaser under a contract of sale of land has the right defined in the second paragraph. That right in English law is an equitable estate in land. But, as explained in section 5, the Indian legislature has eschewed the doctrine of equitable ownership. According to section 3 of the Indian Trust Acts, 1882, what would be in English law the equitable estate of the *cestui que trust* is the benefit of an obligation annexed to the ownership of property. Section 54 of TP Act expressly states that a contract of sale of immovable property does not, of itself, create an interest in or charge upon such property, but it creates an obligation, the fiduciary character of which is recognised in section 3 of the Specific Relief Act, 1963, and in section 91 of the Indian Trusts Act, 1882. A contract for sale, therefore, does not create an interest in land, but creates a personal obligation of a fiduciary character which can be enforced by a suit for specific performance not only against the vendor, but also against a volunteer and a purchaser for consideration with notice.[1293] A contract of sale (as provided by last two paragraphs of section 40) creates an obligation annexed to ownership of property.[1294]

A reading of sections 40 and 54 of the TP Act and section 91 of the Indian Trusts Act, 1882 makes it clear that the subsequent transferee with notice stands in a fiduciary capacity and holds the property in trust to the prior agreement holder, but the prior agreement holder cannot

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1291. *Manubhai v Cambatta,* (1948) ILR Nag 200 : AIR 1948 Nag 286.
1292. *Radha Kamal v Purimuinapabty,* AIR 1954 Ori 110.
1293. *Lalji Jetha v Kalidas Devchand,* [1967] 1 SCR 873 : AIR 1967 SC 978 : [1968] 1 SCJ 48; *Chandmohammad v Murtazakhan,* (1958) ILR Bom 234 : 59 Bom LR 1054 : AIR 1958 Bom 194.
1294. *Bai Dossibai v Mathuradas,* AIR 1980 SC 1334 : (1980) 3 SCC 545; *Narayana Pillai Chandrasekharan Nair v Kunju Amma Thankamma,* AIR 1990 Ker 177, p 180.

automatically become the owner by seeking declaratory relief, and has to necessarily file a suit for specific performance impleading both the vendor and the subsequent transferee.[1295]

In some cases, this fiduciary obligation has been held to be a defence to a suit for ejectment although no suit for specific performance had been filed. But these cases are, in effect, overruled by the decision of the Privy Council in *Main Pir Bus v Sardar Mahomed Tahar.*[1296]

An agreement to pay maintenance out of land, which fell short of creating a charge on any specific property has been said to create a contractual obligation under the second paragraph of this section, and not to be enforceable against a purchaser without notice.[1297] However, where an agreement creates a perpetual charge such as for the payment of an annuity out of a specific property, it is binding on the subsequent transferee for value with notice or a volunteer with or without notice.[1298]

It has been held that the second para of section 40 does not apply to rights in the nature of easements.[1299] The Supreme Court has held that the liability to pay for the estate under section 5(1) of the Estate Duty Act, 1953, arises upon the death of the real owner and not of the *benamidar*, who is merely an ostensible owner.[1300]

Where a simple mortgage deed was executed in favour of the plaintiff and the mortgagor thereafter sold a part of the mortgaged property to another person by a registered sale deed and the earlier mortgage-deed was registered at a later date, it was held in the suit filed by the plaintiff against the mortgagor and the purchaser to recover the mortgage amount, the purchaser cannot claim that the mortgage was not binding on him on the ground that as the mortgage deed was registered at a date later than the date of sale in his favour, he should be taken to be a purchaser for valuable consideration without notice of the mortgage and, therefore, entitled to protection under second para of section 40. Under section 58 of the TP Act, mortgage is a mode of transfer by which an interest in property is created. An interest in property then would not remain simplicitor an obligation arising out of a contract and thus, stands excluded from falling within the protection of the second para of section 40.[1301]

Even under the second para of section 40 there must be a right or obligation for that purpose arising out of a contract and annexed to the ownership of immovable property for the purpose of its enforcement against a gratuitous transferee or a transferee for consideration with the notice of the right or obligation.[1302] Where, even though property was agreed to be sold at ₹3,50,000, it was sold subsequently for ₹61,000, it was held that it is the bounden duty of the purchaser to make all such necessary inquiries and to ascertain all the facts relating to the property to be purchased prior to committing in any manner and hence, he cannot simply come forward to put up a general plea that he is the bona fide purchaser for value and without notice, especially when the purchase is not for the proper value.[1303]

1295. *Kondapalli Satyanarayana v Kondapalli Mayulla,* AIR 1999 AP 170, para 11.
1296. *Main Pir Bus v Sardar Mahomed Tahar,* 61 IA 388 : 60 Cal LJ 370 : 67 Mad LJ 865 : 36 Bom LR 1195 : (1934) All LJ 912 : 151 IC 326 : AIR 1934 PC 235.
1297. *Mohini Debi v Purna Sashi,* (1932) 36 Cal WN 153 : 55 Cal LJ 198 : 138 IC 24 : AIR 1932 Cal 451.
1298. *Bhupati Bhushan v Birendra Mohan,* (1948) ILR 1 Cal 492.
1299. *Nunia Mal v Maha Dev,* AIR 1962 Punj 299.
1300. *Controller of Estate Duty, Lucknow v Aloke Mitra,* (1981) 2 SCC 121, p 134.
1301. *KR Varadaraja Iyengar v T Laxminarayana Setty,* AIR 1985 Kant 245, p 248.
1302. *Leela v Ambujakshy,* AIR 1989 Ker 308, p 311.
1303. *Sri Brahdambal Agency & Partnership Firm v Ramasanty,* AIR 2002 Mad 252, paras 52 & 53.

(9) Attachment

There is a conflict of decisions as to whether the obligation annexed by this section to the ownership of property by a contract of sale will prevail against claims enforceable under an attachment. If after a creditor *C* has attached *A*'s property, and *A* sells it to *B*, the conveyance to *B* will be subject to the claims of *C* enforceable under the attachment. This is because under section 64 of the Code of Civil Procedure 1908 any private transfer by *A* after the attachment will be void as against such claims. The question, however, if the subsequent conveyance was in pursuance of an agreement of sale which was before the attachment, whether the claims of *C* enforceable under the attachment be subject to the obligation created by the contract of sale to *B*. In *Taraknath v Sanatkumar,*[1304] J Cuming held that the contractual obligation could not prevail against the rights of attaching creditor. However, in *Madan Mohan v Rebait Mohan,*[1305] J Woodroffe held that the contractual obligation prevailed over the attachment. The Madras High Court had taken the same view on the ground that if a creditor attaches property which is subject to a particular obligation, he should not be able to override it.[1306] In the case of an attachment before judgment, this is so expressly provided by o 38, r 10 of the Code of Civil Procedure 1908. Again, if after the attachment the vendee filed a suit for specific performance of the contract and the court enforced execution of a conveyance, it is clear that such conveyance would not be a private transfer subject to the provisions of section 64 of the Civil Procedure Code 1908.[1307] The right of a purchaser under section 40 entitling him to the benefit of an obligation arising out of the contract of sale of land by enforcing it against the transferee with notice is an equitable right, though not amounting to interest in immovable property within the meaning of section 53 of TP Act which declares that a contract of sale does not create an interest in the property. On this line of reasoning, it was held by the Madras High Court that the purchaser under an antecedent agreement gets a good title despite attachment.[1308] The attaching creditor attaches only the right, title and interest of the debtor, and attachment cannot confer upon him any right higher than what the judgment debtor had at the date of attachment. Hence, under a contract of sale entered into before attachment, the conveyance and after attachment in pursuance of the contract, passes on good title inspite of the attachment.[1309] Even if the property is sold in execution, he can enforce specific performance of his contract against the auction purchaser.[1310]

According to a Madras case which reiterates the earlier view of the high court, an attaching decree-holder attaches not the physical property, but only the right of the judgment debtor in the property. That right is, on the date of attachment, qualified by the obligation incurred by him under the earlier agreement to sell or mortgage and the attaching

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1304. *Taraknath v Sanatkumar,* (1930) ILR 57 Cal 274 : 122 IC 637 : AIR 1929 Cal 494.
1305. *Madan Mohan v Rebait Mohan,* (1916) 21 Cal WN 158 : 34 IC 953.
1306. *Venkata Reddi v Yellappa Chetty,* 38 IC 107; *Veeraraghavayya v Kamaladevi,* (1935) 68 Mad LJ 67 : 157 IC 1104 : AIR 1935 Mad 193; *Athinarayana v Subramania,* (1941) 2 Mad LJ 722 : 54 Mad LW 474 : 201 IC 307 : AIR 1942 Mad 67.
1307. *Qurban Ali v Ashraf Ali,* (1882) ILR 4 All 219, p 225; *Sunkari Sitayya v Mudaragaddi,* (1924) 46 Mad LJ 361 : 80 IC 388 : AIR 1924 Mad 610; *Laxman v Ramchandra,* (1932) 34 Bom LR 117 : 139 IC 610 : AIR 1932 Bom 301.
1308. *Paparaju Veeraraghayya v Killaru Kamala Devi,* AIR 1935 Mad 193; *Veerappa Thevar v CS Venkatarama Aiyar,* AIR 1935 Mad 872.
1309. *Vannarakal K Sreedharan v Chandramaath Balakrishnan,* (1990) 3 SCC 291; *Purna Chandra Basak v Doulat Ali Moullah,* AIR 1973 Cal 432; *Rango Ramchandra Kulkarni v Gurlingappa Chinnappa Muthal,* AIR 1941 Bom 198; *Yeshvant Shankar Dunnakhe v Pyaraji Nurji Tamboli,* AIR 1943 Bom 145; *Kochuponchi Varughese v Ouseph Lopan,* AIR 1952 Tr & Coch 467.
1310. *Purna Chandra Basak v Daulat Ali Mollah,* AIR 1973 Cal 432 : 78 CWN 352; *Vannaralkal K Sreedharan v Chandramaath Balakrishnan,* (1990) 3 SCC 291.

decree-holder cannot ignore that obligation, and cannot bring the property to sale as if it remained an absolute property of the judgment-debtor.[1311]

According to the Punjab and Haryana High Court, a sale in pursuance of a pre-attachment agreement is a private alienation of property which must be regarded as void against the claim of a decree-holder, though not against the claims of other persons. The object of section 64 of the Code of Civil Procedure 1908 is the protection of the attaching creditor against a transfer made during the attachment.[1312] The Supreme Court disagreeing with the view taken in *Mohinder Singh's* case has now held that the agreement for sale creates an obligation attached to the ownership of property, and since the attaching creditor is entitled to attach only the right, title and interest of the judgment debtor, the attachment cannot be free from obligations incurred under the contract for sale. The right of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property.[1313]

In a later decision without expressing any opinion with regard to the case of an agreement for sale, the Supreme Court opined that a sale deed having been executed prior to attachment before judgment, though registered subsequently, will prevail over attachment before judgment.[1314]

(10) Pre-emption

The nature of a covenant for pre-emption under the TP Act has been considered in the commentary on section 14.[1315] It was submitted in earlier editions to this work that such a covenant was a personal covenant not creating any interest in property, and that certain decisions to the contrary were incorrect. It is unnecessary to further consider this question as the Supreme Court has clearly upheld the view expressed in earlier editions of this work, and held that such a covenant was a personal covenant.[1316] As a personal contract it is binding on the parties thereto and their personal representatives, and it creates an obligation arising out of the contract and is binding on a purchaser for value with notice, and on a gratuitous transferee under the second part of this section.[1317] The benefit of the covenant cannot, however, be transferred as it is restricted in enjoyment to the covenantee.[1318]

(11) Notice

Notice of the contractual obligation may be constructive notice.[1319] Thus, it is sufficient notice if the contract is entered in the *wajib-ul-ars* of the village,[1320] or the contract was for sale to a mortgagee who is in possession.[1321] In a small village, when any transaction takes place, it becomes common knowledge. A subsequent purchaser of land were deemed to have knowledge of an earlier sale agreement when all the parties

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1311. *Angu Pillai v MSM Kasiviswanathan Chettiar,* AIR 1974 Mad 16; *Vannaralkal K Sreedharan v Chandramaath Balakrishnan,* (1990) 3 SCC 291.
1312. *Mohinder Singh v Nanak Singh,* AIR 1971 P & H 381.
1313. *Vennarkkal K Sreedharan v Chandramaath Balkrishnan,* (1990) 3 SCC 291, p 294.
1314. *Hamda Ammal v Avadiappa Pathar,* (1991) 1 SCC 715.
1315. See commentary on section 14.
1316. *Rambaran v Ram Mohit,* [1967] 1 SCR 293 : AIR 1967 SC 744.
1317. See *Basdeo Rai v Jhagru Rai,* (1924) ILR 46 All 33 : 83 IC 390 : AIR 1924 All 400; *Aulad Ali v Ali Athar,* (1927) ILR 49 All 527 : 100 IC 683 : AIR 1927 All 170; *Harkisondas Bhagwandas v Bai Dhanu,* (1926) ILR 50 Bom 566 : 98 IC 634 : AIR 1926 Bom 497; *Rakhana Sitaram v Laxman,* (1959) ILR Bom 1705 : 61 Bom LR 1170 : AIR 1960 Bom 105; *K R Nair v K K Nair,* AIR 1976 Ker 22 : (1975) ILR 2 Ker 709.
1318. See notes under section 6(d).
1319. *Jogmaya v Tulsa,* (1926) ILR 48 All 12 : 89 IC 444 : AIR 1926 All 70 (covenant of pre-emption is a registered lease); *Kameswaramma v Sitaramanuja,* (1906) ILR 29 Mad 177.
1320. *Basdeo Rai v Jhagru Rai,* (1924) ILR 46 All 333 : 83 IC 390 : AIR 1924 All 400.
1321. *Puthenpurayil v Kondiyal,* (1916) Mad WN 31 : 34 IC 906.

belonged to the same village.[1322] A person having full notice and knowledge of facts of existence of a previous contract, even through public notice published in a newspaper, cannot be held to be a bonafide purchaser without notice.[1323]

(12) Court Sale

A purchaser at a court sale is a transferee by operation of law, and is, therefore, not a transferee within the meaning of this section. It has been suggested that the principle of the second para of this section might apply to him.[1324] The point was raised before the Privy Council, but was not actually decided as the purchaser had not an unequivocal notice of the contract. Lord Dunedin, however, observed that "judicial sales would be robbed of all their sanctity if vague references to antecedent contracts could be held to invalidate the buyer's title."[1325] In an Allahabad case, it was assumed that the Official Receiver in whom the property had vested by operation of law was a transferee under this section.[1326]

41. Transfer by ostensible owner.—Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it:

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

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(1) Principle

The foundation of the section is the following well-known passage from the judgment of the Judicial Committee in *Ramcoomar v Mac-queen*:[1327]

1322. *Sucha Singh v Paramjit Kaur*, AIR 2002 P&H 46, para 54.
1323. *Thomson Press (India) Ltd v Nanak Builders & Investors P Ltd*, AIR 2013 SC 2389 : JT 2013 (3) SC 289 : 2013(3) SCALE 26 : (2013) 5 SCC 397.
1324. *Venkatta Reddi v Yellappa Chetty*, 38 IC 107.
1325. *Nur Mahomed v Dinshaw*, (1922) 45 Mad LJ 770 : 71 IC 625 : AIR 1924 PC 393.
1326. *Nand Gopal v Batuk Prasad*, (1932) ILR 54 All 17 : (1932) All LJ 36 : 133 IC 541 : AIR 1932 All 78.
1327. *Ramcoomar v Mac-queen*, (1872) 11 Beng LR 46, p 52, followed in *Seshumull M Shah v Sayed Abdul Rashid*, AIR 1991 Kant 273, p 278.

> It is a principle of natural equity which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it.

The section is a statutory application of the law of estoppel,[1328] the general principle of which is thus stated by the House of Lords in *Cairncross v Lorimer*:[1329]

> If a man, either by words or by conduct, has initiated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might have abstained—he cannot question the legality of the act he had so sanctioned—to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

The law of estoppel is enacted in section 115 of the Indian Evidence Act, 1872 and Shepherd and Brown point out that the leading case on that section falls equally under section 41 of the TP Act. In that case,[1330] the owner transferred property to his wife as *benamidar* and after his death she mortgaged the property, her son assisting in the transaction and receiving the mortgage money. The son was held to be estopped from disputing the mortgage, while if this section had been applied, the case would have been decided on the ground that by the consent of the son, the mother was the ostensible owner.

The transferee will be protected only if he has acted in good faith after taking reasonable care to ascertain that the transferor has power to make the transfer.[1331] The transferee who willfully shuts his eyes and takes the transfer without any inquiry is not protected. The transferee is also required to show that he had purchased the property after taking care to ascertain that the transferor had power to make the transfer. What is reasonable care depends upon the facts and circumstances of each case, and no hard and fast rules can be laid down.[1332]

The principle of this section applies to the territory of Delhi.[1333] The section makes an exception to the rule that a person cannot confer a better title than he has.[1334]

(2) Court Sale

The section applies only to voluntary transfers, and has no application to court sales.[1335] The provisions of sections 41 and 43 logically get engaged in voluntary transfers, and not in

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1328. *Hoorbai v Aishabai,* (1910) 12 Bom LR 457 : 6 IC 898; *Satyanarayan Murthi v Pydaya,* (1943) 1 Mad LJ 219 : AIR 1943 Mad 459; *Lulsingh v Granth Saheb,* AIR 1950 Pepsu 104.
1329. *Cairncross v Lorimer,* (1860) 3 Macq 827, p 829.
1330. *Sarat Chunder v Gopal Chunder,* (1893) ILR 20 Cal 296 : 19 IA 203.
1331. *Sonal Singh v Hukum Singh Chouhan,* AIR 2007 (NOC) 2054 (Utr); *Kashmir Singh v Panchayat Samiti,* (2004) 6 SCC 207 : AIR 2004 SC 2438; *Layak Ram v Daramvati,* AIR 2010 P&H 95.
1332. *Laxman Sakhram Salvi v Balkrishna Balwant Ghatage,* AIR 1995 Bom 190 : (1995) 2 Bom CR 678.
1333. *Kanhya lal v Deepchand,* AIR 1947 Lah 199.
1334. *Kanhu Lal v Palu Sahu,* (1920) 5 Pat LJ 521, p 535 : 57 IC 353; *Maung Sin Ba v Mating Kyme,* (1934) ILR 12 Rang 55 : 150 IC 667 : AIR 1934 Rang 90; *Nainsukhdas v Goverdhandas,* (1947) ILR Nag 510 : AIR 1948 Nag 110; *Drigpal Singh v Wife of Laldhari Ojha,* AIR 1985 Pat 110, p 112; *Controller of Estate Duty Lucknow v Aloke Mitra,* (1981) 2 SCC 121, p 134. For a similar exception as to movable property, see sections 27 to 29 of the Indian Sale of Goods Act, 1930 (replacing section 108 of the Indian Contract Act, 1872, and sections 178 and 178A of the Indian Contract Act, 1872, as amended by Act 4 of 1930).

involuntary transfers like auction sales.[1336] Where under a court auction the property was sold and the vendee was directed to hand over the vacant possession to the recovery officer, his claim to be a bonafide purchaser on the basis of sale deed that was not surrendered, would not be accepted and order passed by recovery officer to him to hand over vacant possession of the property would be proper.[1337]

(3) Requirements of the Section

The following conditions are necessary for the application of the section,[1338] namely:

(1) the transferor is the ostensible owner;

(2) he is so by the consent, express or implied, of the real owner;[1339]

(3) the transfer is for consideration;

(4) the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.[1340]

If any one of these elements is wanting, the transferee is not entitled to the benefit of the section.[1341] The basis of the rule is some representation or act or conduct on the part of the true owner.[1342] The vendor must be the ostensible owner of the property.[1343] If there is no ostensible owner and/with a real owner, the principle under this section has no application.[1344] The principle does not apply in case of gifts and other transfers effected without any monetary consideration.[1345] The question whether the section applies to a given set of facts is a question of law.[1346] This is on the principle that "the proper legal effect of a proved fact is necessarily a question of law".[1347]

1335. *Vaman Pandu v Tikaram,* (1927) 29 Bom LR 471 : 102 IC 64 : AIR 1927 Bom 368; *Shahar Bano v Raj Bahadur,* 149 IC 357 : AIR 1934 Oudh 233 dissenting from *Naraprath v Parambali,* 34 IC 494; *Puran Mal v Shiva Lal,* (1934) All LJ 1260 : 150 IC 86 : AIR 1935 All 234; *Dwarka Halwai v Sitha Prasad,* AIR 1940 All 256 : (1940) ILR All 344 : (1940) All LJ 166 : 188 IC 784; *Lalit Mohan v Thakurain Luchmi,* AIR 1946 Oudh 213; *Nandlal v Sunderlal,* AIR 1944 All 17.

1336. *Jote Singh v Ram Das Mahto,* AIR 1996 SC 2773.

1337. *Amrit Kaur v Recovery Officer,* AIR 2012 (NOC) 418 (P&H).

1338. *Gholam Siddique v Jogendra Nath,* (1926) 31 Cal WN 205 : 96 IC 199 : AIR 1926 Cal 916; *Nand Lal v Karam Bibi,* 146 IC 210 : AIR 1933 Lah 258; *Baba Ramchandra v Kondeo Jagna,* 184 IC 797 : AIR 1940 Nag 7; *CMP Convent v Subanna Govindan,* AIR 1948 Mad 320. See also *Sadiq Hussain v Co-operative Central Bank, Yetmal,* AIR 1952 Nag 64, p 106; *B Sitaram Rao v Bibhushana,* AIR 1978 Ori 222.

1339. *Abdul Gaffer v Nawab Ali,* AIR 1949 Assam 17.

1340. *Chandi Prosad Ganguly v Gadadhar Singh Roy,* AIR 1949 Cal 666 : 53 Cal WN 349; *Sonal Singh v Hukum Singh Chouhan,* AIR 2007 (NOC) 2054 (Utr); *Kashmir Singh v Panchayat Samiti,* (2004) 6 SCC 207 : AIR 2004 SC 2438; *Layak Ram v Daramvati,* AIR 2010 P&H 95.

1341. *Ballu Mal v Ram Kishan,* (1921) ILR 43 All 263 : 64 IC 14 : AIR 1921 All 311; *Partap Chand v Saiyida Bibi,* (1901) ILR 23 All 442, p 447; *Macneill & Co v Saroda Sundari,* (1928) 48 Cal LJ 374 : (1929) 33 Cal WN 526 : 114 IC 142 : AIR 1929 Cal 83, p 86; *Motimul Sowcar v Visalakshi Ammal,* AIR 1965 Mad 432; *B Sitaram Rao v Bibhushana,* AIR 1978 Ori 222.

1342. *Ramrao v State of Bombay,* [1963] 1 SCR 322 (Supp) : AIR 1963 SC 827.

1343. *Kammana Sambamurthy v Kalipatnapu Atchutamma,* (2011) 11 SCC 153 : AIR 2011 SC 103 : LNIND 2010 SC 978 : 2010 (10) SCALE 666.

1344. *Maragathammal v M Kandasamy,* Second Appeal No. 21 of 1997, decided on: 9 January 2017, High Court of Madras.

1345. *Padam Chand v Lakshmi Devi,* (2010) 173 DLT 604 (Delhi) : 2011 (1) RCR (Rent) 39; *Atal Shrivastava v Devprasad,* AIR 2012 Chh 117 : 2012 (1) CGBCLJ 411.

1346. *Mul Raj v Fazal Imam,* (1923) ILR 45 All 520 : 74 IC 307 : AIR 1923 All 583 dissenting from *Jamna Das v Uma Shankar,* (1914) ILR 36 All 308 : 25 IC 158.

1347. *Nafar Chandra Pal v Shukur,* 45 IA 183 : (1919) ILR 46 Cal 189 : 51 IC 760.

In order to obtain the benefit of this section, the transferee must plead it and set out the relevant facts in his pleading.[1348] An alienee from an ostensible owner is protected under section 41, if the alienee can establish that the sale was with the consent, express or implied, of the true owner, and that it was for consideration, and that the alienee had taken reasonable care to ascertain that the transferor had the power to make the transfer and had acted in good faith.[1349]

(4) Ostensible Owner

An ostensible owner is one who has all the indicia of ownership without being the real owner.[1350] It must be shown that with the consent of the true owner, the ostensible owner was able to represent himself as the owner of the property to the purchaser for value without notice.[1351] It has been held that the possession of a manager cannot be treated as ostensible ownership with the consent of the real owner;[1352] and this was held to be so even in a case where the manager's name had been entered in the Municipal House Register as the real owner.[1353] A professed agent or manager cannot of course be an ostensible owner;[1354] nor can the occupation of a menial servant constitute ostensible ownership.[1355] But section 41 would apply where the plaintiff allowed his mother to act as manager with the right to alienate for necessity.[1356] If the property vests in an idol, it would not be possible to hold that this trustee or the manager of the idol can set himself up as the owner of the property.[1357] A co-sharer in occupation of a joint family residential property cannot be held to be an ostensible owner.[1358] The conduct of co-sharers in permitting one of them to manage the common property does not by itself raise any estoppel precluding them from asserting their rights.[1359] A displaced person who has been allotted land by the government would be an ostensible owner. Where the property was allotted to a displaced person, but his legal heirs fraudulently obtained allotment at another place and sold the allotted property, the sale would be void, as the legal heirs and the alienee would not be entitled to the protection of section 41.[1360] Similarly, where the state government transferred by sale the land belonging to the *Panchayat Samiti* in absence of evidence that the transfer was with the consent of the *Samiti*, express or implied, the plea of protection under section 41 will not be entertained.[1361]

1348. *Sheogobind Ram v Anwar Ali,* 116 IC 779 : AIR 1929 Pat 305; *Sonur Kapri v Saligram,* (1949) ILR 28 Pat 542; *Ramsaran v Harihar Prasad,* AIR 1961 Pat 314; *Gauri Shankar v Jwalamukhi,* AIR 1962 Pat 392.
1349. *Ved Kumari v UOI,* AIR 1989 P&H 136 (NOC).
1350. *Kannashi Vershi v Ratanshi Nenshi,* AIR 1952 Kutch 85; *Samay Singh v Hukum Singh Chouhan,* AIR 2007 (NOC) 2054 (Utr); *Binapani Paul v Pratima Ghosh,* AIR 2008 SC 543; *Kashmir Singh v Panchayat Samiti,* (2004) 6 SCC 207 : AIR 2004 SC 2438; *Layak Ram v Daramvati,* AIR 2010 P&H 95.
1351. *Crystal Developers v Asha Lata Ghosh,* AIR 2004 SC 4980 : (2005) 9 SCC 375.
1352. *Jamnadas v Uma Shankar,* (1914) ILR 36 All 308 : 25 IC 158 followed in *Seshumull M Shah v Sayed Abdul Rashid,* AIR 1991 Kant 273, p 278.
1353. *Muhammad Sulaiman v Sakina Bibi,* (1922) ILR 44 All 674 : 69 IC 701 : AIR 1922 All 392.
1354. *Dambar Singh v Jawitri,* (1907) ILR 29 All 292; *Abdullah Khan v Bundi,* (1912) ILR 34 All 22, p 24 : 11 IC 710; *Maung Bya v Maung San,* 10 IC 779.
1355. *Chooni Lal v Nilmadhab,* (1925) 41 Cal LJ 374 : 86 IC 734 : AIR 1925 Cal 1034.
1356. *Kuttappa Nair v Kuttisankaran Nair,* (1957) 2 Mad LJ 603.
1357. *Ratan Sen v Suraj Bhan,* AIR 1944 All 1; *Sri Thakur Krishna v Kanhayalal,* AIR 1961 All 206.
1358. *Lakshmibai v Ravji,* AIR 1949 Kutch 34; *Savithri v Kuriyakose,* AIR 1958 Ker 325; but see *Chandi v Anant Bali,* AIR 1963 Oudh 398.
1359. *Suraj Rattan Thirani v Azamabad Tea Co,* AIR 1965 SC 295; *Kanji Ganesh v Pannanand,* AIR 1992 MP 208, p 212.
1360. *Niranjan Kaur v Financial Commissioner Revenue and Secretary to Government, Punjab,* AIR 2011 P&H 1. (FB).
1361. *Kasmir Singh v Panchayat Samiti,* (2004) 6 SCC 207 : AIR 2004 SC 2438.

It has been held that a mortgagor is the owner of a limited interest, and not an ostensible owner and, therefore, the purchaser of an equity of redemption is not entitled to the protection of this section against the mortgagee.[1362] This is correct, but the transferee may, it is submitted, in an appropriate case, claim the benefit of the principle behind the section, if he has been led by the conduct of the mortgagee to believe that the property was unencumbered. A donor who has not reserved to himself any power of revocation of the deed of gift cannot be regarded as an ostensible owner even if the deed of gift has been in his possession.[1363] A Mahomedan son and daughter inherited property, but as the son remained in possession of his sister's share as well as his own for 25 years, had all the property entered in the revenue papers in his sole name, and alone executed mortgages of the whole property, he was treated as ostensible owner of his sister's share.[1364] So also, when the other heirs of a Mahomedan, who lived in another village, left the widow in sole possession and allowed her to deal with it as if she was solely entitled.[1365] Again, a widow, who had a half share in a house and allowed her husband's cousin to deal with it as if it were his own, was estopped as she had held him out as ostensible owner.[1366] On the other hand, the manager of a Hindu family who has the power to alienate family property only in case of necessity or for the benefit of the estate, cannot be treated as an ostensible owner.[1367] A vendor coparcener in occupation of portion of ancestral property, does not become "ostensible owner".[1368] Where the transferor and the transferee are closely related as uncle and nephew, the transferee is expected to know the real nature of the transaction, and cannot claim the protection of the section.[1369] Nor can a transferee from a Hindu widow claim the protection of section 41, for a Hindu widow holds in her own right, and not as ostensible owner.[1370]

The term "ostensible owner" would include transferee from State government or Union government. An allottee under the Displaced Persons Compensation and Rehabilitation Act (Act 44 of 1954), can be treated to be an ostensible owner and the government as the real owner.[1371]

A *benamidar* is an ostensible owner, and if a person purchases from a *benamidar*, the real owner cannot recover, unless he shows that the purchaser had actual or constructive notice of the real title.[1372] A *benami* transaction in a sense is not a sham transaction. The essence of a

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1362. *Narayan v Purshottam*, (1931) 27 Nag LR 144 : 134 IC 676 : AIR 1931 Nag 144; *Hira Singh v Afzal Khan*, AIR 1941 Pesh 51; *Vasdev v Jugraj Prasad*, AIR 1948 Ori 247; *Bisseswar Poddar v Nabadwib Chandra*, (1961) 64 Cal WN 1067 : AIR 1961 Cal 300.
1363. *Aukamma v Narsaya*, AIR 1947 Mad 127.
1364. *Mul Raj v Fazal Imam*, (1923) ILR 45 All 520 : 74 IC 307 : AIR 1923 All 583.
1365. *Mohammad Shakur v Shah Jehan*, 63 IC 125.
1366. *Thakuri v Kundan*, (1893) ILR 17 All 280.
1367. *Rangaswami v Sundarapamdia*, 110 IC 543 : AIR 1928 Mad 635. But see *Kuttappa Nair v Kuttisankaran Nair*, (1957) 2 Mad LJ 603.
1368. *Ramchandra v Balla Singh*, AIR 1986 All 193.
1369. *Mengha Ram v Makhma*, AIR 1941 Lah 416 : 43 Punj LR 424 : 198 IC 609.
1370. *Shib Deo Misra v Ram Prasad*, (1924) ILR 46 All 637 : 87 IC 938 : AIR 1925 All 79; *Pancham Singh v Balak Ram*, (1930) 28 All LJ 686 : 127 IC 418 : AIR 1930 All 374; *Kapura v Madhu Sudan Das*, AIR 1943 Lah 168 : 45 Punj LR 183 : 209 IC 609; *Abdul Samad v Girdhari Lal*, (1942) ILR All 259 : 200 IC 269 : (1942) All LJ 179 : AIR 1942 All 175.
1371. *Niranjan Kaur v The Financial Commissioner, Revenue and Secretary to Government, Punjab*, AIR 2011 P&H 1 (FB) : 2010 (4) RCR (Civil) 610.
1372. *Jokhu v Mehdi*, (1881) All WN 67; *Luchmun Chander v Kalli Churn*, (1873) 19 WR 292; *Bhugwan v Upooch*, (1869) 10 WR 185; *Brojonath v Koylash*, (1868) 9 WR 593; *Ram Sundar v Ram Narain*, 48 IC 936; *Swaminatha v Krishna*, AIR 1942 Mad 28; *Arta Rout v Bhagabat*, AIR 1957 Ori 157. For test where *benami* question is raised, see *Gangadara Ayyar v Subramania Sastrigal*, AIR 1949 FC 88; *UOI v Moksh Builders & Financiers Ltd*, AIR 1977 SC 409; *Bhim Singh v Kan Singh*, AIR 1980 SC 727; *Girindra Nath Mukherjee v Saumen Mukherjee*, AIR 1988 Cal 375. See also *Rajesh Kumar v Virendra Kumar Agarwal*, AIR 1994 All 135 (distinction between *benami* and sham transactions).

benami transfer is to give it the appearance of reality, to cloak a fictitious transfer with all the appearance of a genuine one.[1373]

The *benamidar* before the enactment of Benami Transactions (Prohibition) Act, 1988, could not have any right title or interest in the property which the benamidar could convey. A mere declaration by such *benamidar* in a release deed that he has no right or interest in the property and that he was a mere benamidar of the release, could not operate as a conveyance.[1374]

Principles for determining whether transfer is *benami* are as under:[1375]

(1) The burden of showing that a transfer is a *benami* transaction lies on the person who asserts that it is such a transaction;

(2) if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary;

(3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money; and

(4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motive governing their action in bringing about the transaction and their subsequent conduct etc.

In *benami* transactions, the points to be considered are the motive for the transaction, the custody of the title deeds, the payment of considerations and actual possession of the property in dispute. If, there is a plausible explanation as to why the documents are taken in the name of the other party, and if a person setting out a *benami* theory is in possession of title deeds, he is in possession of the property, and has made payment of consideration then undoubtedly, it is a *benami* transaction.[1376]

The Gujarat High Court[1377] relying upon the decision of the apex court in *Bhim Singh v Kan Singh* held that by making internal arrangements and getting the sale deed executed in favor of the defendant, there was no intention of either of the parties to have *benami* transactions, or that the defendant should not have any beneficial interest in the property. For almost 18 years, there was no thought of *benami* transaction, and it is only at the time of filing of the suit that there was a legal brainwave, and an idea was struck for invoking the *benami* element. There is no substance in this contention.

(5) Application to Mortgages

The principle of the section is not restricted to conveyances, and also applies to mortgages. A mortgagee from an ostensible owner acting in good faith and with reasonable care has frequently been allowed the benefit of the section.[1378]

1373. *Raj Narain Agarwal v Baij Nath Khanna,* AIR 1984 Del 155, p 157.
1374. *Ratanlal Bansilal v Kishorilal Goenka,* AIR 1993 Cal 144, p 177.
1375. *Raj Ballar Das v Haripada Das,* AIR 1985 Cal 2. See also *Bhim Singh v Kan Singh,* AIR 1980 SC 727 : (1980) 3 SCC 72.
1376. *Parakkate Shankaran Keshavan v TA Sukumaran,* AIR 1997 Bom 381 : (1997) 3 Bom CR 260 : (1997) 4 All MR 176.
1377. *Heirs of Vrajlal J Ganatra v Heirs of Parshottam S Shah,* AIR 1996 Guj 147 : (1996) 2 GLR 361. The court relied upon the decision of SC in *Bhim Singh v Kan Singh,* AIR 1980 SC 727 : (1980) 3 SCC 72.
1378. *Khwaja Muhammad v Muhammad Ibrahim,* (1904) ILR 26 All 490; *Baidya Nath v Alef Jan,* (1922) 36 Cal LJ 9 : AIR 1923 Cal 240; *Annoda Mohan v Nilphamari,* (1922) 26 Cal WN 436 : 65 IC 245 : AIR 1921 Cal 549; *Karamat Khan v Sami-ud-din,* (1886) ILR 8 All 409; *Ghulam Fatima v Gopal Din,* AIR 1940 Lah 269 : 190 IC 599 : on app 45 Punj LR 143 : 209 IC 75 : AIR 1943 Lah 113; *Fakruddin Saib v Ramayya Sethi,* AIR 1944 Mad 299.

In the undernoted case;[1379] there was a difference of opinion as to whether an ostensible mortgagee could be treated as an ostensible owner. It is submitted that he is the ostensible owner of the mortgagee's interest. If a purchaser for consideration of that interest, who had acted in good faith and with reasonable care, sought to enforce the mortgage, it seems clear that the mortgagor, who had created that interest, would be estopped.

ILLUSTRATION

A is induced by *B* to make an colourable conveyance of her house to her granddaughter *C* who is *B*'s wife. *C* makes a colourable conveyance to *D* who is *B*'s brother, 10 years later, *D* makes a colourable conveyance to *B*. The names of *C* and then of *D* have been registered as owners and *B* who is in possession, mortgages the house to *E*. *E* accepts the mortgage after enquiry with reasonable care, in good faith believing *B* to be the owner. *E* obtains a decree for sale of the mortgage and purchases the house. *A* is barred by section 41 from setting up her title to the house.

(6) Consent

The real owner is not responsible, unless the apparent ownership of the transferor has been permitted or created by him. He creates or permits the appearance of ownership either by express words of consent, or by acts or conduct which imply consent. It is not necessary that he should have been influenced by a fraudulent intention, for his liability rests upon his having put the transferor in a position which enabled him to commit a fraud. This is on the principle that "when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud".[1380] The same principle was stated in somewhat wider terms by J Ashurst in *Lickbarrow v Mason,*[1381]

> that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such person to occasion the loss must sustain it.

ILLUSTRATIONS

(1) A husband entered his land in the revenue records in his wife's name and went away on a pilgrimage. Before his departure he had allowed her to mortgage the land. After his departure, she sold the land and the vendee paid off the mortgage. The husband on his return could neither recover the land nor redeem the mortgage.[1382]

(2) *A*, a Hindu husband, purchased land in the name of his wife, *B*. The land was then entered in *B*'s name in the revenue records. After *A*'s death *B*, the widow, mortgaged the land to *C* who took the mortgage after due enquiry believing in good faith that *B* was the owner. *C* obtained a decree for sale on his mortgage and purchased the land. But *D* was then in possession for *D* had purchased the land in execution of a money decree against *A*. *C*'s suit against *D* for possession was decreed. *D* was the successor in interest of *A* who had held out his wife as the ostensible owner and could not defeat the mortgagee who was a transferee in good faith from the ostensible owner.[1383]

1379. *Jogendra v Salamat Khan,* (1930) 33 Cal WN 994 : 125 IC 863 : AIR 1930 Cal 92; *Parvati Ammal v Anga Muthu,* AIR 1942 Mad 730.
1380. By CJ Savage in *Root v French,* (1835) 13 Wendell 570 approved by Lord Halsbury in *Farquharson Bros v King,* (1902) AC 325, p 332 : [1900-3] All ER Rep 120; and J Mookerjee, in *Baidya Nath v Alef Jan,* (1922) 36 Cal LJ 9, p 20 : 70 IC 194 : AIR 1923 Cal 240; Cf *American Jurisprudence,* vol 19, p 641: '...the author of a misfortune shall not himself escape the consequences and cast the burden on another.'
1381. *Lickbarrow v Mason,* (1787) 5 Term Rep 683 : 1 Smith LC 11th Edn, 693.
1382. *Niras Purve v Tetri Pasin,* (1916) 20 Cal WN 103 : 32 IC 82; *Maung Po Sin v Ma Myit,* 146 IC 1063 : AIR 1933 AP 361.
1383. *Annoda Mohan v Nilphamari,* (1922) 26 Cal WN 436 : 65 IC 245 : AIR 1921 Cal 549; *Chapalavala v Sarat Kumari,* AIR 1941 Cal 318.

(3) *A*, a Hindu, dies leaving a daughter *B* who takes a limited estate by inheritance, *B* makes a statement to the revenue authorities that *A's* separated brother *C* is his heir, and allows *C* to take possession of the estate. On *B's* death, her son claims to succeed as reversionary heir of *A*. *C* is not entitled to the protection of section 41, for his ostensible ownership has not been created by the real owner *M*, but by the limited owner *B*.[1384]

The consent must be a free consent as defined in section 14 of the Indian Contract Act, 1872, and it has been held that it must be an intelligent consent, and not one brought about by a misapprehension of legal rights.[1385] However, a consent based on a mistake of fact had been held to be within the section.[1386] Only those alienees from an ostensible owner are protected, who can establish that the sale in their favour was with the consent, express or implied, of the true owner—and that too, only on proving that it was for consideration, and that they had taken reasonable care to ascertain that the transferor had the power to make the transfer, and that they acted in good faith.

A property sold was pre-empted and the pre-emption money was paid by the pre-emptor, but he did not take possession of the property. The prior owners again sold the property to the appellants. On compulsory acquisition of the property, the compensation money was claimed by the respondent, the pre-emptor who was the real owner. The appellants claimed protection under section 41, TP Act, but were denied the same. It was held that the respondent was concededly minor at the time of sales in favour of the appellants. He, therefore, could not be held to have consented expressly or impliedly to the transaction.[1387]

Section 41 does not apply to minors, and a minor's guardian who transfers the property of a minor cannot be treated as an ostensible owner with the consent of the minor,[1388] who, by reason of the disability of infancy, cannot give his consent.[1389] The doctrine of estoppel does not apply to minors,[1390] and still less will the court hold an infant estopped by the acts and omissions of others.[1391]

ILLUSTRATIONS

(1) The owner, a Mohamedan, died leaving a widow and two minor sons. The widow's share was one-eight, but she got herself registered as owner of one-third. She then mortgaged the one-third share to *A*. *A* obtained a decree for sale on his mortgage and purchased the properly. *A* then sold to *B*. The sons were entitled to recover their proper share from *B*. *A* could not be ostensible owner with their consent, express or implied, because they were minors.[1392]

(2) *A* made a colourable conveyance of his *patni* estate to *B* but retained possession of the conveyance and the *patni* lease. After *A's* death his widow as guardian of his minor son appointed *B* as agent to collect the rents. *B* sold the property to *C*. The son was not barred by section 41 from asserting his title against *C*.

1384. *B Sambhu Prasad v Mahadeo Prasad,* (1933) ILR 55 All 554 : (1933) All LJ 1185 : 144 IC 293 : AIR 1933 All 493.
1385. *Dungariya v Nand Lal,* (1906) 3 All LJ 534.
1386. *Ramprosad v Imratbai,* 65 IC 477 : AIR 1922 Nag 79; *Shori Lal v Damodar Das,* AIR 1938 Lah 86 : 175 IC 832.
1387. *Gurcharan Singh v Punjab State Electricity Board, Patiala* AIR 1989 P&H 127.
1388. *Abdulla Khan v Bundi,* (1912) ILR 34 All 22 : 11 IC 710; *Dambar Singh v Jawitri,* (1907) ILR 29 All 292; *Dalibai v Gopibai,* (1902) ILR 26 Bom 433; *Maung Sin Ba v Maung Kyme,* (1934) ILR 12 Rang 55 : 150 IC 667 : AIR 1934 Rang 90.
1389. *Shankar v Daooji,* (1931) ILR 53 All 290 : 58 IA 206 : 132 IC 602 : AIR 1931 PC 118; *Satyanarayana Murthi v Pydayya,* AIR 1943 Mad 459 : (1943) 1 Mad LJ 219; *Kalsum Begum v Ismail,* AIR 1936 Lah 161; *Pooran Chand v Radha Raman,* AIR 1943 All 197; *Kanhialal v Deep Chand,* (1947) ILR Lah 199.
1390. *Sadiq Ali Khan v Jai Kishori,* (1928) 30 Bom LR 1346 : 109 IC 387 : AIR 1928 PC 152; *Gadigeppa v Balangauda,* (1931) ILR 55 Bom 741 : 135 IC 161 : AIR 1931 Bom 561. See note "Minor" under section 7.
1391. *Ram Charan v Joy Ram,* (1912) 17 Cal WN 10 : 16 IC 825.
1392. *Abdullas Khan v Bundi,* (1912) ILR 34 All 22 : 11 IC 710.

This is because—

(i) appointment as agent did not make *B* the ostensible owner;

(ii) even if *B* was the ostensible owner he was not so with the consent, express or implied, of the son as the son was then a minor; and

(iii) if *C* had taken reasonable care, he would have found that *B* was not in possession of the deeds of title.[1393]

Where the widows of the sons of a deceased mortgagee accepted payment of the debt from the mortgagors and transferred the property to them, the real heirs were not bound, for although the widow's names were entered in the revenue records, they had not consented to the transfer.[1394]

Consent of all owners is necessary when a property which is not partitioned, is transferred by one of the owners. In a case where there has been no evidence, either oral or documentary to establish that there has been some partition, the transferee is not a *bona fide* purchaser and is not entitled to the benefit of section 41.[1395]

(7) Implied Consent

Implied consent is consent evidenced by conduct. Thus, if the real owner knows that another person is dealing with his property as if it were his own, and acquiesces, his inaction will imply consent.[1396] However, consent must be to ostensible ownership, there is no such consent where co-sharers left the management of the property to one of them, whose name was also shown in the revenue records as owner, as the least inquiry would have disclosed the true facts.[1397] In a case where the purchaser of a tenure allowed his vendor to represent himself to be still the tenant and to continue to pay the rent of the landlord, the purchaser was bound by a decree for sale in execution of a decree for rent against the vendor.[1398] But in a similar case where the vendor paid rent because the landlord refused to receive the rent from the purchaser, J Mukerji held that there is no acquiescence, and that the purchaser was not bound by the landlord's decree.[1399] These cases were decided on the principle to section 41 for the transfer was involuntary, and by operation of the law. But silence will not work an estoppel, unless it is such as to induce a belief that the party keeping silence has no rights.[1400] When *purdanashin* ladies left the management of their property in the hands of male members of the family who dealt with it without their active concurrence, the Privy Council held that their conduct had not been such as to mislead the mortgagees of the property.[1401] However, in another case where two Mahomedan sisters allowed a spendthrift brother to dissipate their share of the property, the Privy Council held that the brother was the ostensible owner with the implied consent of the sisters, and this was because both the sisters had husbands who

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1393. *Ram Charan v Joy Ram,* (1912) 17 Cal WN 10 : 16 IC 825.
1394. *Sarupa v Dhundan,* (1930) 11 Lah LJ 219 : 120 IC 544 : AIR 1930 Lah 286.
1395. *Manjari Devi v Usha Devi,* AIR 2014 Chh 22 : 2014 (1) CGLJ 636.
1396. *Sara Chunder v Gopal Chunder,* (1893) ILR 20 Cal 296 : 19 IA 203; *Ananda v Parbati,* (1907) 4 Cal LJ 198, p 207; *Mulchand Hazarimal v Hassomal,* 171 IC 127 : AIR 1937 Sau 177; *Shamez-un-Nissa v Sh Ali Asghar,* (1935) Oudh WN 1376 : 159 IC 780 : AIR 1936 Oudh 87.
1397. *Suraj Ratan Thirani v Azamabad Tea Co,* [1964] 6 SCR 192 : AIR 1965 SC 292.
1398. *Mahanta Bhagaban v Bisweswar,* (1927) 44 Cal LJ 434 : 100 IC 302 : AIR 1927 Cal 220.
1399. *Ali Mahamud v Aftahuddin,* (1915) 20 Cal WN 355 : 341 IC 251.
1400. *Joy Chandra v Sreenath,* (1902) ILR 32 Cal 357 (PC); *Mohamad Sujat v Chandbi,* 97 IC 988 : AIR 1927 Nag 4l; *Kanchedilal v Kanhai,* 140 IC 390 : AIR 1932 Nag 165; *Tejumal Josumal v Rochalbai,* (1940) ILR Kar 403 : 191 IC 558 : AIR 1940 Sau 212; *Nagorao Nimbaji v Jogeshwar Murlidhar,* AIR 1944 Nag 20.
1401. *Azima Bibi v Shamalanand,* (1913) ILR 40 Cal 378 : 17 IC 758 (PC).

understood business.[1402] The inaction or silence of a real owner at a time when he was not conscious of his own rights would not debar him from urging his own claim against a transferor even if he is one for consideration. It is essential that a person giving consent must be aware of his right.[1403] It has been held in some cases[1404] that silence or inactivity can never amount to implied consent, even where the real owner is aware of his rights and of the transfer. This seems doubtful, for considerations of equity would require that a party keeping silent ought to be estopped if such silence induces a belief that he has no rights in the property.[1405] When the real owner, by his conduct, allowed the world at large to believe that he has no right in the property, and infact was not in possession of the property and transactions reflected in the revenue record and in the registered documents fully supported the ostensible title and the possession of the ostensible owner, the purchasers under such circumstances are entitled to protection under section 41.[1406] Where the owner executes a power ofattorney authorizing his attorney to sell the property, which he did for consideration through a registered deed, it was held that a suit for injunction was barred by section 41.[1407]

A mortgage contained so inaccurate a description of the property that a purchaser from the mortgagor did not discover the mortgage on a search of the register. This inaccuracy was held to be due to gross negligence on the part of the mortgagee, which enabled the mortgagor to hold himself out as ostensible owner so that the purchaser acquired a title free from the mortgage.[1408] But in a similar case, it was doubted whether such negligence would amount to implied consent.[1409]

It has been said that the words "with the consent express or implied" govern the word "transfers".[1410] This is erroneous for if the real owner consented to the transfer he would be estopped under section 115 Indian Evidence Act, 1872, irrespective of this section.[1411] Moreover, the section applies when the person, who, with the consent express or implied of the real owner, in the position of an ostensible owner, makes a transfer of which the real owner is unaware.[1412]

(8) Attestation

Attestation does not by itself imply consent.[1413] Attestation estops a man from denying nothing whatsoever, except that he has witnessed the execution of the deed.[1414] It may, of

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1402. *Zarif-un-nisa v Shafiq-uz-zaman Khan,* (1928) ILR 3 Luck 372 : 55 IA 303 : 113 IC 113 : AIR 1928 PC 202; *Firm Bhagat Amirchand v Bibi Fatima,* 169 IC 958 : AIR 1937 Pesh 58.
1403. *Shamsher Chand v Bakshi Meher Chand,* AIR 1947 Lah 147.
1404. *Gurbinder Singh v Lal Singh,* (1958) ILR Punj 2258 : 60 Punj LR 528 : AIR 1959 Pat 123 relying on *Shamsher Chand v Bakshi Meher Chand,* AIR 1947 Lah 147; *Sarju Kari v Panchananda Sarma,* (1957) ILR 9 Ass 465 : AIR 1959 Assam 15; *Jit Singh v Kalapati,* AIR 1962 Punj 46; *Gulam Ahmed v Basheer Ahmed,* (1960) 2 Mad LJ 570 : AIR 1960 Mad 99. (The actual decisions in these cases are probably correct on other grounds).
1405. *Gurcharan Singh v Punjab State Electricty Board,* Patiala AIR 1969 P&H 127.
1406. *Neelakanth v Sidalingayya,* AIR 2004 Kant 258 : (2004) 1 KCCR 432; See also *Syed Abdul Khader v Rami Reddy,* AIR 1979 SC 553 : (1979) 2 SCC 601.
1407. *Samay Singh v Hukum Singh Chauhan,* AIR 2007 (NOC) 2054 (Utr).
1408. *KV Galliara v U Thet,* (1929) ILR 7 Rang 118 : 117 IC 580 : AIR 1929 Rang 117.
1409. *Pt Sita Ram v Raj Narayan,* 150 IC 45 : AIR 1934 Oudh 283.
1410. *Shafiquallah v Samiullah,* (1930) ILR 52 All 139 : 123 IC 101 : AIR 1929 All 943.
1411. *Fazal Hussain v Muhammad Kazim,* (1934) All LJ 544 : (1934) ILR 56 All 582 : 150 IC 81 : AIR 1934 All 193. See also *Fakruddin Saib v Ramayya Sethi,* AIR 1944 Mad 299; *Jesa Ram v Ghulaman,* AIR 1936 Lah 816; *Satyanarayana Munhi v Pydaya,* (1943) 1 Mad LJ 219 : AIR 1943 Mad 459.
1412. *Gurcharan Singh v Surjit Kaur,* AIR 2006 P&H 18 : (2005) 141 PLR 232.
1413. *Banga Chandra v Jagat Kishore,* (1916) ILR 44 Cal 186 : 43 IA 249 : 36 IC 420; *Hari Kishen v Kashi Pershad,* (1914) ILR 42 Cal 876 : 42 IA 64 : 27 IC 674; *Raj Lukhee v Gokool Chunder,* (1869) 13 Mad IA 209 : 12 WR 47 (PC).

course, be proved that attestation took place in circumstances, which involved knowledge of, or consent to, the transaction;[1415] and it has been said that the ordinary practice in India is to require attestation in token of consent.[1416] But this practice has been condemned by the Privy Council. Lord Buckmaster said:

> If in fact there be a practice, as is suggested from the evidence, that when the consent of parties to a transaction is required, it can be obtained by inducing them by one means or another to attest a signature of the executing parties, the sooner that practice is discontinued the better it will be for the straightforward dealing essential in all business matters.[1417]

(9) Reasonable Care

Reasonable care has been explained to mean such care as an ordinary man of business would take.[1418] Reasonable care is to be expected from every one who claims to have purchased free from a really existing right.[1419] Revenue records are not documents of title, and it is not safe to rely on the entry of the transferor's name in the revenue registers. A transferee who does so and omits to inquire into title is not protected by this section.[1420] This also applies to entries in Municipal and Police registers.[1421] Mere entrusting of an inquiry to a solicitor does not amount to reasonable care.[1422] A discrepancy in the sale certificate between the description of the property by its name and delineation by boundaries ought to put the transferee on guard.[1423]

(10) Possession and Entries in Revenue Records

It may be that on the facts of a case, it is sufficient if the purchaser ascertains that his vendor is in possession and is entered in the revenue records[1424] (illustrations 1 and 2), but this does not dispense with the duty to make the usual inquiry into title (illustration 3).[1425]

1414. *Pandurang v Markandeya,* (1922) ILR 49 Cal 334 : 49 IA 16 : 65 IC 954 : AIR 1922 PC 20; *Fazal Hussain v Jivan Shah,* (1933) ILR 14 Lah 369 : 141 IC 454 : AIR 1933 Lah 551.
1415. *Tarabag Khan v Nanak Chand,* 138 IC 263 : AIR 1932 Lah 566; *Bhagwat Rai v Gorakh Rai,* 150 IC 765 : AIR 1934 Punj 93; *Sundar Koer v Udey Ram,* AIR 1944 All 42.
1416. *Kandasami v Nagalinga,* (1913) ILR 36 Mad 564 : 16 IC 30; *Narayana v Rama Aiyar,* (1915) ILR 38 Mad 396 : 20 IC 625.
1417. *Pandurang v Markandaya,* (1922) ILR 49 Cal 334, p 344; *Mollaya v Krishnaswami,* (1924) 47 Mad LJ 622 : 85 IC 855 : AIR 1925 Mad 95.
1418. *Kanhu Lal v Palu Sahu,* (1920) 5 Pat LJ 521 : 57 IC 353; *Siddappa v Vishwanathsa,* (1943) 45 Bom LR 825 : AIR 1943 Bom 419; *Beyas Singh v Ramjanam,* (1961) ILR AP 16.
1419. *Zungabai v Bhawani,* (1907) 9 Bom LR 388.
1420. *Nageshar Prasad v Raja Pateshri,* (1915) 20 Cal WN 265 : 34 IC 673 (PC); *Partap Chand v Saiyida Bibi,* (1901) ILR 23 All 442; *Thungavellu Chetty v Mangathaye Ammal,* (1913) Mad WN 674 : 21 IC 21; *Maung Po v Maung Mye,* (1915) 8 Bur LT 85 : 27 IC 777; *Sheogobind v Anwar Ali,* 116 IC 779; *Mohamad Sujat v Chandbi,* 97 IC 988 : AIR 1927 Nag 41; *Ram Chalitra v Shivnandan,* 150 IC 922; *Hargovind Prasad v Babu Ambika Dutt Ram,* (1934) ILR 9 Luck 571 : AIR 1934 Oudh 165; *Har Narain v Ashiq Husain,* (1942) ILR 17 Luck 636 : IC 808 : 199 AIR 1942 Oudh 313; *Ram Kissan v Muktinath,* AIR 1956 Assam 154; *Kanji Ganesh v Parmanend,* AIR 1992 MP 208, p 213.
1421. *Kartar Singh v Mehr Nishan,* (1934) ILR 16 Lah 313 : 155 IC 1064 : AIR 1934 Lah 885.
1422. *Purnendu Nath v Hanut Mull,* (1940) 71 Cal LJ 520 : 44 Cal WN 813 : 192 IC 416 : AIR 1940 Cal 565.
1423. *Himprastha Financiers v UOI,* AIR 1976 HP 29.
1424. *Mubarakunnissa v Muhammad Raza,* (1924) ILR 46 All 377 : 79 IC 174 : AIR 1924 All 384; *Makkama v Masambi,* (1925) 27 Bom LR 208 : 86 IC 876 : AIR 1925 Bom 299; *Muhammad Din v Sardar Bibi,* 104 IC 394; AIR 1927 Oudh 448; *PLTAR Chettiar Firm v Maung Kyaing,* (1929) ILR 7 Rang 276 : 119 IC 217 : AIR 1929 Rang 333; *Mahomed Shakar v Shehjahan,* 63 IC 125; *Mathura Prasad v Anandi,* (1923) 21 All LJ 498 : 74 IC 911 : AIR 1924 All 63; *Udho Das v Mehr Baksh,* 144 IC 340 : AIR 1933 Lah 262.
1425. *Muhammad Shafi v Muhammad Said,* (1930) ILR 53 All 248 : 122 IC 871 : AIR 1930 All 807; *Muhammad Sulaiman v Sakina Bibi,* (1922) ILR 44 All 674 : 69 IC 701 : AIR 1922 All 392; *Chittabala Kundu v Sailen Behari Paul,* 92 Cal WN 398 : AIR 1988 Cal 68 (NOC).

ILLUSTRATIONS

(1) Three grandsons were heirs of one-third of an estate, but they took possession of the whole and entered the whole in their names in the revenue registers, and mortgaged the whole property to a mortgagee who took in good faith. The other heirs to one-thirds of the property were barred by section 41 from disputing the mortgage of their share.[1426]

(2) *A* assigned a lease of town land to *B*, but *A* remained in possession and the land was not transferred to the name of *B* in the Government register. *A* leased a plot of the land to *C* who took the lease finding *A* in possession and the land standing in his name. *B* was barred by section 41 from asserting his title against *C*.[1427]

(3) *A* gave a usufructuary mortgage of land to *B* in 1867 and *B*'s name was erroneously entered in the revenue records as owner. *B*, in 1914, mortgaged the land to *C*, part of the mortgage money being reserved to pay off a prior sub-mortgage of 1902. *A* sued to redeem the mortgage of 1867. *C* pleaded that *B* was in possession, was registered as owner and represented himself to be the owner and that he had not been liable on the mortgage of 1867. If *C* had made enquiry into title, he would have found that in the mortgage of 1902, *B* had described himself as mortgagee. *C* was not entitled to the protection of this section.[1428]

(4) A tahsildar, being forbidden by departmental rules from acquiring land within the limits of his tahsil, purchased land in the name of his minor sons and entered it in their names in the revenue records. The sons afterwards sold and mortgaged the land to a person who acted in good faith and in reliance on the entries in the revenue papers. Nevertheless, the purchasers and mortgagees were not entitled to the protection of this section, as they should not have been satisfied with entries in the revenue records.[1429]

(5) *A* is the owner of property which is entered in the revenue records in the name of *B*. *B* mortgages the property to *C* who accepts the mortgage relying on the revenue register. If *C* had made further enquiry, he would have found that *A* had objected to the entry of the property in *B*'s name and that the property had been left to *A* by will. *C* is not protected by this section.[1430]

(11) Inquiries into Title

The transferee must show that he has made the usual inquiry into title; otherwise he is not entitled to the protection of this section.[1431] In this connection, the courts have frequently quoted a well-known passage from Lord Lindley's judgments in *Bailey v Barnes*:[1432]

> A purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way.

1426. *Mubarakunnissa v Muhammad Raza,* (1924) ILR 46 All 377 : 79 IC 174 : AIR 1924 All 384.
1427. *PLTAR Chetty Firm v Maung Kyaing,* (1929) ILR 7 Rang 276 : 119 IC 217 : AIR 1929 Rang 333.
1428. *Muhammad Shafi v Muhammad Said,* (1930) ILR 53 All 248 : 122 IC 871 : AIR 1930 All 847.
1429. *Partap Chand v Saiyida Bibi,* (1901) ILR 23 All 443.
1430. *Nageshar Prasad v Raja Pateshri,* (1915) 20 Cal WN 265 : 34 IC 673 (PC).
1431. *Rajani Kanta v Bashiram Mestari,* (1929) 49 Cal LJ 532 : 121 IC 409 : AIR 1929 Cal 636; *Lala Jagmohan Dass v Lala Indar Prasad,* (1929) ILR 4 Luck 597 : 115 IC 97 : AIR 1929 Oudh 160; *Zungbai v Bhawani,* (1907) 9 Bom LR 388; *Rahiman Beebi v Khatoon Bee,* 35 IC 569; *Vyankapacharya v Yamanasami,* (1911) ILR 35 Bom 269, 271, p 10 IC 817; *Kasturi Bibi v Balliram,* AIR 1923 Nag 15 : 68 IC 732; *Maung Hmwe v Ma Lun,* 11 IC 85; *Maung Than v Ma, On* 12 IC 858; *Kanchedilal v Kanhai,* 140 IC 390 : AIR 1932 Nag 165; *Khatun Fatima v Shib Singh,* (1933) All LJ 1036 : 147 IC 840 : AIR 1933 All 917; *Sadha Singh v Mangal Singh,* 142 IC 860 : AIR 1933 Oudh 166; *U Po Shin v Edward,* 150 IC 898 : AIR 1934 Rang 139; *Jamshedji v Dorabji,* (1933) 35 Bom LR 1091; 149 IC 317 : AIR 1934 Bom 1.
1432. *Bailey v Barnes,* [1894] 1 Ch 25, p 35.

ILLUSTRATIONS

(1) *A* and his brother *B* formed a joint and undivided Hindu family. *A* out of self-acquired funds purchased a house and took the conveyance in his own name. After *A*'s death, his representatives sold the house to *C*. It appears that *A* had thrown the house into the common stock of the joint family, so that his representatives could only sell a half share. *C* claimed to have acquired title to the whole under section 41. But as he had made no enquiry into title at all, and had not even seen the main deed of title passing the property to *A*, he was not entitled to the protection of this section.[1433]

(2) *W* owned a house in Cawnpore. In 1912 she went on a pilgrimage to Mecca leaving the house in charge, to a relation *B*. In 1915, *B* applied to the Municipality that he was not aware of *W*'s whereabouts and nor whether she was dead or alive, and prayed that the house was entered in his name as he was her heir. The application was granted and two years later *B* sold the house to the defendant who purchased in good faith after inspecting the Municipal register *W* returned to Cawnpore in 1918 and claimed the house. The defendant was not entitled to the protection of section 41 for he knew that *W* was the original owner, and if he had carried his enquiries further, he would have ascertained that *B* had admitted in his application to the Municipality that he did not know whether *W* was dead or alive and the presumption of death could not be made before the lapse of seven years.[1434]

(3) The male member of a Mahomedan family, who had adopted the Hindu religion in matters of worship, mortgaged family property without consulting the female members of the family. The mortgagee, a pleader, was under the impression that the parties were governed by Hindu law and that the females had no proprietary interest. The males had on previous occasions dealt with the property without the concurrences of the females. Nevertheless, as the mortgagees made no enquiry of the females or of their husbands, and as the former were *purdanashin* ladies who usually leave the management of property in the hands of male relations, the mortgagee was not protected by section 41.[1435]

(4) Where vendor, being a member of the Scheduled Caste, had no right to alienate the land for a period of twenty years in view of rule 6(8) of the Punjab Package Deal Properties (Disposal) rules, 1976, it was held that the purchaser is not entitled to the protection of section 41 since had he made a reasonable enquiry, he could have ascertained the bar created by rule 6(8) and also would have found out the red ink entry in the *jamabandi*, which clearly indicated that the land in dispute could not be sold for twenty years.[1436]

The title may be so clear that no particular inquiry is called for. In an Allahabad case,[1437] CJ Stanley said:

> We think that where a person is found in possession of property, and is recorded as owner, and holds the title deeds of the property and deals with a third party in respect of it, there is nothing to suggest a want of good faith in such third party in dealing with him in respect of the property.

However, there may be circumstances which demand further inquiry; and as to these it is not sufficient to assert generally that inquiries should have been made, or that a prudent man would have made inquiry, but some specific circumstances should be pointed out as a starting point of an inquiry, which would have led to some result.[1438] The transferee cannot

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1433. *Rajani Kanti v Bashiram Mestari,* (1929) 49 Cal LJ 532 : 121 IC 409 : AIR 1929 Cal 636.
1434. *Muhammad Sulaiman v Sakina Bibi,* (1922) ILR 44 All 674 : 69 IC 701 : AIR 1922 All 392.
1435. *Azima Bibi v Shamalanand,* 1913 (15) BomLR 423.
1436. *Jit Singh v Piara,* AIR 2003 P&H 258.
1437. *Khwaja Muhammad v Muhammad Ibrahim,* (1904) ILR 26 All 490, p 493; *Ramsaran v Harihar Prasad,* (1961) ILR AP 314.
1438. *Ramcoomar v Macqueen,* 18 WR 166 : 11 Beng LR 46; *Baidya Nath v Alef Jan,* (1922) 36 Cal LJ 9 : 70 IC 194 : AIR 1923 Cal 240; *Rajani Kanta v Bashiram Mestari,* (1929) 49 Cal LJ 532 : 121 IC 409 : AIR 1929 Cal 636; *Gholam Siddique v Jogendra Nath,* (1926) 31 Cal WN 205 : 96 IC 199 : AIR 1926 Cal 916; *Sheotahal v Lal Narain,* 124 IC 413 : AIR 1930 All 422; *Jasodar Dusadhin v Sukurmani,* 170 IC 1005 : AIR 1937 Pat 353.

be held to have acted without reasonable care if there was no clue existing to suggest that the transferor was not the real owner.[1439] It is always necessary to make a particular inquiry if the transferor is the *karta* of a joint family,[1440] or if the land is in possession of a person other than the transferor.[1441] A person who takes a mortgage from one whom he knows to be the sister's son or grandson of the original owner ought to inquire if there are any collaterals in existence.[1442] When oral transfers were permitted by law in the state of Punjab, inspection of records in the registration office was not sine qua non while granting protection to the alienee under section 41 of the TP Act.[1443]

(12) Property Belonging to Women

Where the real owner is a woman who has allowed her male relations to deal with her property or her share of the property, her right may be defeated by the operation of this section, if the transferee has acted bona fide, and has taken reasonable care to investigate title. Such cases turn on their own facts. In *Azima Bibi v Shamalanand,*[1444] a case already referred to, the Privy Council held that *purdanashin* ladies who had left the management of their property to their male relations were not bound by a mortgage of family property executed by them alone. In an Allahabad case,[1445] J Mukerji observed that in Mahomedan families, the names of female heirs are never entered in the revenue records and that:

> if we are to say that Mahomedan sons, simply because their names alone are down in the *khewat,* are entitled to give a good title to a transferee, and the mother and the sisters shall be precluded from claiming their shares, it would be disastrous indeed.

Similarly, in a Nagpur case,[1446] two Mahomedan brothers and a sister inherited property, and the sister allowed it to be entered in the revenue in the names of the brothers who sold it without consulting the sister; but the court said that "the facts that the transferors were Mahomedans ought to have put the present defendant and his predecessors in interest on enquiry as to whether there was a female heir in addition to the two transferors." In *Mubarakunissa v Muhammad Raza,*[1447] the property of a deceased Mahomedan was inherited by three grandsons and two daughters. The grandsons took possession of the whole property, entered it in their own names in the register, and two years later mortgaged it. The daughters first heard of the mortgage when the mortgagee brought the property to sale, and although it does not appear that they had husbands to protect their interests, their claim was held barred by section 41. In *Macneill & Co v Saroda Sundari,*[1448] two Hindu brothers managed the property in which their mother had a third share, and the mother's share was held bound by a permanent lease which they had granted without reference to her. The court

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1439. *Maung Po Lu v Bank of Chettinad,* 154 IC 249 : AIR 1934 Rang 313; *Shiam Lal v Mata Din,* 151 IC 576 : AIR 1934 Oudh 460; *DAV College Reg Society v Umrao,* 157 IC 92 : AIR 1935 Lah 410; *Mazhir Hasan v Mukhtar Hasan,* AIR 1938 All 64 : (1937) All LJ 1356 : 173 IC 360.
1440. *Kanhu Lal v Ram Singh,* (1920) ILR 5 Pat LJ 521 : 57 IC 353.
1441. *Vyankapacharya v Yamanasami,* (1911) ILR 35 Bom 269 : 10 IC 817.
1442. *Ballu Mal v Ram Kishan,* (1921) ILR 43 All 263 : 64 IC 14 : AIR 1921 All 311; *Fazal Hussain v Muhammad Kazim,* (1934) All LJ 544 : (1934) ILR 56 All 580 : 152 IC 81 : AIR 1934 All 193.
1443. *Avtar Singh v Hazura Singh,* AIR 1984 P&H 211, p 215; *Shamsher Chand v Bakshi Mehr Chand,* AIR 1947 Lah 147.
1444. *Azima Bibi v Shamalanand,* (1913) ILR 40 Cal 378 : 17 IC 758 (PC).
1445. *Rasulam Bibi v Nand Lal,* (1930) All LJ 1091, p 1093 : 124 IC 757 : AIR 1930 All 521; *Amir Jahn v Khadim Hassain,* 132 IC 74 : AIR 1931 Oudh 253.
1446. *Mahmad Sujat v Chandbi,* 97 IC 988 : AIR 1927 Nag 41, p 42.
1447. *Mubarakunissa v Muhammad Raza,* (1924) ILR 46 All 377 : 79 IC 174 : AIR 1924 All 384; *Mul Raj v Fazal Imam,* (1923) ILR 45 All 520 : 74 IC 307 : AIR 1923 All 583.
1448. *Macneill & Co v Saroda Sundari,* (1928) 48 Cal LJ 374 : 114 IC 142 : AIR 1929 Cal 83 : (1929) 33 Cal WN 526.

distinguished the Privy Council case of *Azima Bibi v Shamalanand*[1449] on the ground that Hindu women do not as a rule succeed to property by inheritance.

(13) Good Faith

These words mean that the transferee had acted honestly, and in the real belief that the ostensible owner is the real owner. Reasonable care is not enough if there is absence of good faith. A person may act without negligence, but at the same time without honesty. A purchaser may have made a reasonably careful inquiry, but if, after ascertaining the true facts, he chooses to ignore them, he is not protected.[1450] But when a man purchased a possessory title believing in good faith that his vendor was the real owner, and any inquiry that he could have made would only have confirmed him in that belief, the court held he was protected by this section.[1451] The court is slow to believe in the good faith of a transferee who lives in the same village as the real owner, and is acquainted with all the circumstances of his family.[14] Knowledge of the infirmity of the title of the transferor, deprives the transferee of the protection of this section.[1453] Mere misconception of the rights of the transferor will not avail. So, when a person bought property belonging to a female, who had been outcasted for unchastity, believing that her interest was forfeited, he was not protected by this section.[1454] So also, mere good faith is not sufficient. The purchaser must establish that he made reasonable inquiries.[1455] In a Punjab case, the allotment of land to a person (who had migrated from Pakistan to India) in lieu of the land owned in Pakistan, was cancelled by the rehabilitation authorities. Thereafter, the allottee took the land on lease from the rehabilitation authorities and started paying the lease money to them. The land was later auctioned and purchased by the defendants. On application by the allottee, the land was re-auctioned and at the time of re-auction, the allottee competed in the bid with the defendants. When he was unsuccessful in outbidding the defendants, he filed the suit challenging the order cancelling his allotment. However, he had not appealed against the order cancelling the allotment. It was held that the defendants were entitled to the benefit of section 41, and to the principle of estoppel. The conduct of the plaintiff was such that the defendants were led to a belief that the plaintiff consented to the sale of the property, and the purchasers acted in good faith in purchasing it at the time of auction. The plaintiff's participation in the auction, and earlier payment of lease money to the rehabilitation authorities, made defendants believe that no dispute had been left between the plaintiff and the rehabilitation authorities. That conduct of the plaintiff was such that a purchaser at the time of auction could take it in good faith that the plaintiff did not claim the property.[1456] The Patna High Court has held that if the transaction is a sham one, the section cannot apply, since the transferee would then have knowledge of reality.[1457]

1449. *Azima Bibi v Shamalanand,* (1913) ILR 40 Cal 378.
1450. *Hakiman v Badr-un-Nissa,* 148 IC 742 : AIR 1934 Lah 658; *Laxman Sakharam Salvi v Balkrishna Balwant Ghatage,* AIR 1995 Bom 190 held that a transferee who willfully shuts his eyes and takes the transfer without any inquiry, is not protected.
1451. *Chandra Kanta v Bhagjur,* 1 IC 525.
1452. *Gurbaksh Singh v Nikka Singh,* [1963] 1 SCR 55 (Supp) : [1963] 2 SCJ 285 : AIR 1963 SC 1917; *Pateshri Pertab v Nageshar,* (1911) 8 All LJ 358 : 10 IC 961 : on app (1916) 20 Cal WN 265 : 34 IC 673 (PC); *Beyas Singh v Ramjanam,* AIR 1961 Pat 16.
1453. *Lala Jagmohan Dass v Lain Indar Prasad,* (1929) ILR 4 Luck 597 : 115 IC 97 : AIR 1929 Oudh 160; *Mollaya v Krishnaswami,* (1925) 47 Mad LJ 622 : 85 IC 855 : AIR 1925 Mad 95; *Ragho v Dwarka Das,* 79 IC 687 : AIR 1924 Lah 738; *Abbas Bandi v Saiyid Muhammad,* (1929) ILR 4 Luck 452 : 120 IC 387 : AIR 1929 Oudh 193.
1454. *Angammal v Venkata,* (1903) ILR 26 Mad 509.
1455. *Khwaja Afzal v Md Saheb,* (1936) ILR Nag 177 : 165 IC 177 : AIR 1936 Nag 214; *Layak Ram v Dharmavati,* AIR 2010 P&H 95.
1456. *Qandhara Singh v UOI,* AIR 1984 P&H 51.
1457. *Rai Sunil Kumar v Thakur Singh,* AIR 1984 Pat 80, p 86, para 13.

Plaintiff vendor alleged that sale deed was as security for loan advanced by defendant. Plaintiff continued in possession despite the sale deed. The defendant admitted during cross-examination, that on many occasions he has entered into a sale transaction of the land to keep it as security. Therefore, it was held that sale deed was security for loan advanced, and not an outright sale.[1458]

Where the transferee fails to prove that he acted in good faith taking reasonable care to ascertain that the transferor had the power to transfer the land he is not entitled to protection of section 41.[1459] Where the property was jointly owned by the three co-owners and the property was undivided, without a partition, and one of them transferred the property but the transferee had neither ascertained from any other person whether the transferor had the capacity to transfer the property, he cannot claim the benefit of being a bonafide transferee without notice and no protection under section 41 would be available to him.[1460] Similarly, a transferee pendente lite cannot seek the protection of section 41 as he cannot be considered a bonafide transferee without notice.[1461]

In a suit for declaration, a co-sharer with vendor could not be said to be the owner of share of his sister by way of adverse possession. Where the property was owned by the brother and a sister of their respective shares, and the plaintiff had not ousted the sister from the suit land and the vendor had also not abandoned her share in suit property, the subsequent vendees having made inquiry from revenue records and on satisfying themselves that as per revenue record vendor was owner of half of the share in the suit property had purchased the same, in such circumstances the subsequent vendees would be entitled to protection under section 41 being bonafide purchasers for consideration.[1462]

Where the transferee knew it fully well that property belonged to "*A*" and the transferor, the grandson of *A* had no title over the property, a consent letter executed by *A* would neither convey any title nor create any interest in favour of the transferee in any land as the transferor had no right to sell the land and the transferee had knowledge of it. The transfer of property through sale would thus be not proper.[1463] In determining whether the relationship was based on trust or confidence, then the court shall consider the factual context.[1464]

When section 41 has no application

In case of failure to mention in the pleadings that the transferor was an ostensible owner with consent of the original owner of the land, the claim of the plaintiff for right, title in land on account of transfer of land by a person other than owner to him would not be accepted. Section 41 has no application where transfer is held invalid under sections 19 and 24 of the Displaced Persons (Compensation and Rehabilitation Act, (Act 44 of 1954)), as no estoppel can be pleaded against provisions of a statute. It would be within right of subsequent purchasers to challenge order of cancellation on merits, but sale in their favour cannot be protected under section 41 of the Transfer of Property Act. The subsequent vendee can only claim refund or damages from his vendor. Section 41 cannot be applied for

1458. *Bimbadhar Rout v Kuna Senapati,* AIR 1995 Ori 258.
1459. *Baby Rani Deb v Manik Dey,* AIR 2014 Gau 56 : 2014 (1) Gau LT 138 : LNIND 2013 GAU 347.
1460. *Manjari Devi v Usha Devi,* AIR 2014 Chh 22 *Layak Ram v Dharamwati,* AIR 2010 P&H 95.
1461. *Lakhwinder Singh v Dilbagh Singh,* AIR 2010 (NOC) 1113 (P&H).
1462. *Layak Ram v Dharamwati,* AIR 2010 P&H 95.
1463. *Atal Shrivastava v Devprasad,* AIR 2012 Chh 117 : 2012 (1) CGBCLJ 411.
1464. *Marcel Martins v M Printer,* (2012) 5 SCC 342 : AIR 2012 SC 1987 : LNIND 2012 SC 262 : 2012 (5) Mad LJ 645.

the benefit of a transferee pendente lite as he would not be a bonafide transferee without notice.[1465]

Limitation in a Suit for Cancellation of the Sale Deed

Where right from the execution of the sale deed and whenever the transferee had tried to get the mutation done in his name the co-owners had been objecting to it and ultimately an order was passed by the court that gave them the cause of action, a suit filed within three years from this order would be within the period of limitation.[1466]

(14) Partial Interest

The section also applies to cases where the transferor has actually some interest and the appearance of an interest greater than he really has. In one case, the plaintiff granted a mortgage by conditional sale by two contemporaneous deeds, one a sale and the other an agreement of reconveyance. The plaintiff retained the agreement of reconveyance, and the mortgagee who was in possession sold the land after the lapse of 42 years to the defendant, who on inspection of the sale deed believed the mortgagee to be a vendee. The plaintiff sued to redeem the defendant, but section 41 was held to bar the suit.[1467] It may be observed, in passing, that such a case could not occur since the amendment of section 58(c) which requires a condition of reconveyance in a mortgage to be engrossed in the same deed. Cases in which the transferor is a mortgagor or one of several heirs have already been cited.

(15) Onus of Proof

The section is an exception to the general rule that no person can dispose of an interest in property that is not vested in him and, therefore, the onus is, in the first place, on the transferee to show that the transferor was the ostensible owner, and that he (the transferee) had acted in good faith, and with reasonable care.[1468] The person who alleges that the property conveyed to another really belongs to him must prove his allegation.[1469]

This burden of proving a transaction to be a *benami* one is on the person who alleges the same to be *benami*, because the apparent state of affairs must be taken to be real, unless the contrary is proved. In a suit for declaration of title to the suit property on a plea that the defendant was a *benamidar* of the plaintiff, the initial burden is on the plaintiff to prove the *benami* nature of the transaction.[1470] The burden, however, does not continuously rest in one place, but may shift to the other side. Where it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable

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1465. *Baby Rani Deb v Manik Dey,* AIR 2014 Gau 56 : 2014 (1) Gau LT 138 : LNIND 2013 GAU 347.
1466. *Manjari Devi v Usha Devi,* AIR 2014 Chh 22.
1467. *Sethumadhava v Bacha,* 111 IC 539 : AIR 1928 Mad 778. But see *Sahodra v Badri Prasad,* 122 IC 593 : AIR 1929 All 737.
1468. *Gurbaksh Singh v Nikka Singh,* [1963] 1 SCR 55 (Supp) : [1963] 2 SCJ 285 : AIR 1963 SC 1917; *Suraj Ratan Thirani v Azamabad Tea Co,* [1964] 6 SCR 192 : AIR 1965 SC 295; *Crystal Developers v Asha Lata Ghosh,* AIR 2004 SC 4980; *Maung Sin Ba v Maung Kyme,* (1934) ILR 12 Rang 55 : 150 IC 667 : AIR 1934 Rang 90; *Sunder Kuer v Udey Ram,* (1944) ILR All 42; *Hajarkhan v Kesarkhan,* (1967) 9 Guj LR 1066 : AIR 1968 Guj 229.
1469. *Maung Po Kun v Maung Poshein,* AIR 1926 PC 77; *Jaydalal Poddar v Bidi Hazra,* AIR 1974 SC 171; *Krishnanand Agnihotri v State of Madhya Pradesh,* AIR 1977 SC 796; *Girindra Nath Mukherjee v Soumen Mukherjee,* AIR 1988 Cal 375, p 383; *Rama Kanta Jain v M S Jain,* AIR 1999 Del 281 : (1999) 50 DRJ 232 : 1999 IIIAD (Delhi) 32.
1470. *Bhupendra Kumar R Parikh v M K Lakshmi,* AIR 1990 Mad 46, p 59 : 1989-2-LW 294.

probabilities and legal inferences arising from proved or admitted facts.[1471] The decision must be based on legal grounds, and not mere suspicion.[1472]

The onus is then shifted on the party seeking to defeat the transferee's title to show that there was something to call attention and invoke inquiry. This is because the real owner having created the appearance of title in another person, it is incumbent on him, or on those who derive title from him to show something which amounts to constructive notice of the real title, some specific circumstance as the starting point of an inquiry which would have led to the discovery of it.[1473] The same rule was applied in a case where the ostensible owner had a lien on the property.[1474] If notice by the purchaser is pleaded by the real owner, the burden is on him (the real owner) to prove such notice. He must show that the purchaser had direct notice, or something which amounts to constructive notice of the real title, or that there existed circumstance which ought to have put the purchaser on an inquiry which, if prosecuted properly, could have led to discovery of the real title.[1475]

To substantiate a case of *benami*, several factors have to be taken into consideration by the court. The relevant factors are:

(a) the consideration;

(b) possession and enjoyment of the property;

(c) possession of the title deeds;

(d) motive, and

(e) mutation in the public records.

Further, if the *benamidar* and the real owner were related as wife and husband, the payment of consideration may not be decisive, for, it is most likely that the husband intended to benefit the wife.[1476]

(16) Subsequent Transferee

The section is not limited to the immediate purchaser from an ostensible owner, but extends to subsequent purchasers also. Even if the immediate purchaser had notice, yet the ultimate purchaser, if he purchases bona fide and with reasonable care, is protected.[1477] *A* is the real owner of property and leaves it in the possession of *B* as ostensible owner. *B* sells it to *C*, who has constructive notice of *A's* title. *C* then sells it to *D*, who is not aware of the fact which gave *C* constructive notice. *D* buys from *C* in good faith and after inquiry with reasonable care, *D* is entitled to the protection of the section. Where a sale deed and power of attorney in favour of the defendant purchaser was duly registered and the purchaser had also created the third party rights by subsequent sale of suit property by virtue of the power of attorney and sale deed, it was held that such third party's rights have to be protected and the plaintiff having failed to prove loan transaction would not be entitled to get the relief of suit for title and cancellation of power of attorney and sale deed.[1478]

1471. *Radheyshyam v Maharaj Bahadur Singh,* AIR 1982 Cal 571.
1472. Ibid.
1473. *Rajani Kanta v Bhashiram Mestari,* (1929) 49 Cal LJ 532 : 121 IC 409 : AIR 1929 Cal 636; *Baidya Nath v Alef Jan,* (1922) 36 Cal LJ 9 : 70 IC 194 : AIR 1923 Cal 240; *Ramcoomar v Macqueen,* 18 WR 166; *Mohamad Sujat v Chandbi,* 97 IC 988 : AIR 1927 Nag 41.
1474. *Raja of Karvetnagar v Saraavana,* 35 IC 893.
1475. *Dhuruba v Puma,* AIR 1973 Ori 192.
1476. *Andalammal v Rajeswari Vedachalam,* AIR 1985 Mad 321, p 329.
1477. *Gholam Siddique v Jogendra Nath,* (1926) 31 Cal WN 205 : 96 IC 199 : AIR 1926 Cal 916; *Baidya Nath v Alef Jan,* (1922) 36 Cal LJ 9; *Purenendu Nath v Hanut Mull,* (1940) 71 Cal LJ 520 : (1940) 44 Cal WN 813 : 192 IC 416 : AIR 1940 Cal 565.
1478. *Trilok Nath v Khem Chand,* AIR 2018 (NOC) 104 (Del).

(17) Section 52 Excludes section 41

In a case decided by Allahabad High Court the property was in the possession of three illegitimate sons whose names were entered in the revenue records. The rightful heir filed a suit to recover possession and obtained a decree. But a few days after he filed the suit, the illegitimate sons mortgaged the property, and the mortgagee, relying on their ostensible ownership, claimed that the rightful heir was bound by the mortgage. The mortgagors whose names were entered in the revenue records and who were in possession were no doubt ostensible owners; but as the real owners had filed a suit against them, it is clear that they were not, on the date on which the mortgage was made, ostensible owners with their consent, express or implied. In *Ishwar Das v Bir Singh,*[1479] the property in dispute initially belonged to *A*, who gifted some landed property to *W*, but pursuant to the suit filed by his sons, it was found that the gifted land also included the ancestral property and *W* was entitled to only a 1/6 of the same and not 1/3. During the pendency of the suit regarding the ancestral property, *B* purchased the part of property of *W*; claimed himself as a bonafide purchaser; and prayed for a decree for declaration and protection of his joint possession to the extent of 1/3 of the ancestral property. The court held that *B* was not entitled to the protection contemplated under section 41 of the Act for the reasons that section 52 of the Act has an overriding effect on section 41 and the person having purchased property during the pendency of the suit is not entitled to the protection of section 41 of the Act. The doctrine of lis pendens under section 52, therefore, excludes the doctrine of ostensible ownership under this section.[1480]

(18) Registration Act, 1908

Section 41 should not be read so as to conflict with section 47 of the Registration Act, 1908. *A* sells his property to *B*, and before the sale deed is registered sells it again by a registered sale deed to *C*. *B*'s sale deed, though registered later, has priority. *C* cannot claim that *A* was the ostensible owner with the consent of *B* so as to bar *B*'s claim under section 41.[1481]

(19) Code of Civil Procedure 1908

A transferee from a certified purchaser at a court sale is, by virtue of section 66 of the Code of Civil Procedure 1908, protected from a suit on the ground that his transferor was a *benamidar.*[1482]

(20) Reliance on Recitals

The inaccuracy in the recitals describing the property cannot whittle down the effect of clear recitals in the documents about the property to be sold thereby.[1483]

(21) Prohibition of *Benami* Transactions

The Parliament has enacted the Benami Transactions (Prohibition) Act, 1988 prohibiting *benami* transactions under section 3(1), and making them punishable under section 3(3). The prohibition does not, however, apply to the purchase of property by any person in the name

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1479. *Ishwar Das v Bir Singh,* RSA No 439 of 2002, decided on: 27 November 2015, High Court of HP, Shimla .
1480. *Shafiquallah v Samiullah,* (1930) ILR 52 All 139 : 123 IC 101 : AIR 1929 All 943; *Gendmal v Laxman,* AIR 1945 Nag 86; *Kanshi Rum v Kesho Ram,* AIR 1961 Punj 299 (a case from the Punjab, where the TP Act does not apply); *Manickchand v Gangadhar,* (1961) 63 Bom LR 163 : AIR 1961 Bom 288.
1481. *Mathura v Ambika,* (1914) 12 All LJ 993 : 25 IC 725.
1482. *Manji v Hoorbai,* (1911) ILR 35 Bom 342 : 8 IC 752.
1483. *I A Nalvade v D S Surati,* AIR 1995 SC 2486 : 1995 Supp (3) SCC 541.

of his wife or unmarried daughters and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughters. *Benami* transaction is defined under section 2(1) so as to mean any transaction in which property is transferred to one person for consideration paid or provided by another person. Nothing in the *Benami* Transactions (Prohibition) Act shall affect the provisions of section 53 of the TP Act as laid down in section 6. The Supreme Court has held that the *Benami* Transaction (Prohibition) Act is a piece of prohibitory legislation, and it prohibits *benami* transactions subject to stated exceptions and makes such transactions punishable, and also prohibits the right to defences against recovery of *benami* transactions as defined in section 2(a) of that Act.[1484]

42. Transfer by person having authority to revoke former transfer.—Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

ILLUSTRATION

A lets a house to *B*, and reserves power to revoke the lease if, in the opinion of a specified surveyor, *B* should make a use of it detrimental to its value. Afterwards *A*, thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B's* lease subject to the opinion of the surveyor as to *B's* use of the house having been detrimental to its value.

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(1) Principle

The principle of the section is that if a person has a right to transfer property, after exercising a right to revoke a previous transfer, a transfer of such property by him will imply an exercise of the right of revocation. The illustration shows that if the power of revocation is subject to a condition, the transfer is subject to the same condition.[1485]

If the first transfer is a gift and is revocable at the will of the donor, it is void under section 126 of TP Act.

43. Transfer by unauthorised person who subsequently acquires interest in property transferred.—Where a person fraudulently or[1486] erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

1484. *Mithilesh Kumari v Prem Behari Khare*, AIR 1989 SC 1247, p 1253. See also *Ouseph Chacko v Raman Nair Raghavan Nair*, AIR 1989 Ker 317 (a sham transaction cannot be treated as a new class of *benami* having any statutory protection under section 4 of the Benami Transactions (Prohibition) Act, 1988).

1485. See in this connection *Judah v Abdool*, (1874) 22 WR 60.

1486. Ins. by Act 20 of 1929, sec. 13.

ILLUSTRATION

A, a Hindu, who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*, representing that *A* is authorised to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B*'s dying *A* as heir, obtains *Z*. *C*, not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

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(1) Amendment

The words "fraudulently or" were inserted by the amending Act 20 of 1929.

(2) Scope

The Supreme Court in *Jumma Masjid Mercara v Kodimaniandra Deviah*[1487] has held that section 43 embodies a rule of estoppel, and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on such representation. It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled, where the transferee knows as a fact that the transferor does not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. Section 43 would then have no application, and the transfer will fail.

(3) Feeding the Estoppel and the English Law

By the English law of estoppel, "where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition, goes automatically to the earlier grantee, or as it is usually expressed, feeds the estoppel".[1488] The principle is based partly on the common law doctrine of estoppel by deed, and partly on the equitable doctrine that a man who has promised more than he can perform must make good his contract when he acquires the power of performance.

Under the common law doctrine, if a man sells property which does not belong to him and afterwards acquires such title as enables him either wholly or partially to perform his contract, he is bound to do so; and the subsequently acquired estate feeds the estoppel

1487. *Jumma Masjid Mercara v Kodimaniandra Deviah*, AIR 1962 SC 847, p 852; *Kartar Singh v Harbans Kawi*, AIR 1993 P&H 186, p 188.

1488. *Rajapakse v Fernando*, [1920] AC 892, p 897; *Fernando v Gunatillaka*, [1921] 2 AC 357, p 366.

which arises out of the vendor's covenants for title, express or implied. In *Tilakdhari Lal v Khedan Lal,*[1489] Lord Buckmaster stated the rule of estoppel by deed as follows—

> If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate, instantly passes.

The words "the estate instantly passes" are important, for under the common law rule the estate passed without any further act of the transferor, and the estoppel prevailed even against a purchaser for value. The application of the common law rule is complicated by many curious technicalities,[1490] and it is fortunate that it does not apply in India.[1491]

The law of estoppel in the case of real property is different from the law of estoppel as between persons. It is the law which operates where a grantee of land has had a conveyance of the whole interest in land from a grantor who himself at that time had only a partial interest. The former then has a right when the grantor gets the entire interest in the land, to say as against all the world that, that interest had passed to him. It does not then depend upon the mere representation by the grantor that he had the whole interest. The estate feeds the estoppel and, therefore, becomes an interest. From the moment, therefore, the transfer commences to operate on the interest acquired by the transferor in the property, it is no longer in the region of estoppel, but becomes an interest and the commencement of that interest is from the date when the transferor had acquired interest in the property.[1492]

(4) Indian Law and the Specific Relief Act

The equitable doctrine is an application of the equity enunciated in *Holroyd v Marshall,*[1493] *Collyer v Issacs*[1494] and *Tailby v Official Receiver,*[1495] and which regards that as done, which ought to be done. Under the English equity, as soon as the property is afterwards acquired, an equitable estate in it passes to the transferee. Under the Indian system, as soon as the property is afterwards acquired, no estate passes (section 54), but an obligation is annexed to the property (section 40), and the transferor becomes trustee of it for the transferee. This equitable rule is enacted in section 13(l)(a) of the Specific Relief Act, 1963, which is as follows:

Where a person contracts to sell or lets certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely: if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest.

Section 43 follows the common law rule of estoppel. The rule is that if a man, who has no title whatever to the property, grants it by a conveyance which in form carries the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. Thus, where a person having a partial interest in certain property passes a larger interest, and subsequently acquires that interest, the section applies and the transferee is

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1489. *Tilakdhari Lal v Khedan Lal,* (1920) ILR 48 Cal 1, p 20 : 47 IA 239, p 254 : 57 IC 465 : AIR 1921 PC 112.
1490. See the criticism of Sir George Jessel in *General Finance etc Co v Liberator etc Society,* (1878) 10 Ch D 15.
1491. *Zamindar Bomaya v Virappa,* (1864) 2 Mad HC 174; *Dooli Chund v Brij Bhookun,* (1880) 6 Cal LR 528; *Uday v Ladu,* (1870) 13 Mad IA 585; *Tilakdhari Lal v Khedan Lal,* (1920) ILR 48 Cal 1 : 47 IA 239 : 57 IC 465 : AIR 1921 PC 112.
1492. *Sankari Ammal v Ramachandra,* (1954) ILR Mad 791 : (1954) 2 Mad LJ 569 : AIR 1954 Mad 861.
1493. *Holroyd v Marshall,* (1862) 10 HLC 191.
1494. *Collyer v Issacs,* (1881) 19 Ch D 342.
1495. *Tailby v Official Receiver,* (1888) 13 App Cas 523.

entitled to the interest acquired by the transferor.[1496] Where a person having no title represents that he has a present and transferable title and the transferee (acting on it) takes a transfer, and the transferor subsequently acquires the property, the section applies.[1497] However, it departs from the common law rule in two respects. For (1) the estate does not pass instantly, but only at the option of the transferee; and (2) the transferee may be defeated by a purchaser for value without notice. As no estoppel can be pleaded contrary to the provisions of a statute, this "rule of feeding the estoppel" shall apply only in absence thereof, according to which 'where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition, goes automatically to the earlier grantee, or as it is usually expressed, feeds the estoppel".[1498]

Section 43 follows the equitable rule in that, until the option is exercised, it treats the transferee as the beneficiary of a trust who may be defeated by a purchaser for value without notice. However, it departs from the equitable rule in that it does not require the transfer to be effected by a further conveyance. The word "deliver" in the illustration is significant of the meaning of the section. If the transferee were enforcing the contract under section 13(l)(a) of the Specific Relief Act, 1963, the transferor would be required to execute a further conveyance. But under section 43 the exercise of the option, or the mere requisition of the transferee is sufficient to bring the subsequent interest within the scope of the original transfer. The section is a species of estoppel, and cannot be availed of by a person who knowing the facts was not misled. Questions of knowledge and belief are material and the other side must be given a chance of raising its defence, if and when the section is pleaded.[1499]

Comparison between (13)(l)(a) of the Specific Relief Act, 1963—then section 18(a) of the old Act—and section 43, has been shown in *Silla Chandra Sekharam v Ramchandra Sahu.*[1500]

(5) Sections 41 and 43 Compared

There is a substantial difference between the ambits of sections 41 and 43. Section 41 provides that a transfer by an ostensible owner cannot be avoided on the ground that the transferor was not authorised to make it, and the rule is made subject to an express provision that the transferee should take reasonable care to ascertain that the transferor had power to make the transfer, and to act in good faith before he can claim its benefit. On the other hand, section 43 enables a transferee to whom a transferor has made a fraudulent or erroneous representation to lay hold, at his option, of any interest which the transferor may subsequently acquire in the property, provided by doing so he does not adversely affect the right of any subsequent purchaser for value without notice.[1501] The provisions of sections 41 and 43 logically get engaged in voluntary transfers, and not in involuntary transfers, like auction sales.[1502]

(6) Principle Applied to Hindu Conveyances

The principle of the section has been held to apply to Hindu conveyances and to transactions before 1872, when the Indian Evidence Act enacted the equitable rule of estoppel in section 115.[1503]

1496. *Abdul Kadar v Jamebie Khatun,* (1951) ILR AP 815; *Ram Bhawan Singh v Jagdish,* (1990) 4 SCC 309, pp 313–314; *Renu Devi v Mahendra Singh,* (2003) 10 SCC 200 : AIR 2003 SC 1608.
1497. *EA Patra v ER Patra,* AIR 1980 Ori 95.
1498. *Jharu Ram Roy v Kamjit Roy,* 2009 (4) SCJ 155 : (2009) 4 SCC 60.
1499. *Kesau v Seharam,* (1951) ILR Nag 12 : AIR 1951 Nag 8.
1500. *Silla Chandra Sekharam v Ramchandra Sahu.* [1964] 7 SCR 858 : AIR 1964 SC 1789.
1501. *Sundariah v Ramasastry,* (1955) ILR Mys 1 : AIR 1955 Mys 8.
1502. *Jote Singh v Ram Das Mahto,* AIR 1996 SC 2773 : (1996) 5 SCC 524.
1503. *Krishna Chandra v Rasik Lal,* (1916) 21 Cal WN 218 : 33 IC 568.

(7) Fraudulently or Erroneously Represents

The English common law doctrine of estoppel by deed was extended by equity to estoppel by representation. This extension dates from *Pickard v Sears.*[1504] The rule in India is the rule as extended by equity, and it is enacted in section 115 of the Indian Evidence Act, 1872, and is explained in the leading case of *Sarat Chunder v Gopal Chunder.*[1505] As the equitable doctrine of estoppel requires a man to make his representation good, the words "fraudulently or erroneously represents" have been said to make estoppel the foundation of the section, and in the absence of such representation, the section does not apply.[1506] Thus the sine qua non for application of section 43 is that at the initial stage the person should have fraudulently or erroneously represented that he is authorized to transfer certain immovable property or professes to transfer such property for consideration. Only if this pre-condition is satisfied, the question of option of the transferee arises in case the transferor acquires any interest in the property at any time during which the contract of transfer subsists.[1507] The representation need not be intentionally false.[1508] It requires an erroneous misrepresentation or a fraudulent representation,[1509] and whether it is erroneous is a question of fact.[1510] It need not be in a particular form. It can be by word of mouth or by a document.[1511] Where a vendor sold as agent of a Hindu widow and then became her heir, the section did not operate, for he had sold as agent and had made no erroneous representation.[1512] However, when a Mahomedan mortgaged his wife's property purporting to act on a power of attorney which was not proved, the share which he inherited at her death was liable for the mortgage.[1513] A *ghatwal* mortgaged land which he held on restricted tenure alleging it to be his *jagheer,* and subsequently got a *mokarari* lease of it. He was estopped from pleading his subsequent title, and the mortgagee got the benefit of the *mokarari* interest.[1514] Two brothers mortgaged their interest in a tank in which their cousin had a half share. They subsequently acquired their cousin's share by inheritance, but the mortgagee who had got a decree for sale on his mortgage, purchased the property and sold it to the plaintiff. The plaintiff did not get the benefit of the cousin's share as there had been no representation, erroneous or fraudulent.[1515] But when the head of a joint Hindu family mortgaged joint family property representing that he had a right to do so, he was bound to make good his representation to the extent of a share which came to him afterwards on partition.[1516]

1504. *Pickard v Sears,* (1837) 6 A&E 469.
1505. *Sarat Chunder v Gopal Chunder,* (1893) ILR 20 Cal 296 : 19 IA 203 (PC).
1506. *Jagan Nath v Dibbo,* (1908) ILR 31 All 53 : 1 IC 818; *Pandiri Bangaram v Karumoory,* (1910) ILR 34 Mad 159 : 8 IC 388; *Ladu Narain v Gobardhan,* (1925) ILR 4 Pat 478 : 86 IC 721 : AIR 1925 Pat 470; *Krishna Paramada v Dhirendra,* (1929) ILR 56 Cal 813 : 56 IA 74 : 113 IC 465 : AIR 1929 PC 50; *Jabedali v Prasanna,* (1923) 27 Cal WN 433 : 75 IC 281 : AIR 1923 Cal 423; *Ram Bharosey v Bhagwan Din,* AIR 1943 Oudh 196 : (1943) Oudh WN 5 : 204 IC 543; *Kanthimathinatha v Vayyapuri,* AIR 1963 Mad 37; *Abdul Qadamiya Sheikh v Jagannath Murlidhar Rathi,* AIR 2002 Bom 413.
1507. *Agricultural Produce Marketing Committee v Bannamma,* (2015) 5 SCC 691 : AIR 2014 SC 3000 : 2014 (8) SCALE 707.
1508. *Hattikudur v Andar,* (1915) 28 Mad LJ 44 : 27 IC 785.
1509. *Jamuna Mayee v Koimaindra,* AIR 1953 Mad 427.
1510. *Saradamoyi v Atul Chandra,* 68 IC 203 : AIR 1923 Cal 165.
1511. *Ganeshdas v Kamlabai,* AIR 1952 Nag 29.
1512. *Syed Nurul Hossein v Sheosahai,* (1893) ILR 20 Cal 1 : 19 IA 221.
1513. *Aisha Bibi v Mahfuz-un-nissa,* (1924) ILR 46 All 310 : 78 IC 180 : AIR 1924 All 362. See also *Hanuman Das v Gursahay Singh,* (1913) 18 Cal LJ 181 : 21 IC 700.
1514. *Mokhoda Debi v Umesh Chandra,* (1907) 7 Cal LJ 381.
1515. *Saradamoyi v Anil Chandra,* 68 IC 203 : AIR 1923 Cal 165.
1516. *Kamla Prasad v Nathuni,* 66 IC 149 : AIR 1922 Pat 347; *Ram Ratan v Chaudhri,* (1923) 26 OC 245 : 71 IC 581 : AIR 1923 Oudh 265; *Ramaswamy Pattamali v Lakshmi,* (1962) ILR 2 Ker 130 : AIR 1962 Ker 313.

Again, the father of a joint family consisting of himself and two sons sold family property representing that it was his self-acquisition. The vendee sued for possession and pending the suit one of the sons died. The vendee got the benefit of this accession to the father's estate, and was awarded half of the property.[1517] So also, where a member of a joint Hindu family mortgaged his undivided share in the joint property in favour of another person, alleging that he was separate from the rest of the members, and thereafter there was a partition giving such member certain property, it was held that the mortgage lien would be transferred to the property which fell to such member's share.[1518] No fraudulent or erroneous representation was found when the sale showed that transferor had 8 anna share in the land and he sold only that much.[1519]

ILLUSTRATION

A and *B* were two brothers and effected a partition at which the equity of redemption of a mortgage shop was allotted to *A*. In 1903, *A* had disappeared and *B* sold the equity of redemption to *C*, erroneously representing that it was ancestral property to which he was solely entitled. In 1924, *C* sued to redeem the mortgage of the shop and was met with the defence that he got no title from *B* as *A* was alive in 1903 and the equity of redemption belonged to him. It was proved that *A* died in 1914 leaving no heir except *B*. *C* was entitled to redeem as he was owner of the equity of redemption by virtue of this section.[1520]

A lady who had already executed a settlement of the suit property in favour of *V* on certain conditions cancelled it (though no such power had been reserved), and executed a sale-deed in favour of *G*. Thereafter, the settlement lapsed because of non-fulfilment of the conditions of *V*. The purchaser from *G* filed a suit for declaration of title and possession. It was held that there was an erroneous representation by the lady to *G* that the lady was authorised to transfer the property. As the lady (by failure of the settlement) subsequently acquired an interest in the property, the transferee was entitled to that interest, as he had not rescinded the transfer which was still subsisting. The case squarely fell within the terms of the section.[1521] Similarly, a Muslim woman transferring property that she purchased with the consideration received after relinquishing her *spes successionis* would not be allowed to claim her ineligibility to transfer the same and the transfer would be valid.[1522] Where the son sold the property belonging to his mother under a registered deed on her behalf and delivered the possession to B despite the fact that he was not authorized to make the said transfer, it was held that the transferee was entitled to benefit of section 43, containing the rule of estoppel, as he had acted on the representation made by the son and paid consideration.[1523]

Where the mother sold property in which her minor son had half share and the son successfully challenged the alienation of his share and obtained a decree but died thereafter, it was held that though the mother inherited the property of her son on his death, the vendee could not invoke section 43 in respect of his share as the original contra did not subsist in view of the decree which was obtained by the son.[1524] Where a person mortgages property which he has no right to mortgage and the property

1517. *Muthuswami Pillai v Sandana Velan,* (1927) 53 Mad LJ 218 : 101 IC 619 : AIR 1927 Mad 649; Cf *Sundar Lal v Ghissa,* (1929) 27 All LJ 1087 : 118 IC 705 : AIR 1929 All 589.
1518. *Kharag Narayan v Janki Rai,* (1936) ILR 16 Pat 230 : 169 IC 906 : AIR 1937 AP 546.
1519. *Krishna Laxman Bhatkar v Vithal Ganesh Athavale,* AIR 2004 Bom 418 : (2004) 3 Bom CR 835 : (2004) 1 All MR 406.
1520. *Sundar Lal v Ghissa,* (1929) 27 All LJ 1087 : 118 IC 705 : AIR 1929 All 589.
1521. *Velluswami Thevar v Ganesa Thevar,* (1976) 2 Mad LJ 115.
1522. *Jameela v Basheer,* AIR 2012 Ker 107 : (2012) 2 Kar LJ 273.
1523. *Tulsa v Sita,* 2015(6) ABR 565.
1524. *Kartar Singh v Harbans Kaur,* AIR 1993 P&H 186, p 189.

subsequently becomes vested in him, the mortgage will operate against him under the provisions of this section.[1525] When a lessor erroneously represents that he is authorized to lease a property and grants a lease of it, and afterwards acquires that property, the lessee is entitled to have the property from the lessor.[1526] Where a partner sells the property of the firm in his own right and subsequently on the dissolution of the firm is allotted the same property, this section would apply.[1527] Where the holder of *"sir"* land (*"sirdar"*) proposes to acquire *bhumidhari* rights by depositing money, he does not acquire title immediately on deposit of money, but acquires it only when the *bhumidhari* certificate is issued. Nevertheless, if he effects the sale after such deposit, then section 43 applies, if he makes an erroneous representation that he was authorised to sell. In such a case, the transfer cannot be challenged by the son of the transferor.[1528] In a case where one of the daughters of the original owner was in exclusive possession of the property which she purported to transfer; the Supreme Court held that the transferee was entitled to the property under section 43, which substantially satisfies the equitable principle of feeding the grant by estoppel. The partition, between the daughters could be presumed to have been made with the consent of the other. In any case, after the death of her sister, the last limited owner, (transferor) got exclusive possession of the entire estate, and section 43 would apply.[1529]

ILLUSTRATIONS

(1) A Hindu wife executed a mortgage of her husband's property as if it belonged to her, five years after he had disappeared. The mortgage was invalid as the presumption of the death does not arise until seven years. But when the mortgagee filed a suit more than seven years later, the mortgage was valid, as she then had acquired a widow's estate.[1530]

(2) *A, B* and *C* owned a property in equal shares. *A* and *B* leased the whole property to *B* as if they were entitled to it to the exclusion of *C*. *C* died and bequeathed his share to *A* and *B*. *D*'s title as lessee of the whole property was perfected.[1531]

(3) *A* obtained property from *B* by way of exchange. At the time of the exchange *B* had only a half share although he professed to transfer the whole. When *B* subsequently purchased the remaining half it was available to perfect *A*'s title.[1532]

(4) A seller, who had no *Bhumidhar* rights on date of sale made an erroneous statement in sale deed to the effect that he had these rights. After 13 years, he acquired the *Bhumidar* rights.

It was held that such rights would enure to the transferee as sale deed remained intact for the said period.[1533]

Transferee is not entitled to protection under section 43 when there has been no pleading that there was fradulent or erroneous representation by transferor consequent to which no issue was framed.[1534] One must make a specific pleading regarding fradulent or erroneous representation made. Where the tenant knew that the person inducting him is

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1525. *Sarju Prasad v Bindeshri,* (1911) ILR 33 All 382 : 9 IC 298; *Eshaq Lal v Balla,* 122 IC 177 : AIR 1930 All 115; *Villa v Petley,* 148 IC 721 : AIR 1934 Rang 51; *Ram Japan v Jagesara Kuer,* 182 IC 829 : AIR 1939 Pat 116; *Subbarayudu v Venkatasubbiah,* AIR 1960 AP 592.
1526. *Protab Chandra v Judisthir Das,* (1914) 19 Cal LJ 408 : 23 IC 69; *Aditya Prasad v Parmananda,* (1919) 4 Pat LJ 505 : 53 IC 96; *Jyoti Prasad v Chandra Kanta,* 171 IC 438; *Jagmohan Tewari v Rain Pher Tewari,* (1955) 53 All LJ 760; *Rusi v Goodale,* [1957] Ch 33 : [1956] 3 All ER 373.
1527. *Peyarelal v Misri,* (1940) ILR All 674 : (1940) All LJ 592 : 192 IC 281 : AIR 1940 All 453.
1528. *Rampyari v Ram Narain,* AIR 1985 SC 694 : (1985) 2 SCC 162.
1529. *Brahma Sonathan Dhanna Mahamandal v Prem Kumar,* AIR 1985 SC 1102 : (1985) 3 SCC 350.
1530. *Mahadeo v Har Buksh,* 106 IC 489 : AIR 1928 Oudh 13.
1531. *Sulin Mohan v Raj Krishna,* (1921) 25 Cal WN 420 : 60 IC 826 : AIR 1921 Cal 582.
1532. *Bhairab Chandra v Man,* (1921) 33 Cal LJ 184 : 60 IC 819 : AIR 1921 Cal 748.
1533. *Sachchidand Pandey v Ram Phar Singh,* AIR 2004 All 232.
1534. *Ganesh Patra v Banabihari Patra,* AIR 2004 Ori 23 : (2003) 96 CLT 436.

not the landlord and hence, was never misled by any false or erroneous representation, it was held that section 43 has no application.[1535]

(8) Transferee Acts on the Representation

The section does not expressly provide that the transferee should have been misled by the erroneous representation, for, as has been said, there is no estoppel by a false statement when the truth is known to both parties.[1536] The right of a transferee arises from the fact that he has not got what he has paid for. If he knew that he was buying a defective title, he has paid less, and got what he bargained for.[1537] That is also the position at common law, where it is well-settled that no estoppel can arise where the true position is apparent in the document itself.[1538] If both parties are aware of the title of the transferor, section 43 does not apply.[1539] A transferee is entitled to the benefit of section 43 if he believed in the representation made by the vendor and was not aware of the true interest of the vendor, with reference to the property.[1540] Where it was found that there were no fraudulent or erroneous representations and the parties were fully aware of the on-going proceeding in revenue court, merely because the land reverted to the vendor making him the owner, would not entitle the vendee, the protection of section 43.[1541]

Where one brother having only the leasehold right in his favour sold property in favour of another brother who had knowledge of the fact that he does not have absolute ownership but only the leasehold rights, he cannot later claim the benefit of section 43 and pray that newly acquired absolute rights be transferred in his favour.[1542] In *Mulraj v Indar Singh,*[1543] it was observed that the word "represents" used in section 43 clearly shows that the transferee must have acted on the representation, and it has been so held in numerous decisions.[1544] It is submitted that the same conclusion can perhaps be based on the words "fraudulently or erroneously represents"; a false statement known to be so can certainly not be fraudulent, and it is difficult to describe it even as an erroneous representation. In two cases, however, the contrary view has been taken. In *Parma Nand v Champa Lal,*[1545] a Full Bench of the Allahabad High Court overruled *Mulraj v Indar Singh,*[1546] and *Jagernath v*

1535. *Sri Narayan Chandra Saha v Dipali Mukherjee,* AIR 2002 Cal 229 : (2002) 2 Cal LT 5 : (2002) 2 CHN 14.
1536. *Mohori Bibee v Dhurmodas Ghose,* (1905) ILR 30 Cal 539 : 30 IA 114; *Prasanna Kumar v Srikantha Rout,* (1913) ILR 40 Cal 173 : 16 IC 365; *Dwarka Prasad v Nasir Ahmed,* 78 IC 850 : AIR 1925 Oudh 16; *Bhagwan Din v Muhammad Unus Khan,* (1934) ILR 9 Luck 359 : 148 IC 367; AIR 1934 Oudh 112; *Maina v Bhagwati Prasad,* (1936) All LJ 1230 : 164 IC 193 : AIR 1936 All 557; *Ouseph v Govindan Kutty,* AIR 1972 Ker 96.
1537. See, however, *Parma Nand v Champa Lal,* (1956) ILR 1 All 313 : (1956) All LJ 1 : AIR 1956 All 225.
1538. *Halsbury's Laws of England,* 3rd Edn, vol 15, p 216; *American Jurisprudence,* p 612.
1539. *EA Patra v ER Patra,* AIR 1980 Ori 95.
1540. *Banwari Lal v Sudhakaran Dayal,* AIR 1973 SC 814; *Trilochan Behera v Naiko Behra Subhadra,* AIR 1991 Ori 80, p 82.
1541. *Abdul Dadamiya Shaikh v Jagannath Muralidhar Rathi,* AIR 2002 Bom 413 : (2003) 1 Bom CR 537.
1542. *Ashok Chinnappa Metagud v Annapurna,* AIR 2018 Kant 1 : 2016 (1)MhLJ 561 : LNIND 2015 NGP 321.
1543. *Mulraj v Indar Singh,* (1926) ILR 48 All 150 : 92 IC 471 : AIR 1926 All 102.
1544. *Pandiri Bangaram v Karumoory,* (1933) ILR 34 Mad 159 : 8 IC 388; *Lakshmi Narasayyar v Meenakshi,* (1913) Mad WN 707 : 52 IC 992; *Chakrapani v Gayamoni,* 48 IC 228; *Hattikudur v Andar,* (1915) 28 Mad LJ 44 : 27 IC 785; *Kodi v Moidin,* (1918) 35 Mad LJ 120 : 49 IC 147; *Dwarka Prasad v Nasir Ahmed,* 78 IC 850 : AIR 1925 Oudh 16; *Gopi Nath v Rup Ram,* (1930) 28 All LJ 926 : AIR 1930 All 786; *Sundar Lal v Ghissa,* (1929) 27 All LJ 1087 : 118 IC 705 : AIR 1929 All 589; *Ladu Narain v Gobardhan,* (1925) ILR 4 Pat 478 : 36 IC 721 : AIR 1925 Pat 470; *Contra Jag Mohan v Sita Raj,* 20 IC 72 : 39 IC 186.
1545. *Parma Nand v Champa Lal,* (1956) ILR 1 All 313 : (1956) All LJ 1 : AIR 1956 All 225.
1546. *Mulraj v Indar Singh,* (1926) ILR 48 All 150 : 92 IC 471 : AIR 1926 All 102.

Dhanpati,[1547] and held that a transferee of a certain shop, who knew that the transferor was only the owner of a half-share in the shop, was entitled under section 43 to the other half-share when the transferor became entitled to it. The court held that there was nothing in section 43 which excluded its operation where the transferee was aware of the true position. A similar view has also been expressed by the Andhra Pradesh High Court.[1548] Both these judgments held that the knowledge of the transferee is immaterial, unless it is found that the transfer was illegal or collusively entered into to defeat the provisions of law or is opposed to public policy. It is submitted, with respect, that both these judgments are erroneous. In any event, it is difficult in practice to conceive of many cases where a transferee would, with the knowledge of the true position, enter into such a transaction except to circumvent a provision of the law, or for some other purpose opposed to public policy.[1549]

ILLUSTRATION

A mortgaged to *B* a half-share in family property in which he was entitled only to a third share. Subsequently, *A*'s father died and *A* became owner of a half-share. But as *B* knew that *A* had only a third share he could only enforce his mortgage against a third share.[1550]

Similarly, when a mortgagee of land attached to a *deshgat watan* knew that the mortgagor could only convey a life interest, the subsequent enlargement of the mortgagor's interest did not enure for his benefit, for he only took the estate the mortgagor was capable of conveying at the date of the mortgage.[1551] Where evidence regarding the representation is vague and the facts are known to the purchasers, section 43 cannot apply.[1552] Where the transferee knows as a fact that the transferor does not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer, and in such a situation section 43 would have no application.[1553]

It is no defence to the person estopped to plead that the transferee made no proper inquiry.[1554]

Section 43 does not, like section 41, impose upon the transferee the duty of taking reasonable care.[1555] No duty is cast on the vendee to make any inquiry and notice to the vendee of encumbrance does not bar the application of the section.[1556] In *Bloomenthal v Ford,*[1557] Lord Halsbury said that a person who has made a mis-statement of fact that has been acted upon has no right to say "I told you so and so you ought not to have believed me. You were too great a fool. I had a right to mislead you because you were too great a fool."

1547. *Jagernath v Dhanpati,* 151 IC 809 : AIR 1934 All 969.
1548. *Veeraswami v Durga Venkata Subbarao,* AIR 1957 AP 288. The observations are *obiter.*
1549. Some of the illustrations given by J Agarwala in *Parma Nand's* case (1956) ILR 1 All pp 316–317 are, it is submitted, of transfers designed to defeat the provisions of law.
1550. *Pandiri Bangaram v Karumoory,* (1911) ILR 34 Mad 159 : 8 IC 388.
1551. *Gangabai v Baswant,* (1910) ILR 34 Bom 175 : 5 IC 866; Cf *Kunwar Bahadur v Gilsher Khan,* AIR 1937 All 287.
1552. *Banwarlal v Subhadarshan Dayal,* AIR 1973 SC 814.
1553. *Jumma Masjid v Kodimaniandra Deviah,* AIR 1962 SC 847; *Ram Pyare v Ram Narain,* AIR 1985 SC 694; *Johri v Mahila Draupati,* AIR 1991 MP 340, pp 344, 345. See also *Ganeshdas v Kamlabai,* AIR 1952 Nag 29; *Jagat Narain v Laljee,* AIR 1965 All 504.
1554. *Gopi Nath v Rup Ram,* (1930) 28 All LJ 926 : 133 IC 17 : AIR 1930 All 786; *Madirazu v Bommadevara,* AIR 1946 Mad 107.
1555. *Maung Ba Tin v Maung Po Kin,* (1935) 14 Bur LR 329; *Ganga Prasad v Raghubansa,* (1936) Oudh WN 1241 : 165 IC 793 : AIR 1937 Oudh 127.
1556. *Zogu Ram v Venkata Kreshnayya,* AIR 1946 Mad 107 : (1945) 2 Mad LJ 478 : 224 IC 425.
1557. *Bloomenthal v Ford,* [1897] AC 156, p 162.

ILLUSTRATION

A transfers property to *B* falsely representing that he is solely entitled to it. *B* believes *A*, but if he had made proper inquiry into the title, he would have discovered that A's cousin is owner of a share. *A* inherits his cousin's share. In spite of his negligence, *B* is entitled to the share.

(9) For Consideration

The section does not apply if the transfer is not for consideration;[1558] it does not apply to a transaction of gift.[1559]

(10) Invalid Transfer

In order to get the benefit of the section, two conditions which must be satisfied are—(1) the contract of transfer was made by a person who was competent to contract; and (2) the contract would be subsisting at the time when a claim for recovery of the property is made.[1560] The section will not apply if the transfer is invalid as being forbidden by law or contrary to public policy. This follows from the principle that there can be no estoppel against an Act of the legislature and when considerations of public interest are involved.[1561] Thus, if a minor transfers, the section has no application.[1562] Sale by a lunatic being void from its inception, the purchaser cannot get any relief under section 43.[1563] So also, when the transfer required the previous permission of the Collector, and no such permission was obtained.[1564] Where the settlement was invalid and inoperative not on account of any fraudulent or erroneous representation, but on account of the subsisting lease in respect of the land and as the landlord could not superimpose a second lease in respect of the tenanted property, it was held that no interest could be created under the subsequent document, and, therefore, there could be no question of feeding the estoppel.[1565] In *Barrow's case*[1566] VC Bacon said that:

> estoppel only applies to a contract *inter partes*, and it is not competent to for the parties to estop themselves or anybody else in the face of an Act of Parliament.

No equities can arise out of a transaction that is forbidden on grounds of public policy.[1567] In *Annada v Gour Mohan*,[1568] J Mookerjee said that the principle of feeding the estoppel has no application when the contract of assignment refers to property which has been expressly rendered inalienable by the legislature. The interest of a Hindu reversioner is a *spes successionis*, and is not transferable. An agreement to transfer, or a transfer of, such

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1558. *Jaggan Nath v Dibbo*, (1908) ILR 31 All 53 : 1 IC 818; *Deoman v Atmaram*, AIR 1948 Nag 122; *Sadhu Saran v Sheo Prasad*, (1959) ILR 37 Pat 1078 : AIR 1959 Pat 278.
1559. *Ganga Baksh v Madho Singh*, (1955) ILR 1 All 587 : (1955) All LJ 162 : AIR 1955 All 587.
1560. *Sheo Ram v Ganesh Shanker*, (1954) All LJ 92 : AIR 1954 All 452.
1561. *Delhi Development Authority v Ravindra Mohan Aggarwal*, AIR 1999 SC 1256.
1562. *Ajudhia Prasad v Chandan Lal*, AIR 1937 All 610.
1563. *Johri v Mahila Draupati*, AIR 1991 MP 340, p 345.
1564. *Deoman v Atmaram*, AIR 1948 Nag 122.
1565. *Ram Bhawan Singh v Jagdish*, (1990) 4 SCC 309, p 314.
1566. *Barrow's case* (1880) 14 Ch D 432, p 441; *Sitharama v Krishnaswami*, (1915) ILR 38 Mad 374; *Sanjib Chandra v Santosh Kumar*, (1922) ILR 49 Cal 507 : 69 IC 877 : AIR 1922 Cal 436.
1567. *Sannamma v Radhabhayi*, (1918) ILR 41 Mad 418 : 43 IC 935; *Ramasami v Ramasami*, (1907) ILR 30 Mad 255; *Ramayya v V Jagannadhan*, (1916) ILR 39 Mad 930 : 30 IC 889; *Gopala Dasu v Rami*, (1921) ILR 44 Mad 946, p 948 : 64 IC 328 : AIR 1921 Mad 410; *Ramayya v Dhara Satchi*, (1913) 25 Mad LJ 635 : 21 IC 600.
1568. *Annada v Gour Mohan*, (1921) ILR 48 Cal 536 : 59 IC 476 : AIR 1921 Cal 501 : on app (1923) ILR 50 Cal 929 : 50 IA 239 : 74 IC 499 : AIR 1923 PC 189.

an interest does not become effective when the succession opens out.[1569] However, in two cases the Madras High Court has held that if the reversioner transfers, not his reversionary interest, but the land *in praesenti* as if he were absolutely entitled, section 43 will apply to validate the transfer when he succeeds to the property.[1570] This distinction seems to have the support of the illustration to the section where *A* transfers field *Z* as to which he has only an expectancy of succession. In another case,[1571] the Madras High Court has dissented on the ground that such a distinction would defeat the provisions of section 6(a). The Allahabad High Court, however, has followed the earlier case decided by Madras High Court holding that the illustration to section 41 is not repugnant to section 6 of the TP Act.[1572]

The provisions of sections 6(1) and section 43 "operate on different fields, and under different conditions, and there is no ground for reading a conflict between them or for cutting down the ambit of one by reference to the other; both of them can be given full effect on their own terms, in their respective spheres."[1573]

A case decided by Rajasthan High Court, though it does not purport to be a case on section 41, is of interest. It holds that where a landlord is given possession by mistake of court (in disregard of a stay order staying execution of the eviction decree passed, against the tenant), the landlord's possession is illegal, and any new tenant inducted by the landlord cannot claim restitution as a bona fide transferee.[1574]

It was held by Supreme Court in *Jumma Masjid v Kodimaniandra Deviah,*[1575] affirming a Full Bench decision of the Madras High Court, that the section applies to all transfers which fulfil the conditions prescribed therein, "and it makes no difference in its application, whether the defect of title in the transferor arises by reason of his having no interest whatsoever in the property, or of his interest therein being that of an expectant heir".[1576] In that case, the Supreme Court held that even where a person having a mere *spes successionis* represents that he is the owner thereof, and transfers it to another, he is precluded from questioning the validity of the transfer, if he later on succeeds thereto, or acquires an interest therein. In *Delhi Development Authority v Ravindra Mohan Aggarwal,*[1577] a plot of land within the green belt zone was auctioned. The vice-chairman of Delhi Development Authority accepted the bid. Subsequently, the zonal plan was changed, and the said plot of land was converted for residential purpose. The Supreme Court held that since the initial auction was bad in law, and since there cannot be any estoppel against statute, the subsequent conversion would not entitle the bidder, the protection of section 43.

1569. *Jagannada v Rajah Prasada Rao,* (1916) ILR 39 Mad 554 : 29 IC 241; *Dwarka Prasad v Nasir Ahmed,* 78 IC 850 : AIR 1925 Oudh 16; *Bhairon v Baldeo* (1903) 7 OC 98; *Bindeshwari Singh v Har Narain,* (1929) ILR 4 Luck 622 : 127 IC 20 : AIR 1929 Oudh 185; and see *Jagat Narain v Laljee,* (1965) All LJ 255 : AIR 1965 All 504; *Annapurna v Munshi,* (1967) All LJ 315 : AIR 1967 All 531.
1570. *Alamanaya v Murukuti,* (1915) 29 Mad LJ 733 : 29 IC 439; *Vellayammal v Palaniyandi Ambulam,* (1933) 65 Mad LJ 772 : 147 IC 381 : AIR 1933 Mad 856.
1571. *Official Assignee of Madras v Sampath Naidu,* (1933) 65 Mad LJ 588 : 145 IC 965 : AIR 1933 Mad 795; *Ram Bharosey v Bhagwan Din,* AIR 1943 Oudh 196 : (1943) Oudh WN 5 : 204 IC 547.
1572. *Shyam Narain v Mangal Prasad,* (1935) All LJ 13 : 153 IC 163 : AIR 1935 All 244.
1573. *Jumma Masjid v Kodimaniandra Deviah,* AIR 1962 SC 847, p 850; *Damodaran Kavirajan v T D Rajappan,* AIR 1992 Ker 397, p 401.
1574. *Mangi Lal v Kailash Chand,* AIR 1982 Raj 269.
1575. *Jumma Masjid v Kodimaniandra Deviah,* [1962] 2 SCR 554 (Supp) : AIR 1962 SC 847; affmg (1953) ILR Mad 427 : (1953) 1 Mad LJ 388 : AIR 1953 Mad 637 and overruling *Official Assignee of Madras v Sampath Naidu,* (1933) 65 Mad LJ 588; *Arulayi v Jagadeesiah,* (1963) 2 Mad LJ 365 : AIR 1964 Mad 122.
1576. [1962] 2 SCR 554, p 561 (Supp).
1577. *Delhi Development Authority v Ravindra Mohan Aggarwal,* AIR 1999 SC 1256 : (1999) 3 SCC 172.

The section does not apply to transfers forbidden by law on grounds of public policy. Thus a mortgage by a proprietor disqualified under the Jhansi Encumbered Estates Act, 1882, cannot be enforced after the disqualification has been removed.[1578] A purchaser of service *inam* land acquires no title after the land has been enfranchised.[1579] The court cannot under the guise of section 43 uphold a transfer forbidden by law, but if the restriction on alienation is not an absolute restriction founded on considerations of public policy, but is only imposed by agreement, grant, or decree of court, the section will apply.[1580]

A mortgage by a judgment debtor of property which is the subject of execution by the Collector is absolutely void, and is not effective against any residue that might be left after the Collector's regime has ended.[1581] On the other hand, a mortgage by an undischarged insolvent becomes effective if the property revests in the insolvent after his discharge.[1582]

Where grant is subjected to statutory restrictions which bar alienation of the granted land, the transferee would not get a valid title to the land by invoking the doctrine of feeding the estoppel, or by virtue of section 43.[1583] If a particular piece of property has been declared by a statute to be specifically inalienable such as *Bhumidar* land, section 43 does not apply.[1584]

(11) Punjab

The principle of the section has been applied to Punjab where a transfer of a *spes successionis* is valid (section 6(a)). Therefore, a mortgage of property to which the mortgagor has only a reversionary interest becomes effective when the succession opens out.[1585]

(12) Covenants for Title

In *Basava Sankaran v Anjaneyulu,*[1586] an Official Receiver sold property before an order vesting it in him had been made, and the implied covenant of title was treated as an erroneous representation, and under section 43 the title of the purchaser was held to be complete when the vesting order was subsequently made. It would appear, however, that the representation under this section should be distinct from the transfer and the covenant in the transfer.

(13) When there is no Representation

As stated above, the section does not apply to cases where there has been no erroneous or fraudulent representation as there is no estoppel if truth is known to both the parties.[1587]

1578. *Radha Bai v Kamod,* (1908) ILR 30 All 38.
1579. *Sannamma v Radhabhayi,* (1918) ILR 41 Mad 418; *Ramayya v Dhara Satchi,* (1913) 25 Mad LJ 635 : 21 IC 600; *Narahari v Korithan,* (1913) 24 Mad LJ 462 : 19 IC 881; *Ramayya v Jagannadhan,* (1916) ILR 39 Mad 930 : 30 IC 889.
1580. *Balbhaddar v Kusehar Das,* (1928) ILR 3 Luck 636 : 110 IC 357 : AIR 1928 Oudh 344; *Kusehar v Balbhaddar,* 107 IC 872 : AIR 1928 Oudh 153.
1581. *Gaurishankar v Ghinnumaya,* (1918) ILR 46 Cal 183 : 45 IA 219 : 48 IC 312 dissenting from *Magniram v Bakubai,* (1912) ILR 36 Bom 510 : 16 IC 570.
1582. *Rup Narain Singh v Har Gopal Tewari,* (1933) ILR 55 All 503 : (1933) All LJ 475 : 143 IC 836 : AIR 1933 All 449; *Diwan Chand v Manakchand,* (1934) ILR 16 Lah 392 : 155 IC 938 : AIR 1934 Lah 809.
1583. *M C Lakshminarasappa v Asstt Commr, Chikkaballapur,* AIR 1993 Kant 326, p 331.
1584. *Ramkali v State of Uttar Pradesh,* AIR 2009 (NOC) 190 (All).
1585. *Autar Singh v Lal Singh,* 155 IC 880 : AIR 1934 Lah 996.
1586. *Basava Sankaran v Anjaneyulu,* (1927) ILR 50 Mad 135 : 99 IC 8 : AIR 1927 Mad 1 followed in *Muthiah Chettiar v Doraswami,* (1927) Mad WN 794 : 106 IC 641 : AIR 1927 Mad 1091; Cf *Narasimudu v Basava Sankaram,* (1925) 47 Mad LJ 749 : 85 IC 439 : AIR 1925 Mad 249.
1587. *Jharu Ram Roy v Kanijet Roy,* (2009) 4 SCC 60; See also *Shanti Sports Club v UOI,* (2009) 15 SCC 705 : (2009) 11 JT 311, wherein it was held that the rule "no one can pass a better title than what he himself possesses", applies in cases property is transferred after its acquisition. Such transfers are void and the remedy in those cases is to claim compensation.

But the section has its origin in two different equities, one of which does not involve misrepresentation. These are—

(1) The equity of estoppel with regard to the passing of property whereby the transferor is estopped from saying that the after-acquired interest did not pass; and

(2) the equity with regard to the personal obligation which compels the transferor to perform his contract when he is able to do so on the acquisition of the subsequent interest.

The first equity compels a man to make good his representation, and this comes very near the second equity which compels a man to perform according to his ability when performance becomes possible. The apex court has held that if a person pretends to be the owner of the property and subsequently becomes the owner, the transfer by him conveys a good title.[1588] Cases under the second equity where there is no representation may, therefore, bear a very close resemblance to cases under the section. The following are instances of the application of this second equity which is outside the rule of estoppel. In *Viraya v Hanumanta,*[1589] a Hindu coparcener agreed to sell family property as if he was the owner. The purchaser sued to enforce the transfer, and pending the suit one of the two other coparceners died. The purchaser was entitled to half the property. In *Goya Din v Kashi,*[1590] the plaintiff was suing for pre-emption, and in order to raise money for the litigation, in anticipation of a decree, mortgaged the suit property. After he obtained a decree and got possession, equity treating that as done which ought to be done, gave the mortgagee a charge on the property and placed him in the position of a mortgagee. In *Deb Nath Moral v Sashi Bhusan Moral,*[1591] a landlord made a settlement of a non-transferable holding. The settlement was invalid at the time it was made because the *raiyat* had not abandoned the holding. But the subsequent abandonment of the holding by the *raiyat* validated the settlement. In *Loot Narain v Showkie Lal,*[1592] a *ghatwal* mortgaged his *ghatwal* land by *zuripeshgi* lease, and shortly after the mortgage the *zamindar* got a decree by which the *ghatwal* tenure was extinguished and the mortgagee evicted. Some years later, the *zamindar* granted the *ghatwal* a permanent lease of the same land. The *ghatwal* was held liable to make good the *zuripeshgi* lease out of his new estate. In *Surendra v Rajendra,*[1593] a *ghatwal* mortgaged property which he held on restrictive tenure. The restriction was subsequently removed and as to the enlarged interest J Mookerjee said that the deed was operative as an executory agreement which attaches to the property the moment the restriction is removed, and is transferred by equity to the mortgagee. This case is very similar to *Mokhoda Debi v Umesh Chandra,*[1594] which has already been referred to, but in which there was an erroneous representation by the *ghatwal* and which was, therefore, decided under section 43. However, where the plaintiff knew that the suit land that he had purchased did not belong to the vendor but to his grandmother and consequently, he had no title to the property section 43 would have no application and the plaintiff would not have any benefit of section 41 or section 43.[1595] Similarly, where the vendor was the cultivating

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1588. *Hardev Singh v Gurmail Singh,* AIR 2007 SC 1058 : (2007) 2 SCC 404.
1589. *Viraya v Hanumanta,* (1890) ILR 14 Mad 459; *Randhir Singh v Bhagwan Das,* (1913) ILR 35 All 541 : 21 IC 654.
1590. *Goya Din v Kashi,* (1907) ILR 29 All 163; *Ram Lal v Shiama Lal,* (1913) 29 All LJ 73 : 131 IC 38 : AIR 1931 All 275; *Bansidhar v Sant Lal,* (1888) ILR 10 All 133.
1591. *Deb Nath Moral v Sashi Bhusan Moral,* (1934) 37 Cal WN 1144 : 58 Cal LJ 145 : 149 IC 1099 : AIR 1934 Cal 82.
1592. *Loot Narain v Showkie Lal,* (1878) 2 Cal LR 382.
1593. *Surendra v Rajendra,* (1918) 27 Cal LJ 289 : 43 IC 740.
1594. *Mokhoda Debi v Umesh Chandra,* (1907) 7 Cal LJ 381.
1595. *Atal Srivastava v Dev Prasad,* AIR 2012 Chh 117.

tenant of the land in question and the plaintiff vendee was very much aware of absence of title in vendor vis-a-vis land, once he had chosen to transact with vendor, knowing fully well that latter did not hold title to land, he cannot seek enforcement of agreement to sell and subsequent acquisition of title by vendor would not enure to benefit of plaintiff.[1596]

A very good instance of the distinction between the section and this equity is the case of *Rustom Ali v Abdul Jubbur.*[1597] *A* transferred a field to his wife *B* in satisfaction of dower and another debt. But at the time of the transfer, the owner of the field was *C*, the sister of *A*. *C* sold the field to a party who sold it back to *A*. The lower appellate court had held that *B* was entitled to *A*'s after-acquired interest in the field under section 43. This decision was objected to in second appeal on the ground that there was no finding that *A* had made an erroneous representation. The high court, however, thought it unnecessary to remand the appeal for a finding on this issue because the wife was entitled to it under the equity enunciated by J Mookerjee in *Surendra v Rajendra.*[1598] Similarly, where a lessee assigned his interest in a lease which was contingent upon the demised property being derequisitioned by the military authorities, he was required to carry out the assignment after the property was derequisitioned.[1599] This equity will not apply when the professed transfer is by a person incompetent to transfer, eg if the mortgagor is a judgment debtor whose property is being sold by the Collector in execution of a decree.[1600]

This equitable interest (like that under section 43) is not available against a transferee for value without notice. *A*, an undivided coparcener in a Mitakashara family, made a mortgage to *B* of the family property which he was not authorised to make. Subsequently, there was a partition and a share of the family property was allotted to *A*. This share should have been liable to *B*'s mortgage, but as *A* had sold it to *C* who had no notice of the mortgage, *B* could not enforce his mortgage against *C*.[1601]

(14) Mortgages

In the case of transfer by way of mortgage, a discharge by a mortgagor of an encumbrance,[1602] or of a prior mortgage,[1603] enures for the benefit of the mortgagee. When the mortgagor of a *chak* acquires the *mokarari* interest, that interest is an accession to the security, and passes with it to the purchaser at a sale in execution of a decree on the mortgage.[1604] In a Calcutta case,[1605] three coparceners mortgaged family property in which an aunt had a share reciting in the deed that "the properties are owned and possessed by us." After the mortgagee's suit the aunt died, and CJ Rankin held that the increased share of the mortgagors became liable to the mortgage not only under section 43, but also on the principle that any enlargement of the mortgagor's interest enures for the benefit of the mortgagee—section 70. In *Basar Khan v Moulvi Syed Leakat,*[1606] the mortgage was of a *mokarari* interest which had been granted to the mortgagor by the widow of the owner. That interest failed as the widow proved to be only a *benamidar*. Nevertheless, as the mortgagor

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1596. *S Kanaka Durga Manikyhamba v Ramapragada Surya Prakasa Rao,* AIR 2010 AP 99 : 2010 (2) ALD 480.
1597. *Rustom Ali v Abdul Jubbur,* 76 IC 499 : AIR 1923 Cal 535.
1598. *Surendra v Rajendra,* (1918) 27 Cal LJ 289 : 43 IC 740.
1599. *Indraloke Studio Ltd v Santi Debi,* AIR 1960 Cal 609.
1600. *Gaurishankar v Chinnumaya,* (1918) ILR 46 Cal 183 : 45 IA 219 : 48 IC 312 : AIR 1918 PC 168 dissenting from *Magniram v Bakubai,* (1912) ILR 36 Bom 510 : 16 IC 570 (where section 43 was wrongly applied.)
1601. *Bhagannah v Chandi Singh,* (1911) 14 OC 295 : 13 IC 466.
1602. *Shyama v Ananda,* (1880) 3 Cal WN 323.
1603. *Manjappa v Krishnayya,* (1908) ILR 29 Mad 113.
1604. *Surja v Nandal Lal,* (1906) ILR 33 Cal 1212.
1605. *Behary Lal v Indra Narayan,* (1927) 31 Cal WN 985 : 104 IC 206 : AIR 1927 Cal 665.
1606. *Basar Khan v Moulvi Syed Leakat,* (1919) 23 Cal WN 841 : 50 IC 678 : AIR 1919 PC 14.

had inherited a share of the same estate from the real owner, the Privy Council held that the mortgage was binding to the extent of that share.

(15) Any Interests which the Transferor may Acquire

The section applies to all transfers except gifts, and it applies whatever the nature of the after-acquired interest may be. It applies when the transferor has no interest and subsequently acquires one, as in the case cited of the mortgage of the subject-matter of a pre-emption suit.[1607] When the transferor has no interest, but subsequently acquires a charge upon part of the property, the benefit of that charge will pass to the transferee.[1608] The section applies also when the transferor having a limited interest transfers a larger interest to the transferee on a misrepresentation and subsequently acquires a larger interest,[1609] or the interest is enlarged by the removal of a restriction on alienation,[1610] or by the discharge of an encumbrance,[1611] or of a prior mortgage[1612] or when a *maufi* tenure ripens into a proprietary right.[1613] In this connection *Zollikofer & Co v Official Assignee*[1614] is an instructive case. *A* mortgaged property to *B*, erroneously representing that he was the sole owner, when as a matter of fact, a quarter share belonged to *C*. The whole property was subject to a prior mortgage which *A* then redeemed. *A* obtained a decree for contribution in respect of one-fourth of the money due to him on the prior mortgage against *C*, and the decree made this a charge on *C*'s quarter share. *B* discovered the defects in *A*'s title and *A* delivered the decree against *C* to *B*. The delivery of the decree did not amount to an assignment, nevertheless the charge was a subsequent acquisition to which *B* became entitled. Therefore, on *C*'s insolvency, *B* was entitled to a charge on *C*'s quarter share as against the creditors of the insolvent. In *Gurmail Singh v Udham Kaur*,[1615] when the transferor who was husband of the opposite party had subsequently acquired half share in property on death of his wife, it was held that the transferee would be entitled to get benefit of section 43 so far the said half share was concerned. Property sold at the time when transferor had no title to it but the title later acquired through a settlement would also result in the validation of the transfer.[1616]

The section, of course, has no application if the transferor does not acquire a further interest in the property transferred,[1617] or if such further interest is acquired not by the transferor, but by his successor-in-interest.[1618] The section cannot apply where the transferor never became owner of the property and the same had been acquired by the parties in their own rights, and not as heirs of the persons who had contracted.[1619]

(16) In such Property

The section applies when the transferee acquires an interest in the property which is the subject of the transfer. It does not apply to an interest acquired in any other property,[1620] or where no grant or interest in immovable property is involved.[1621] In *P Chellamuthu v Abinaya*

1607. *Goya Din v Kashi*, (1907) ILR 29 All 163.
1608. *Mohan Singh v Sewa Ram*, 75 IC 579 : AIR 1924 Oudh 209.
1609. *Prem Nath Khanna v State of Orissa*, AIR 2009 Ori 166 : 107 (2009) CLT 741 : (2009) 1 OLR 416.
1610. *Mokhoda Debi v Umesh Chandra*, (1907) 7 Cal LJ 381.
1611. *Shyama v Ananda*, (1880) 3 Cal WN 323.
1612. *Manjappa v Krishnayya*, (1908) ILR 29 Mad 113.
1613. *Balbhaddar v Kusehar Das*, (1928) ILR 3 Luck 636 : 110 IC 357 : AIR 1928 Oudh 344.
1614. *Zollikofer & Co v Official Assignee*, (1926) ILR 4 Rang 532 : 100 IC 261 : AIR 1927 Rang 100.
1615. *Gurmail Singh v Udham Kaur*, AIR 1999 P&H 300 : (1999) 122 PLR 747.
1616. *Bhawari Bai v B C Sudhakar*, (2017) 3 MLJ 300.
1617. *Ramkrishna v Anasuyabai*, (1924) 26 Bom LR 173 : 86 IC 265 : AIR 1924 Bom 300.
1618. *Ramdeo v Deputy Director*, AIR 1968 All 262.
1619. *Anand Padhan v Dhuba Mohanty*, AIR 1979 Ori 5.
1620. *Babu Lal v Noor Mohammad*, 149 IC 313 : AIR 1934 All 731.
1621. *Panchanon v Nirode*, AIR 1962 Cal 12.

Muthusamy,[1622] the property owned by *A* was under a notification to be acquired by the authorities. He challenged the said notification but lost. During the period of challenge, he executed a power of attorney in favour of *B*, who sold the property on the very same day to *C*. Next day A revoked the power of attorney issued in favour of *B* and instead sold the property to *D*. *B*, on the other hand petitioned to the authorities to cancel the land acquisition and accepting his case, the authorities re-conveyed the land in favour of *B*, instead of *A*, the original owner from whom they had acquired the land. Meanwhile *C* had also sold the property to three different persons, at whose instance the suit was brought to the court. On the issue of application of section 43, the court held that at the time when *A* had sold the property to *D*, he did not have any interest as the property was acquired by the government. On its re-conveyance, the title in favour of *C* was perfected. *B* on the other hand had no right to have the land re-conveyed in his favour as he was merely a power of attorney holder that was cancelled by the original owner.

(17) Subrogation

The principle of this section overrides the rule of subrogation enacted in section 92. *A* mortgages his property first to *B* and then to *C* and lastly, to *D*. If *D* redeems *B*, he is subrogated to the rights of *B*, and *C* is still subject to *B*'s mortgage now held by *D*. But if *A* himself redeems *B* he is not subrogated to the rights of *B* and interest so acquired enures for the benefit of *C* and *D*, and has the effect of enlarging their security.[1623] A mortgagor paying a debt for which he is liable cannot set up a charge against a subsequent encumbrance.[1624]

(18) Third Parties

In cases of persons who contract to sell property, but with no title, the purchaser can take advantage of the subsequent acquisition of such title by the vendor and the law compels the vendor to convey the property if, by a supervening act or otherwise, his imperfect title or no title is perfected. This is the well known principle of feeding the grant by estoppel. If third persons are interested in the bargain and if the vendor can compel such persons to join in the transfer of such property over which he had no title or had only an imperfect title, then the purchaser can compel the vendor to procure such concurrence or compel such third parties to procure such a conveyance.[1625]

(19) Execution Sales

The section has of course no application to execution sales.[1626] An execution sale stands on a different footing. The decree holder does not guarantee the title of the judgment debtor, and the intending purchaser knows that under the law he can acquire nothing beyond the right, title and interest of the judgment debtor.[1627] So when a *ghatwal* tenure was sold pending negotiations for its enfranchisement, the sale was invalid and the execution purchaser got nothing although the tenure was subsequently enfranchised.[1628]

1622. Second Appeal Nos 549, 1004, 1005 of 2006 and CMP Nos. 6827 of 2006, 204 of 2009, 63 of 2009 and 1 of 2006; decided on: 17 February 2017. High Court of Madras.
1623. *Manjappa v Krishnayya,* (1908) ILR 29 Mad 113; *Badan v Murari Lal,* (1915) ILR 37 All 309 : 28 IC 973 : 13 All LJ 407; *Chelamanna v Parameswaran,* AIR 1971 Ker 3.
1624. *Syed Lutf Ali Khan v Futteh Bahadoor,* (1890) ILR 17 Cal 23 : 16 IA 129 (PC).
1625. *Rajendrakumar Bhandari v Poosamal,* (1975) 2 Mad LJ 59 : AIR 1975 Mad 379.
1626. *Alukmonee Dabee v Banee Madhub,* (1877) ILR 4 Cal 677; *Nanak Chand v Gandu Ram,* AIR 1938 Lah 360 : 40 Punj LR 202 : 177 IC 746; *Kama Rai v Nona Keshore,* AIR 1952 All 287.
1627. *Prasanna Kumar v Srikantha Rout,* (1914) ILR 40 Cal 173 : 16 IC 365.
1628. *Purna Chandra v Soudamini,* (1918) 28 Cal LJ 283 : 48 IC 335.

(20) At the Option of the Transferee

Subsequent acquisition of the title by the transferor does not automatically invest the transferee with the title so acquired; he must exercise the option.[1629] The word "option" implies that the transferee may take the after-acquired interest, but that it cannot be forced upon him. The title in the after-acquired property does not pass the instant it is acquired, but only on demand made by the transferee, when the transferee exercises the option and the title passes, it does not vest in the transferee from the date of execution of the original document.[1630] The option need not be exercised in any particular form.[1631] It is not necessary that the transferee must give notice immediately to the transferor that he holds him bound by the agreement. It is not the exercise of the option that the subsequent transferee must have notice of, before he can be bound. It is not necessary to establish that the second transferee has known that the transferor's title was defective at the date of the first transfer, that the transferor later acquired interest which he had previously purported to transfer, and that the transferee had elected to hold the transferor bound by the agreement. The words 'notice of the existence of the option' have been used, as the first transferee who had an equitable interest only has nothing more than an option to proceed against the property included in his transfer, it being merely an equitable right, and not a transfer of legal interest. The second transferee must be deemed to have notice of the said option, if he has knowledge of the previous transactions.[1632] Any action by the transferee, indicative of the exercise of the option, will suffice. A "demand" is not required.[1633]

The word "option" in the section shows that the law has specified only one of the various remedies open to the transferee. The transferee can repudiate the contract, or he may elect to ask for damages. That he can do under the general law. The relief provided by the first paragraph is additional, and enables him to get at the property itself provided the contract subsists at the date.[1634]

(21) At Any Time when the Contract of Transfer Subsists

The option of the transferee to require that the transfer should operate on any subsequently acquired interest can only be exercised while the contract subsists. If the transferee has rescinded the contract and elected to seek a remedy in damages, the contract is not in existence, and the transferee can have no interest in the subject-matter of the contract. If he had taken such partial interest as the transferor can convey, the contract has not been fully executed, and is still executory as to the remaining interest; and when that interest is acquired, the transferee can claim it.

A contractual obligation becomes extinguished by merger when it becomes the subject of a decree. Accordingly, it has been held that the option cannot be exercised after the transferee has obtained a decree on the contract. In an Allahabad case,[1635] a Hindu mortgaged his own share and his brother's share. He had no authority to dispose of his brother's share, but he inherited that share on his brother's death, after the mortgagee had obtained a decree on the mortgage. It was correctly held that the inherited share was not liable to the mortgage.

1629. *Krishnadhan v Kanailal,* AIR 1973 Cal 422 : 77 Cal WN 450.
1630. *Hardev Singh v Gurmail Singh,* AIR 2007 SC 1058 : (2007) 2 SCC 404; *Sachidanand Pandey v Ram Phar Singh,* AIR 2004 All 232; *Lakhwinder Singh v Paramjit Kaur,* AIR 2004 P&H 6 : (2003) 135 PLR 837; *Narayan v Laxmikant,* (1955) ILR Nag 204.
1631. *Gomathy Ammal v Rukmini Amma,* (1966) ILR 2 Ker 221 : AIR 1967 Ker 58.
1632. *Girja Shanker v Jagannath,* AIR 1952 All 301.
1633. *Krishnadhan v Kanailal,* AIR 1973 Cal 422 : 77 Cal WN 450.
1634. *Ganeshdas v Kamlabai,* (1952) ILR Nag 629 : AIR 1952 Nag 29.
1635. *Jadu Bans v Sheojit Singh,* 10 IC 443.

It has been held by the Madras High Court[1636] that though a contract of mortgage merges in the judgment and decree passed in the mortgage suit, "it must be held to subsist all the same, till the mortgage is satisfied and the mere fact of the share in question having devolved on respondent subsequent to the decree appears to me to be no reason for holding section 43 of the Transfer of Property Act to be inapplicable".[1637] This decision has been reaffirmed and followed by the same High Court in *Arulayi v Jagadeesiah,*[1638] wherein it was held that the mortgage must be held to subsist for the purposes of section 43 until the property is actually sold. As the mortgagor is entitled to redeem until the sale of the property,[1639] the mortgage undoubtedly subsists in that sense.

After the sale of the property, section 43 would be inapplicable, but the purchaser may still invoke section 115 of the Indian Evidence Act, 1872, read with the representation of title implied under section 65(a).[1640]

(22) Proviso

The proviso protects transferees in good faith without notice of the option.[1641] The option can be exercised against an heir of the transferor, and all persons claiming under him except a purchaser in good faith for consideration without notice of the existence of the option.[1642] This is because until the option is exercised the transferee's right to the after-acquired property is only a contractual obligation, and the transferor holds the interest as his trustee.[1643] If property is transferred for a consideration in good faith without misrepresentation of fraud and transferee had taken reasonable steps to ascertain title of transferor, then such transfer would not be void.[1644]

A representing that he had a transferable interest in property in which he had no such interest mortgaged it to *B*. *A* subsequently acquired the transferable interest which he transferred to *C* who had no notice of *B*'s mortgage. The transfer was made before *B* had exercised his option, and, therefore, *B*'s mortgage was subject to the rights of *C*.[1645] In an Oudh case,[1646] *A* mortgaged to *B* a share in property to which he had no title representing himself to be the owner. Subsequently, he acquired a charge over it by paying off a prior mortgage decree. Before *B* exercised his option, *A* assigned the charge to *C*. The court held that as *C* was not aware of *B*'s option, he was not affected by the mortgage. But as the report shows that *C* was aware of *B*'s mortgage, it is difficult to understand how he was unaware of the option, unless he was not aware that *A* had no title when he mortgaged.

(23) Other Cases of Estoppel

There may be other cases of estoppel operating in the realm of property law. Thus, a person who assents to a deed may be estopped from challenging the transaction. In a particular case, attestation may imply consent.[1647]

1636. *Ajijuddin v Sheik Budan,* (1895) ILR 18 Mad 492, foll in *Durga Das v Muhammad,* (1908) All WN 155; *Sinclair v Sitab Khan,* (1890) 3 CPLR 72.
1637. *Ajijuddin v Sheik Budan,* (1895) ILR 18 Mad 492.
1638. *Arulayi v Jagadeesiah,* (1963) 2 Mad LJ 365 : AIR 1964 Mad 122.
1639. See *Sukhi v Ghulam Safdar,* 48 IA 465 : (1921) ILR 43 All 469 : 65 IC 151 : AIR 1922 PC 11; and see note "By decree of a Court", under section 60.
1640. *Arulayi v Jagadeesiah,* (1963) 2 Mad LJ 365 : AIR 1964 Mad 122.
1641. *Durga Das v Muhammad,* (1908) All WN 155.
1642. *Beni Rai v Natabar Sirkar,* 33 IC 975; *Hanuman Das v Gurschay Singh,* (1913) 18 Cal LJ 181 : 21 IC 700; *Cheta Bahira v Purna Chandra,* (1914) 19 Cal WN 1272 : 27 IC 982, p 987.
1643. See note (2) above, "Feeding the estoppel".
1644. *V Chandrashekharan v Administrative Officer,* (2012) 12 SCC 133 : 2012 (9) SCALE 142 : JT 2012 (9) SC 260.
1645. *Cheta Bahira v Purna Chandra,* (1914) 19 Cal WN 1272.
1646. *Mohan Singh v Sewa Ram,* 75 IC 579 : AIR 1924 Oudh 209.
1647. *A S Muthiah v Peter Nadar,* (1974) 2 Mad LJ 404.

44. Transfer by one co-owner.—Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

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(1) Transfer by One Co-owner

The principle of this section is that of subrogation or substitution. When one of several co-owners transfers his share, the transferee stands in the shoes of the transferor. He acquires as against the other co-owners the same rights that the transferor had, and is subject to any condition and liabilities affecting the share at the date of the transfer. The section may be compared with section 74 where the ownership of the property is not divided between co-sharers, but between a mortgagor and a first and second mortgagee. The second mortgagee paying off the first mortgagee has all the rights the first mortgagee had against the mortgagor.

The object of this section as well as of section 4 of the Partition Act, 1893 is to keep off strangers who may purchase the undivided share of a co-sharer of an immovable property, so far as dwelling houses are concerned to make it possible for a co-sharer who has not sold his share to buy off the stranger purchaser.[1648] Thus where the property is in the nature of a dwelling unit, and is inherited by two brothers, the sale by one brother without partition would be improper even if the boundaries of the property are clearly mentioned or the question of possession was mentioned in the sale deed.[1649] Merely because, the plaintiff's ancestor was once a co-sharer of the alienee's predecessor-in-interest, it cannot be said that the plaintiff was a co-sharer in respect of the dwelling house so as to attract the provisions of section 44 of the TP Act.[1650] However, a person purchasing a share of a tenancy right is not entitled to a declaration of title to an exclusive possession of specific portion of the land.[1651] Where the property is jointly

1648. *Daral Chandra Chatterji v Gartha Behari Metra,*(1954) ILR 1 Cal 384 : (1952) 56 Cal WN 681 : AIR 1953 Cal 259; *Dorab Cawasji Warden v Coomi Sorab Warden,* AIR 1990 SC 867, p 877 : (1990) 2 SCC 117; *Bulu Sarkhel v Kali Prasad Basu,* AIR 2012 Cal 67.
1649. *Anjan Barman Choudhury v Ranjan Barman Choudhury,* AIR 2013 Gau 42 : 2013 (1) Gau LR 107 : 2012 5 GLT 340 : LNIND 2012 GAU 94.
1650. *Golaka Chandra Nayak v Gobinda Nayak,* AIR 1996 Ori 189.
1651. *Bolaram v Dondiram,* AIR 1950 Ass 1.

owned by more than one owner, an individual owner cannot sell the property in excess of the share that she owns. Where one co-owner sells the portion of property belonging to the co-sharer it would be illegal and the vendee cannot claim relief of title on basis of the said sale deed. The ground of unsubstantiated oral relinquishment would still make the sale illegal and invalid.[1652]

This section assures the transferee the right to joint possession or common enjoyment of the property, but does not confer on him any right to exclusive possession without enforcing partition.[1653]

ILLUSTRATION

A, B and *C* are co-owners of a field that is subject to a mortgage. *C* transfers his share to *D*. *D* has a right to joint possession with *A* and *B*, and has also a right to claim partition and separate possession of his share. But the share *D* has acquired is still subject to the mortgage.

The transferee of a co-sharer acquires the rights of his transferor so far as is necessary to give effect to the transfer, and no further. However, if a co-sharer is in exclusive possession of any portion of an undivided holding not exceeding his own share, he cannot be disturbed in his possession until partition. If instead of remaining in possession himself, he transfers the possession of his joint *khata*, the transferee will have the same rights and cannot be disturbed by other co-sharers until the final partition. In such a case, other co-sharers are only entitled to a declaration that the possession of the transferee will be that of a co-sharer subject to an adjustment at the time of partition.[1654] A co-owner who is not in actual physical possession or exclusive occupation over a parcel of land cannot transfer a valid title to that portion of the property. The remedy of the transferee, in such cases would be to get a share from out of the property to be allotted to that co-sharer in partition or to get a decree for joint possession or claim compensation from the co-sharer.[1655] The transferee of a Hindu coparcener may acquire a right to joint possession or to ascertain his share by partition, but he will not acquire the status of a coparcener in the family. Where a suit was filed for cancellation of the sale deed by A on the ground that he as the son of the owner of the property had a right of pre-emption, but he could neither prove the relationship, nor any right of pre-emption, his claim to the property as a co-heir and co-sharer would not be maintained. He would neither be entitled to any right of pre-emptionor to be substituted in the sale deed in place of the purchasers.[1656]

(2) Hindu Law

The section applies to Hindus, but it does not alter any rule of Hindu law. The rights of the transferee of a coparcener both as to joint possession, and as to partition vary in different schools of Hindu law and in different provinces. These differences are not affected by the section, for they are saved by the words "subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred." In Madras, a purchaser from a coparcener is in no case entitled to joint possession. The Madras High Court has said that

1652. *Baldev Raj Sharma v Kanta Devi*, AIR 2017 P&H 119.
1653. *Lalita James v Ajit Kumar*, AIR 1991 MP 15, p 17. See also *Ramdayal v Maneklal*, AIR 1973 MP 222.
1654. *Chanda Singh v Santa Singh*, AIR 1954 Pepsu 6; as to inter-se rights and liabilities of co-owners, see *Om Prakash v Chhaju Ram*, AIR 1992 P&H 219, p 221; *Bhartu v Ram Sarup*, (1981) PLJ 204; *Sant Ram Nagina Ram v Daya Ram Nagina Ram*, AIR 1961 Punj 528. For the proposition a co-owner cannot appropriate to his exclusive use any portion of the joint property, see *Muthu v Ammalu*, AIR 1993 Ker 272; *IGouri v CH Ibrahim*, AIR 1980 Ker 94, p 97.
1655. *Baldev Singh v Darshani Devi*, AIR 1993 HP 141.
1656. *Kailashchandra v Sant Ramtaram Guru Sant*, AIR 2017 (NOC) 1060 (Raj) : LNIND 2017 RAJ 57.

section 44 does not override this rule.[1657] It is submitted that the saving clause as to conditions and liabilities shows that the section is not intended to override any such rule. The purchaser of an undivided coparcener's interest in a joint Hindu family property is not entitled to possession of what he has purchased. His only right is to sue for partition and for allotment to him of that which, on partition, might be found to fall to the share of the coparcener whose share he has purchased. His right to partition would date from the period when a specific allotment was made in his favour. The fact that his transferor has executed a rent note is immaterial, since the rent note does not specify any specific portion of the house in occupation of the family; estoppel under section 116 of the Indian Evidence Act, 1872 is also not attracted.[1658]

A Full Bench of the Madhya Pradesh High Court has held that according to the Mitakshara law, as administered in Madhya Pradesh, a coparcener can alienate for value of his undivided interest in coparcenary property without the consent of the other coparcener, but he has no right to alienate, his interest in any specific property belonging to the coparcenary, for no coparcener can before partition claim any such property as his own, and if he does alienate, the alienation is valid to the extent only of his own interest in the alienated property.[1659]

The purchaser of the interest of a Hindu coparcener takes that interest subject to any charges or encumbrances affecting the coparcenary property, or interest at the time of the transfer.[1660]

A Hindu coparcener filing a suit for partition must bring all the joint property into hotchpot, and his purchaser acquires the right to enforce partition, but is under the same obligation of suing for general partition.[1661] The Allahabad High Court had held that the purchaser is entitled to partition of the specific property purchased without bringing a suit for general partition.[1662] The section, however, is not merely restrictive in its operation, but while taking away a right of a stranger transferee of a share in a dwelling house to ask for joint possession, it also creates a right in favour of the other co-sharers to institute a suit for injunction restraining such transferee from exercising any act of joint possession in respect thereof.[1663] This decision was always doubtful law, and must now be treated as superseded by the section. A purchaser of the undivided interest of a son in joint family property takes that interest subject to the Hindu law liability attaching to that interest of paying his father's personal debts not tainted with immorality.[1664]

(3) Transfers his Share or Interest

The section applies to all transfers including sales and mortgages. However, partition must be necessary to give effect to the mortgage, if the transfer is in the nature of a

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1657. *Kota Balabadra v Khetra Doss,* (1916) 31 Mad LJ 275 : 37 IC 168; *Permanayakam v Sivaraman,* (1952) ILR Mad 835 : AIR 1952 Mad 419 : (1952)1 Mad LJ 308.
1658. *Sheo Nath Seth v Krishna Kumari Devi,* AIR 1973 All 496.
1659. *Ramdayal v Manaulal,* AIR 1973 MP 222; *Maharu v Dhansai,* AIR 1992 MP 220, p 222. See also *Ramdas v Sitabai,* AIR 2009 SC 2735 : (2009) 7 SCC 444.
1660. *Udaram v Ranu,* (1875) 11 Bom HC 76; *Narayan v Nathji,* (1904) ILR 28 Bom 201; *Venkureddi v Venku Reddi,*(1927) ILR 50 Mad 535, p 538 : 100 IC 1018 : AIR 1927 Mad 471.
1661. *Udaram v Ranu,* (1875) 11 Bom HC 76, *Murarrao v Sitaram,*(1899) ILR 23 Bom 184; *Shivmurteppa v Virappa,* (1900) ILR 24 Bom 128; *Ishrappa v Krishna,* (1922) ILR 46 Bom 925 : 67 IC 833 : AIR 1922 Bom 413; *Venkatarama v Meera,*(1890) ILR 13 Mad 275; *Palani v Masakonan,* (1897) ILR 20 Mad 243; *Manjava v Shanmugu,* (1915) ILR 38 Mad 684 : 22 IC 555.
1662. *Ram Mohan v Mul Chand,* (1906) ILR 28 All 39.
1663. *Lal Behari Samanta v Gour Charan,* (1951) ILR 2Cal 266 : AIR 1952 Cal 253.
1664. *Venkureddi v Venku Reddi,* (1927) ILR 50 Mad 535.

mortgage.[1665] A lessee of an undivided share can maintain a suit for partition, if partition is necessary to give effect to the lease.[1666] Even a monthly tenant was allowed to enforce a partition when there was no probability of the lease being determined.[1667] In a suit for partition there must be unity of possession and unity of title,[1668] and a lessee of a share fulfils these conditions, for it is not necessary that the title should be of the same degree.[1669] A lessee does not lose his right to partition because the lease is liable to forfeiture in certain contingencies.[1670] When these conditions are fulfilled, the only ground on which partition can be refused is that of inconvenience.[1671] Where, however, a co-owner has executed a usufructuary mortgage of his share in favour of another person, it is that person and not the original co-owner who is entitled to the unity of possession with other co-owners. So long as the mortgage subsists, the original co-owner cannot exercise any right to joint possession.[1672] A usufructuary mortgagee from a coparcener, if not given possession, has to sue for partition and separate possession.[1673]

It has been held that the section applies to all transferees; it is irrelevant whether a transferee is a defendant or a plaintiff.[1674] Where several co-sharers enter into a contract to convey a joint property belonging to them, the contract can be enforced against one of them if the others are unable to convey their shares.[1675] Where after entering into an agreement for sale of property jointly owned by several persons, with some of them, the transferee paid a sum of money to avoid a distress sale of the property by the bank, it was held that alienation of such undivided interest was valid and the transferee would get a good title to it.[1676]

(4) Conditions and Liabilities

As the transferee acquires the rights of the co-sharer, he is also bound by any conditions and liabilities affecting the share at the date of the transfer. Instances have already been cited under note "Hindu law" above, with reference to a purchaser of a share of a Hindu coparcener. A purchaser of a share is of course not liable for the damage caused to the rest of the property by the transferor after the date of the transfer.[1677]

(5) Dwelling House

The transferee of a share of a dwelling house of an undivided family cannot be put into joint possession.[1678] This exception follows the opinion of CJ Westropp in a Bombay case,[1679] that such a procedure would be inconvenient, and lead to breaches of peace. The remedy is a

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1665. *Hariharayyar v Ahammadunni,* (1940) 51 Mad LW 511 : (1940) Mad WN 59 : 191 IC 57 : AIR 1940 Mad 491.
1666. *Muhammad Jaffer v Mazhar-ul-ashan,* (1906) 3 All LJ 474.
1667. *Rajanimohan v Sambhunath,* (1930) ILR 57 Cal 715 : 126 IC 121 : AIR 1929 Cal 710.
1668. *Durga Charan v Khundkar,* (1918) 27 Cal LJ 441 : 45 IC 705; *Maung Ba Tu v Ma Thet Su,* (1927) ILR 5 Rang 785 : 108 IC 809 : AIR 1928 Rang 73.
1669. *Bhagwat Sahai v Bepin Behari,* (1910) ILR 37 Cal 918 : 37 IA 198 : 7 IC 549.
1670. Ibid.
1671. *Hemadri Nath Khan v Ramani Kanta Roy,* (1897) ILR 24 Cal575; *Rajanimohan v Sambhunath* (1930) ILR 57 Cal 715 : 126 IC 121 : AIR 1929 Cal 710.
1672. *Haranandan DasvMuhammad Kalim,* AIR 1944Pat 341.
1673. *Balwant Rai v Gurdas Rai,* AIR 1974 P&H 160.
1674. *Udaynath v Ratnakar,* AIR 1967 Ori 139.
1675. *KS Krishan v Krishan,* AIR 1993 Ker 134, p 139.
1676. *Syscon Consultants Pvt Ltd v Primella Sanitary ProdPvt Ltd,* 2016 (9) SCALE 26:(2016) 7 MLJ 820 : LNIND 2016 SC 382.
1677. *Chandra Shekar v Abidalli,* 80 IC 920 : AIR 1925 Nag 68.
1678. *Bulu Sarkhal v Kali Prasad Basu,* AIR 2012 Cal 67; *Ram v Ram Kishan,* AIR 2010 All 125 : (2010) 5 AWC 4634.
1679. *Balaji v Ganesh,* (1881) ILR 5 Bom 499.

suit for partition.[1680] The proper course is to direct delivery of possession by partition in execution proceedings, or to leave the purchaser to his remedy by separate suit for partition.[1681] Thus, where one co-sharer in the dwelling house sells his share to a stranger, the transferee cannot force his way into dwelling house but has to seek partition and obtain an order from court or make a settlement with co-owners who have not transferred their shares.[1682]

The applicability of this proviso for specific performance of agreement of sale of house would not be applicable where the vendor's wife had half-share in undivided property.1683 Similarly, where the dwelling house does not belong to an undivided family, section 44 of the TP Act does not apply.[1684]

The Partition Act, 1893, gives the co-sharer the option of buying out the transferee at a valuation to be made by the court. So a member of the family who has not transferred his share may purchase the transferee's share when the transferee files a suit for partition.1685 With reference to the Partition Act, 1893 it has been held that the term "dwelling house" includes not only the structure of the building, but also adjacent buildings, curtilage, court yard, garden or orchard, and all that is necessary to the convenient occupation of the house;[1686] and that the phrase "undivided family" is not limited to Hindus,[1687] but includes any group of persons related in blood who live in one house under one head, and that it applies if they are undivided *qua* the dwelling house which they own.[1688] The same construction applies to the words used in this section,[1689] and it is not necessary that the family should have constantly lived in the dwelling house.[1690] The test in order to determine whether a particular house is a family dwelling house is whether the family had abandoned all ideas of occupying the house as a residential house.[1691]

In an earlier decision of the Madras High Court, it was held that the expression "dwelling house" has a plain meaning, and did not necessarily connote a dwelling house occupied by an undivided family, owning it. The legislature might quite easily have used the term "family dwelling house" if it had wished to do so, but it contended itself with the simple word "dwelling-house". So also, the words "belonging to an undivided family" are quite unqualified and do not per se, at all import that the house must be occupied permanently or even temporarily by the undivided family.[1692] In a later decision, however, the same high

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1680. *Lal Behari Samanta v Gorari Charan,* (1951) ILR 2 Cal 266 : (1950) 54 Cal WN 912 : AIR 1952 Cal 253; *Paresh Nath v Kamall Krishna,* (1957) 61 Cal WN 776 : AIR 1958 Cal 614; *Uma Shankar v Dhaneshwari,* AIR 1958 Pat 550.
1681. *Girija Kanta v Mohin Chandra,* (1916) 20 CalWN 675 : 35 IC 294.
1682. *Sunil Gupta v Nargis Khanna,* 2012 IAD (Delhi)277 : 185 (2011) DLT 760 : 2011(126) DRJ 97 : ILR (2011) Supp(5) Delhi 59.
1683. *Kammana Sambamurthy v Kalipatnapu Atchutamma,* (2011) 11 SCC 213 : [2011] 1 MLJ 404.
1684. *Ram Bilas Tewari v Shiv Rani,* AIR 1977 All 437 : (1977) All LJ 1013.
1685. *Ram v Ram Kishan,* AIR 2010 All 125 : LNIND 2010 ALL 356 : 2010 (80) ALR 346 : 2010 AIHC 3308.
1686. *Kshirode Chunder v Saroda Prosad,* (1911) 12 Cal LJ 525 : 7 IC 436; *Nilkamal v Kamakshaya,*109 IC 67 : AIR 1928 Cal 539; *Pran Krishna v Surath Chandra,* (1918) 45 Cal 873 : ILR 45 IC 604.
1687. *Sultan Begam v Debi Prasad,* (1908) ILR 30 All 324; *Kalka Prasad v Bankey Lal,* (1906) 9 OC 156; *Nilkamal v Kamakshaya,*109 IC 67 : (1911) 12 Cal LJ 525; *Dorab Cawasji Warden v Coomi Sorab Wanden,* AIR 1990 SC 867, p 875 : (1990) 2 SCC 177.
1688. *Kshirode Chunder v Saroda Prosad,* 7 IC 436; *Sivaramayya v Kapa Venkata Subbama,* (1930) ILR 53 Mad 417 : 126 IC 593 : AIR 1930 Mad 561.
1689. *Masitullah v Umrao,* 119 IC 523 : AIR 1929 All 414; *Bala Krishna v Akhoy Kumar,* AIR 1950 Cal 111; *Sundari Bewa v Ranka Behara,* (1968) ILR Cut 134 : AIR 1968 Ori 134.
1690. *Pakija Bibi v Adhar Chandra,* 118 IC 574 : AIR 1929 Cal 231.
1691. *Janakiammal v PAK Natarajan,* AIR 1989 Mad 88, p 94; *Bhagirath v Afag Rasul,* AIR 1952 All 207; *Ramanathan Chettiar v L Narataja Chettiar,* (1955) 1 Mad LJ 118.
1692. *Subramania Sastri v Shaikh Ghannu,* AIR 1935 Mad 628.

court disagreed with the view that a house which was completely let out to tenants could fall within the expression "dwelling house" belonging to an undivided family.[1693]

A "dwelling house" obviously is a house with the superadded requirement that it is dwelt in or the dwellers in which are absent only temporarily, having *animus revertendi* and the legal ability to return:

> The existence of someone being able to go of his own right to all the rooms of the premises is one of the hallmarks of a dwelling house.[1694]

If a person had abandoned his house as his residence, it would no longer be his dwelling house. Where the property lost the character of a typical dwelling-house as per section 44, as once a stranger comes in, section does not apply, the purchaser cannot be ousted from the second floor of the property and the registered sale deed would be final as regards the transfer of title and related rights.[1695] In a right of exercise of pre-emption suit against the stranger purchaser, where a stranger purchaser was put in possession of his vendor's flat since purchase, the other co-sharers of the said dwelling house complex had a right to resist the possession under section 44 of the Transfer of Property Act, however the co-sharers cannot exercise their right of pre-emption in absence of the claim of partition by stranger purchaser.[1696] Where a dwelling house belonging to an undivided family is let out to the tenants, no question of the transferee stranger coming into joint possession or other common or part enjoyment of the house as such can arise, since it would be in exclusive possession and enjoyment of the tenants. If the members of the undivided family owning such a house, are in a position to obtain a decree of eviction and possess the requisite animus to dwell in the house, then the stranger transferee of a share of one of such co-owners will not be in a position to obtain joint possession or common enjoyment of the house with the members of the family. Even if an undivided family owns more than one dwelling house, the transferee of a share in a dwelling house in which the members of the family may not be actually residing at all points of time, will not be able to claim joint possession or common enjoyment of the house with the members of the undivided family so long they have not abandoned the house as their residence, and have *animus revertendi* and the legal ability to return to that house.

Where the house in question was not in use as a dwelling or for residential purposes but was used for commercial purposes it would not be a dwelling house for the purposes of section 44, and the purchaser of the share of the co-owner of the house can obtain and remain in joint possession of the house. He does not have to necessarily file a suit for separate possession of his share or for its separation.[1697] The nature of construction of the building as one unit and the land underneath remaining undivided, cannot lead to the conclusion that it is an undivided family dwelling house. If this is accepted for the purpose of attracting section 4 of the Partition Act, 1893, there will be hardly any case where this provision will not apply.[1698] The character of a house as a dwelling house belonging to an undivided family is not altered by the mere fact that an undivided share is transferred to a stranger who comes into possession, and collects rents from a portion of the tenants.[1699]

1693. *Janakiammal v PAK Natarajan,* AIR 1989 Mad 89, p 91.
1694. *St Catherine's College v Poring,* [1979] 3 All ER 250, p 255 (CA).
1695. *Sunil Gupta v Nargis Khanna,* 2012 IAD (Delhi) 277 : 185 (2011) DLT 760 : 2011(126) DRJ 97 : ILR (2011) Supp (5) Delhi 59.
1696. *Bulu Sarkhel v Kali Prasad Basu,* AIR 2012 Cal 67 : LNIND 2011 CAL 1081.
1697. *Hafizulla Sheikh Barakatullah v Puran Chand Jain,* AIR 2017 (NOC) 1086 (MP): LNIND 2017 MP 165.
1698. *Harinder Pal Singh Chawla v Nirmal Daniere,* (1993) 51 DLT 191.
1699. *Nirupama Basak v Baidyanath Paramanik,* AIR 1985 Cal 406.

The section has, however, no application to a dwelling house a part of which is occupied by strangers after a partition.[1700] The provision is of a negative nature. It affords a defence to the members of a joint family, but does not create a positive right in them. It gives discretion to the court to grant the relief.[1701]

While construing the words "dwelling house" belonging to an undivided family within the meaning of section 44 of the TP Act, the Supreme Court has held the ratio of the decisions rendered under section 4 of the Partition Act equally applicable to the interpretation of the second para of section 44, as the provisions are complementary to each other, and the terms "undivided family" and "dwelling house" have same meaning in both the sections.[1702]

(6) Section 44 of TP Act and Section 4 of Partition Act, 1893

The Supreme Court in *Gautam Paul v Debi Rani Paul*[1703] has held that:

> There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers/outsiders can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of a share in a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claims separation of his share. In that case, section 4 of the Partition Act comes into play. Except for section 4 of the Partition Act, there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider.

It may be noted that to avail the benefit of section 4 of the Partition Act, 1893, conditions laid down in *Ghanteshwar Ghosh v Madan Mohan Ghosh*[1704] have to be fulfilled.

(7) Involuntary Sales

The principle underlying this section can be applied to involuntary sales as a rule of equity, justice and good conscience.[1705]

(8) Injunction against Stranger Transferees

Once it is held that the plaintiff is entitled to protection under the second part of section 44 and the stranger purchasers are liable to be restrained, it would follow that even if the defendants have been put in possession or have come jointly to possess, they can be kept out by injunction. The remedy of the stranger purchaser is actually one of partition and until then, he is obliged to keep out from asserting joint possession. Denying an injunction against such transferee would prima facie cause irreparable injury to the other members of the family. Thus, where the purchasers were inducted in the premises in a hurried and clandestine manner defeating the appellants' attempt to go to court for appropriate relief, the Supreme Court held that in such circumstances, it is but just and necessary that the respondent purchasers be directed by an interlocutory mandatory injunction to undo what they have done.[1706]

1700. *Bhim Singh v Ratnakar,* AIR 1971 Ori 198.
1701. *Jugendra Nath v Adheed Chandra,* (1951) 55 Cal WN 589 : AIR 1951 Cal 412.
1702. *Dorab Cawasji Warden v Coomi Sorab Warden,* AIR 1990 SC 867, p 876 : (1990) 2 SCC 117, p 131.
1703. *Gautam Paul v Debi Rani Paul,* (2000) 8 SCC 330.
1704. *Ghanteshwar Ghosh v Madan Mohan Ghosh,* (1996) 11 SCC 446.
1705. *Jagatbandhu Biswas v Iswer Chandra,* (1948) 52 Cal WN 411 : AIR 1948 Cal 61; *Puddipeddi Laxinarasamma v Gadi Ranganaya Kamma,* AIR 1962 Ori 147.
1706. *Dorab Cowasji Warden v Coomi Sorab Warden,* AIR 1990 SC 867, p 878 : (1990) 2 SCC 117, pp 131, 134; *Udaynath Sahu v Ratnakar Bej,* AIR 1967 Ori 139, pp 141-142; *Ashim Ranjan Das v Bimla Ghosh,* AIR 1992 Cal 44, p 47.

45. Joint transfer for consideration.—Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

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(1) Co-owners' Interests

Where a transfer for consideration to two or more persons jointly makes them co-owners of the property transferred, their interests are in proportion to the shares of the consideration that they have been advanced. If the consideration is paid out of a common fund, their shares would be the same as their interests in that common fund. Although a mortgage is indivisible as between the mortgagor and the mortgagee, yet as between the mortgagees inter se their interests in the property would be proportionate to the shares of the mortgage money they had advanced. Joint transfer for consideration rules as embodied in this section applies when payment (consideration) is made out of one fund.[1707] In such cases where ownership is admitted, the concerned parties would be entitled to shares in the property, in accordance with the proportion of payment (of consideration) made by them for acquiring it.[1708] Where four mortgagees advanced money in equal shares, and the fourth mortgagee consented to the mortgagor redeeming the other three mortgagees, he could only recover one-fourth share of the mortgage money by sale of one-fourth of the property mortgaged.[1709] In an Allahabad case, there was a recital in a sale deed that the plaintiff had contributed one half of the consideration for the suit property, but his share was shown as 1/21. It was held that in view of section 45, his share would be one half. Since the dispute was not between vendor and vendee, but between two co-purchasers, section 92 of the Indian Evidence Act, 1872 would not come in the way.[1710] If two or more persons purchase a property out of common fund, the share of each of those persons would be the same as their interest in the common fund, then the rule in section 45 would be automatically attracted. The fact that the property was purchased in the name of one of the co-owners would not make a serious dent on the above rule of good conscience

1707. *Kalpanaben Hasmukhbhai Patel v Urvashiben Rajnikant Patel*, 2010 SCC OnLine Guj 6730 : LNIND 2010 GUJ 11172.
1708. *Dinesh Kumari Mishra v Ranjana Mishra*, (2011) 177 DLT 577 (Delhi) : LNIND 2012 DEL 12173.
1709. *Pertab v Nihal Singh*, 96 IC 134 : AIR 1926 All 676.
1710. *Mohan Lal v Board of Revenue*, AIR 1982 All 273, p 275.

provided, however, it is established by acceptable evidence that such purchase in the name of the co-owner was by consent, and that the consideration for such purchase emanted from common fund.[1711] This section applies only where two or more persons purchase a property or an interest in property, and is of no assistance in ascertaining the position when one person purchases a property partly from ancestral, and partly from self-acquired funds.[1712]

Section 45 has nothing to do with the method of creating common ownership, or the manner in which several persons can become co-owners in respect of a single property. It really deals with the quantum of interest, and its determination where there are several joint purchasers of immovable property.[1713] Admissions made by co-sharers in income-tax and wealth-tax proceedings can be relied upon to ascertain the shares which they were having in the property in question for the purpose of section 45.[1714]

Co-ownership is a relationship which springs from consensus and contract. Legislation has only imprinted, on the concept of co-ownership, certain rights which have a supervening effect which are declaratory of the rights inter se as between co-owners. The legal relationship (in co-ownership) is always knitted in a framework of jointness, and no one interested therein can predicate, with certainty, as to what portion of the property held in common is his, and an element of inseparability is inherent in the doctrine of co-ownership. What can be predicated by reason of section 45 and by invoking the principle of quasi-trust under the Indian Trusts Act, 1882 is the quantum of rights of such co-owners in the entirety of the property. Such quantification of rights of each of the co-owners in a given property depends on the facts and circumstances of each case. It is for the purpose of providing a just rule for weighing and appreciating the value or interest of a co-owner in joint property that the rule of equity is laid down in section 45. If the source of the purchase price or the consideration for the investment in a joint enterprise emanates from a common fund, then the shares of each of the co-owners or co-entrepreneurs would be the same as their interest in that common fund. This equitable right is, of course, subject to an intent to the contrary.[1715]

(2) Ejectment of One by the Other—Permissibility

A partnership business was carried on by tenants *A* and *B* in the premises with shares in it. Subsequently, the firm was dissolved. In a suit by tenant *A*, the tenants *B* and *A* were declared to be in possession of three-fourth and one-fourth part of the premises respectively. It was held that *A* could not eject *B* or his successor.[1716]

(3) Joint Tenancy or Tenancy in Common

The section does not deal with the question whether the transferee takes as joint tenants, or as tenants in common. A joint tenancy connotes unity of title, possession, interest and commencement of title; in a tenancy in common, there may be unity of possession and commencement of title, but the other two features would be absent.[1717]

The rule of English law is to presume that a transfer to a plurality of persons creates a joint tenancy with a right of survivorship, unless there are words of severance.[1718] This

1711. *M Printer v Marcel Martines,* AIR 2002 Kant 191.
1712. *Mangal Singh v Harkesh,* (1957) All LJ 752 : AIR 1958 All 42.
1713. *Guruswami Asari v Raju Asari,* AIR 1973 Mad 473 : (1973) 2 Mad LJ 203.
1714. *Chiranjitlal v Bhagwan Das,* AIR1991 Del 325, p 332.
1715. *CV Ramaswami Naidu v CS Shyamala Devi,* (1978) 1 Mad LJ 505.
1716. *Sher Singh v Mohd Ismail,* AIR 1981 All 114.
1717. *Ram Awalamb v Jata Shankar,* 1968 All LJ 1108 : AIR 1969 All 526.
1718. *Morley v Bird,* (1798) 3 Ves 628.

principle is adopted in section 106 of the Indian Succession Act, 1925, replacing section 93 of the Indian Succession Act, 1865; and a joint tenancy has been recognised in a gift by will of an Indian Christian,[1719] Parsee,[1720] and Muslim.[1721]

The Hindu rule is the opposite. In *Jogeswar Narain v Ram Chand Dutt,*[1722] the Privy Council said:

> The principle of joint tenancy appears to be unknown to Hindu law, except in case of coparcenery between members of an undivided family.

This has been approved by the Supreme Court in *Venkatakrishna v Satyavathi.*[1723] Even if the grantees are members of a coparcenery, they will take as tenants in common,[1724] unless a contrary intention appears from the grant.[1725] It is held that in India the court must always lean against holding a bequest or a grant to be a joint bequest or grant, and the presumption must always be in favour of a tenancy in common.[1726] Words in a will that possession should be in the hands of both, and that both should enjoy the property in their lifetime is not enough evidence of a contrary intention.[1727]

A joint tenancy may be severed and converted into a tenancy in common by one of the joint tenants disposing of or contracting to sell his interest, or by mutual agreement, or by a course dealing by all the joint tenants sufficient to indicate a severance.[1728]

A tenant in common is entitled to joint possession, and if excluded from such possession may sue for a declaration of his right. However, if there is no exclusion or denial of his right, a tenant in common who gives up joint possession has no right of suit for his share of the joint profits.[1729] Entry by one co-tenant, in the absence of clear proof to the contrary, enures for the benefit of all. The presumption under section 45 is not attracted when there is a joint business, and there is no partition of house and all members are staying in the house, and source of money for plot of land purchased appears to be the joint earning.[1730]

If *A* and *B* are co-tenants of property of which *A* is in actual possession, and *B* sells his share to *C*, the possession of *A* is the possession of *C*.[1731] But in a case where *A* and *B* were tenants in common, each in possession of a moiety and *A* look possession of *B*'s share on *B*'s death by right of inheritance, his possession was adverse to a purchaser from *B*.[1732]

1719. *Arakal v Domingo,* (1911) ILR 34 Mad 80 : 6 IC 7.
1720. *Navroji v Perozbai,* (1899) ILR 23 Bom 80.
1721. *Mahamad Jusali v Fatima,* AIR 1948 Bom 53.
1722. *Jogeswar Narain v Ram Chand Dutt,* 23 IA 37, p 44; *Bahu Rani v Rajendra Baksh Singh,* 60 IA 95, p 101.
1723. *Venkatakrishna v Satyavathi,* [1968] 2 SCR 395 : AIR 1968 SC 751 : [1968] 2 SCJ 337.
1724. *Bai Diwali v Patel Bechardas,* (1902) ILR 26 Bom 445; *Kishori DubainvMundra Dubain,* (1911) ILR 33 All 665 : 10 IC 565; *Ram Piari v Krishna,* (1921) ILR 43 All 600 : 63 IC 301 : AIR 1921 All 50; *Janakiram v Nagamony,* (1926) ILR 49 Mad 98 : 93 IC 662 : AIR 1926 Mad 273.
1725. *Yethirajulu v Mukunthu,* (1905) ILR 28 Mad 363; *Narpad Singh v Mahomed Ali,* (1884) ILR 11 Cal 1 (PC).
1726. *Mahamed Jusali v Fatimabai,* (1948) ILR Bom 53 : 49 ILR Bom LR 505 : AIR 1949 Bom 33; *Venkayya v Subbarao,* AIR 1957 AP 619.
1727. *Venkatakrishna v Satyavathi,* [1968] 2 SCR 395 : AIR 1968 SC 751 : [1968] 2 SCJ 337.
1728. *Williams v Hensman,* (1861) 1 John and H 546; *Tan Chew Hoe Neo v Chee Swee Cheng,* 56 IA 112 : 56 Mad LJ 643 : 116 IC 385 : AIR 1929 PC 72.
1729. *Radhakanta Pal v Manmohinee Pal,* (1933) ILR 60 Cal 292 : 144 IC 193 : AIR 1933 Cal 397.
1730. *Rajeshwari v Bakhand Jain,* AIR 2001 MP 179 : (2001) 2 MPLJ 505.
1731. *Biswanath v Rabija Khatun,* (1929) ILR 56 Cal 616 : 117 IC 593 : AIR 1929 Cal 250.
1732. *Krishnachandra Das v Poornachandra Das,* (1935) ILR 62 Cal 305 : (1935) 39 Cal WN 159 : 60 Cal LJ 232 : 155 IC 987 : AIR 1935 Cal 195.

(4) Presumption of Equity

The second paragraph of this section lays down that in the absence of evidence as to the interests in the fund to which the co-owners are respectively entitled or as to shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.[1733] Thus, in the absence of specific mention about the shares of co-owners in any share deed, all co-owners will have equal shares in the properties thereunder.[1734] Similarly, in *State of Maharashtra v BE Billimoria,*[1735] the Supreme Court has held two persons to be owners of equal shares in the plot as there was no evidence to the contrary.

In a case where a common share which had been forfeited, was brought in by the Collector out of a fund contributed by the co-sharers, it was presumed that the Collector had debited an equal amount to each co-sharer, and that each co-sharer had an equal interest in the share when it was recovered,[1736] but when a person can produce evidence of the amount of his share, but fails to do so, he cannot avail himself of this presumption of equality.[1737]

(5) Involuntary Sales

It has been held that the principle of this section applies to property purchased at an involuntary sale as it embodies a rule of justice, equity and good conscience.[1738]

46. Transfer for consideration by persons having distinct interests.— Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

ILLUSTRATIONS

(a) *A,* owning a moiety, and *B* and *C,* each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura, and *B* and *C* each to a sixteenth share in that mauza.

(b) *A* being entitled to a life-interest in mauza Atrali and *B* and *C,* to the reversion, sell the mauza for ₹ 1,000. *A*'s life-interest is ascertained to be worth ₹ 600, the reversion ₹ 400. *A* is entitled to receive ₹ 600 out of the purchase-money. *B* and *C* to receive ₹ 400.

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(1) Distinct Interest..... 277

(1) Distinct Interest

This section is the converse of section 45. That section refers to interests in the property of several purchasers, while this section refers to the shares in the consideration of several vendors. Tenants in common have joint possession, but distinct interests. A tenant for life and a remainderman have distinct interests, and so have a mortgagee and a mortgagor, and a lessee and a lessor.[1739] The value of the interest of a mortgagee is the mortgage money, and when a mortgagee

1733. *Saiyad Abdullah v Saiyad Ahmad,* (1929) 27 All LJ 1196, p 1199 : 122 IC 666 : AIR 1929 All 817.
1734. *Durlabhji D Patel v Competent Authority & Dy Collector, Surat,* AIR 1996 Guj 197 : (1996) 2 GLR 640.
1735. *State of Maharashtra v BE Billimoria,*(2003) 7 SCC 336 : AIR 2003 SC 4368.
1736. *Debi PershadvAklio,*(1899) 4 Cal WN 465.
1737. *Ram Pher v Ajudhia Singh,* 87 IC 17 : AIR 1925 Oudh 369.
1738. *Balai Chandra v Raisuddin Naskar,* (1956) 60 Cal WN 270 : AIR 1956 Cal 58.
1739. *Morris v Debenham,* (1876) 2 Ch D 540.

and a mortgagor join in a conveyance, then, in the absence of a contract to the contrary, the mortgagee is entitled to the mortgage money as the price of his interest, and the mortgagor to the balance as the price of the equity of redemption. The shares of the transferors in the consideration are in proportion to their respective interests in the property transferred. The second illustration is that of a tenant for life and a remainderman, where it is necessary to have the respective interests valued.

47. Transfer by co-owners of share in common property.—Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

ILLUSTRATION

A, the owner of an eight-anna share, and *B* and *C*, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of *A*, and half-an-anna share from each of the shares of *B* and *C*.

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(1) Transfer by Tenants in Common..... 278

(1) Transfer by Tenants in Common

When owners who hold an estate as tenants in common transfer a part of the estate, the share of each co-owner is proportionately reduced. If the shares are equal, each share is reduced equally. If the shares are unequal, there is a greater reduction in the greater share, and a lesser reduction in the lesser share. If each co-owner had a distinct plot, it would not be a case of a tenancy in common, and there could be no question of a transfer of a share of the whole. The word "value" is more appropriate in section 46 which includes interests in land which have to be valued, while the word "extent" in this section means only the fraction that each share bears to the whole. The same fraction would determine the share of the consideration that each co-owner would be entitled to under section 46. All co-owners have equal rights and coordinate interest in the property, though their shares may be either fixed or indeterminate. Each co-owner has, in theory, interest in every infinitesimal portion of the subject-matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property jointly with others.[1740]

The principle of this section was applied in a Sind case,[1741] where two Mahomedan *zamindars* who held an estate as tenants in common in equal shares sold an undivided half of it. One of the *zamindars* had been under the protection of the manager, encumbered estates, and was by virtue of the Sind Encumbered Estates Act (Bombay Act 20 of 1891) incapable of alienating beyond his lifetime. After his death his heirs sued for partition, and it was held that the vendee had taken one-fourth from each *zamindar*, so that the heirs were entitled to one-fourth. Where a sale of joint property was effected by the widow of brother of plaintiff from joint property without informing such brother and neither the sale deed bore the signatures of co-sharer in the joint property but the registration of the deed also violated section 30 of the Registration Act, it was held that the sale deed was not valid as the

1740. *Kochkunju Nair v Koshy Alexander*, (1999) 3 SCC 482 : (1999) 3 SCC 482.
1741. *Mir Ali Nawaz v Mir Ali Ashar*, 97 IC 124 : AIR 1927 Sau 62.

purchaser had not applied for maturation for over five years and no hearing was given to the plaintiff at the time of quashing of order for mutation by the deputy commissioner.[1742]

48. Priority of rights created by transfer.—Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

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(5) Priority Forfeited 282

(1) Priority

The transferor cannot prejudice the rights of the transferee by any subsequent dealing with the property. This self-evident proposition is expressed in the equitable maxim *qui prior est tempore potior est jure*. The application of this maxim in English law is complicated by the preference given to the legal estate over the equitable interest. This complication does not occur in Indian law, but the rule in India is subject to certain exceptions which will presently be noticed.

Qui prior est tempore potior est jure

The literal meaning of the maxim *qui prior est tempore potior est jure* is "he who is prior in time is better in law". The one who has the advantage in time should have precedence in law as well is the basis of this rule where two successive transfers of the same property have been effected. The section embodies the rule of priority founded on law and justice. Determination of the right of priority in case of successive transfers over the same immovable property calls for a combined operation of section 48 of the TP Act and sections 47 and 49 of the Registration Act.

In a case where two deeds of transfer over the same property or one involving portions of property covered by other as well, were executed on the same day, it must be proved which deed was in fact executed first. However, if the deeds themselves show an intention either that they shall take effect pari passu or even that the later deed shall take effect in priority to the earlier, it will be presumed that the deeds were executed in such order as to give effect to that intention. Where two or more deeds were executed on the same day and the order of their execution cannot be ascertained, all the deeds will take effect at once and pari passu. The rule of priority is subject to the equitable principle of estoppel. In a case where the first transferee was aware of the second transfer and also the contents of the deed there under, necessarily any claim by him on the right of priority has to be examined with reference to the principles of equity and also rule of estoppel.[1743]

The essence of *nemo dat quod non habet* is the transactional exigibility ie, the binding effect of prior property rights of subsequent transferee irrespective of notice or knowledge of prior property rights on part of subsequent transferees.[1744]

1742. *State of Jharkhand v Lalita Devi Kejriwal,* AIR 2018 Jhar 7: 2017 (4) AJR 448 : 2018 (1) JLJR 71.
1743. *Xavier v John,* AIR 2011 Ker 103.
1744. *Harshad Govardhan Sondagar v International Assets Reconstruction Company limited,* (2014) 6 SCC 1: 2014 (4) SCALE 484 : 2015 (3) SCJ 641 : 2014 (3) KLJ 495; *P Chellamuthu v Abinaya Muthusamy;* Second Appeal Nos. 549, 1004, 1005 of 2006 and C M P Nos 6827 of 2006 : 204 of 2009 : 63 of 2009 and 1 of 2006; decided on 17 February 2017. High Court of Madras.

Registered deed

A transfer operates from the date of execution of the deed, although it may have been registered at a later date.[1745] This is the effect of section 47 of the Registration Act, 1908.

(2) Successive Transfers

If there are successive transfers of the same property, the latter transfer is subject to the prior transfer.

Thus, if *A* mortgages his property to *B*, and subsequently sells it to *C*, *C* purchases only the equity of redemption.[1746] Similarly, in the case of two successive mortgages, the later or puisne mortgage is subject to the prior mortgage. The puisne mortgagee is only an assignee of the equity of redemption of the prior mortgage, and as such may sue to redeem it section 91(a).

A puisne mortgagee may sue for sale on his mortgage, but the property will be sold subject to the prior mortgage.[1747] If he sues for sale making the prior mortgagee a party, but claiming no relief against him, the prior mortgagee is in the position of a holder by title paramount outside the controversy.[1748] If the mortgagor gives two usufructuary mortgages of the same property, the prior mortgagee is entitled to possession.[1749]

A mortgage by deposit of title deeds is a completed transfer, and not an oral agreement. This is now made clear by section 58(f) of TP Act. The proviso to section 48 of the Registration Act, 1908 as inserted by Act 21 of 1929, enacts that a mortgage by deposit of title deeds shall take effect as against any mortgage deed subsequently executed and registered relating to the same property; similarly, an earlier mortgage by deposit of title deeds would have priority over a subsequent sale.[1750] Mortgages by deposit of title deeds are sometimes described as equitable mortgages. The judgment in an old Bombay case[1751] suggests that a formal registered mortgage being a legal "mortgage" would have priority over an "equitable mortgage." In *Imperial Bank of India v U Rai Gyaw*[1752] Lord Dunedin said:

> It is to be observed that there is here no distinction between a legal and equitable mortgages as in English law, where the legal mortgage will always prevail against the equitable unless the holder of the legal had done or omitted to do something which prevents him in equity from asserting his paramount rights.

A charge is not a transfer of an interest in property, and an oral non-possessory charge has no priority over a subsequent mortgage if the mortgagee has no notice of it. This is the effect of section 100 of TP Act. In a case in which section 100 was construed as not having retrospective effect, the same conclusion was arrived at by reference to section 48 of the Registration Act, 1908.[1753] Where pursuant to a loan taken by the borrower from Bank, a charge is created in favour

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1745. *KJ Nathan v SV Maruthi Rao,* AIR 1965 SC 430; *Thakur Kishan Singh v Arvind Kunar,* AIR 1995 SC 73 : (1994) 6 SCC 591; *Mahendra Kar v Babul Kumar Ghosh,* AIR 2001 Gau 29; *Motichand v Sagun* (1905) ILR 29 Bom 46; *Mathura v Ambika,* (1914) 12 All LJ 993 : 25 IC 725; *Bindeshri v Somnath,* (1916) 14 All LJ 382 : 35 IC 347; *Gopal Ram v Lachmi,* 95 IC 138 : AIR 1926 All 549; *Rumuswami Pillai v Ramasami Naicker,* AIR 1960 Mad 396; *Kuldip Singh v Balwant Kaur,* AIR 1991 P&H 291, p 297.
1746. *Sobhagchand v Bhaichand,* (1882) ILR 6 Bom 193, p 208.
1747. *Kanti Ram v Kutubuddin,* (1895) ILR 22 Cal 33.
1748. *Radha Kishun v Khurshed Hossein,* (1920) ILR 47 Cal 662 : 47 IA 11 : 55 IC 959; *Official Assignee of Calcutta v Jagabandhu Mullick,* (1934) ILR 61 Cal 494 : (1934) 38 Cal WN 492 : 150 IC 321 : AIR 1934 Cal 552.
1749. *Sukhdeo Misra v Sheodial,* (1901) All WN 52.
1750. *Bisseswar Poddar v Nabadwib Chandra,* (1906) 64 Cal WN 1067 : AIR 1961 Cal 300.
1751. *Dayal v Jivraj,* (1877) ILR 1 Bom 237.
1752. *Imperial Bank of India v U Rai Gyaw,* 50 IA 283, p 289 : (1923) ILR 1 Rang 637 : 76 IC 910 : AIR 1923 PC 211.
1753. *Chhaganlal v Chunilal,* (1934) 36 Bom LR 277 : 152 IC 267 : AIR 1934 Bom 189.

of the Bank, and the property is sold for a higher amount after a one time settlement offer is made to the borrower by the Bank for the settlement of the entire debt due to it, the first charge holder is entitled to recover the entire amount due to it, and any amount remaining after the recovery of amount by the first charge holder can be realized by second charge holder.[1754]

A *Raja* made a grant of certain villages to the defendant as maintenance for life, and then gave a *putni* of the villages to the plaintiff on the allegation that the grant to the defendant had been revoked. However, as the grant had not been revoked, the court held that the *putni* took effect after the death of the defendant.[1755]

Where loan was taken by borrower from the bank creating first charge over the bank, whereupon one time settlement offer was made to borrower by the bank for settlement of entire debt due to it, and the property was sold for higher amount, in determining the extent of claim of the charge holder in a property, the first charge would be entitled to recover the entire amount due to it and any amount remaining after recovery of amount by the first charge holder can be realised by the second charge holder.[1756] In *SFL Industries Ltd v Reliance Capital Ltd*,[1757] M/s SFL Industries Ltd the Company (in liquidation) was ordered to be wound up by a court order and an official liquidator was appointed to complete the winding up process. *A* and *B* were the first and the second charge holders respectively in the fixed assets of the company. *B* contended that they were not called by the officials of the company for determination of claim, but *A* argued that a lot of attempts have been made to communicate with *B* that were never reciprocated. On the issue with respect to the rights of priorities over the mortgaged assets, the court held that since special statute is silent qua dealing with the contractual and other statutory rights between the different kinds of secured creditors, then in that eventuality the specific provisions contained in the statute shall prevail. The first charge holders will have the right to recover first along with claims of the other workmen and borrowers if some amount is left with the second charge holder would be entitled to their statutory claims.

(3) Same Date

If two mortgages are executed on the same date, evidence may be taken as to which was executed first, and the first has priority. If this cannot be determined, the mortgagees take as tenants in common, or joint tenants.[1758]

(4) Exceptions

There are several exceptions to the rule of priority. Section 50 of the Registration Act, 1908 gives a subsequently registered deed priority over a prior unregistered deed of which registration is optional. This exception is subject to the doctrine of notice,[1759] and only applies when the deeds are antagonistic, and not when effect can be given to one without infringement of the other.[1760] However, since optional registration has been abolished by TP Act as regards sale deeds by section 54, and as to mortgage deeds by section 59 as amended by Act 6 of 1904, the scope of this exception is very limited, being applicable only to those territories to which TP Act does not extent.

1754. *Karnataka State Financial Corporation, Bangalore v State Bank of India*, AIR 2011 Kant 130.
1755. *Cheta Bahira v Purna Chandra*, (1915) 19 Cal WN 1272 : 27 IC 982.
1756. *Karnataka State Financial Corporation, Bangalore v State Bank of India*, AIR 2011 Kar 130.
1757. *SFL Industries Ltd v Reliance Capital Ltd*, AIR 2015 P&H 116.
1758. *Ram Ratan v Bishun Chand*, (1906) 11 Cal WN 732.
1759. *Hathisingh v Kuvarji*, (1886) ILR 10 Bom 105; *Moreshwar v Dattu*, (1888) ILR 12 Bom 569; *Abdool Hossein v Raghu Nath*, (1886) ILR 13 Cal 73; *Harnandun Singh v Jawad Ali*, (1900) ILR 27 Cal 468; *Bhikhi Rai v Udit Narain*, (1903) ILR 25 All 366.
1760. *Sobhagchand v Bhaichand*, (1882) ILR 6 Bom 193, p 208; *Bapuji v Satyabhamabai*, (1882) ILR 6 Bom 490, p 493; *Ramaraja v Arunachala*, (1884) ILR 7 Mad 248; *Ishri Prasad v Gopi Nath*, (1912) ILR 34 All 631, p 635 : 17 IC 19.

Under section 98 of the Bengal Tenancy Act (Bengal Act 8 of 1885) a previous mortgage by a co-owner of his share was subject to a subsequent charge created by a manager over the whole estate.[1761]

Similarly, in a suit for partition, if a receiver, under the direction of the court mortgages the whole or part of the estate, the mortgagee would be entitled to priority over an execution creditor by whom the property was attached after the commencement of the suit for partition.[1762] Again, when a court for the purpose of preserving the property in suit, directs the receiver to execute a mortgage, it has jurisdiction to order that the mortgage shall take precedence over prior charges.[1763] This is an application of the equity which gives salvage liens, ie, liens for money advanced for the purpose of saving the property from destruction of forfeiture, priority over all their encumbrances. With regard to such liens the general rule is reversed, and they are entitled to priority in inverse order to their dates.[1764] Salvage liens are confined in English law to maritime liens. A salvage lien was claimed in an old Calcutta case[1765] in respect of an advance made for the purpose of carrying on an indigo factory, and again in another case[1766] in respect of an advance made to enable the mortgagor to pay the rent of the premises mortgaged, but in both cases the claim was repelled.

The lien of a co-sharer for owelty money on partition is entitled to precedence over prior mortgagees of property allotted to the co-sharer who is liable to pay owelty.[1767]

(5) Priority Forfeited

Priority is forfeited by fraud, misrepresentation or gross negligence.[1768]

If a prior mortgage is to secure future advances and expresses the maximum to be secured, a puisne mortgagee who has notice of the prior mortgage is not entitled to priority over subsequent advances by the prior mortgagee within the amount of the expressed maximum.[1769]

49. Transferee's right under policy.—Where immovable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

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(1) Insured Property..... 282

(1) Insured Property

If the property is at the date of the transfer insured against loss or damage by fire, the section enacts that the transferee may require the transferor to apply the insurance money, in

1761. *Amarchunder Kundu v Sohi Bhusan Ray,* (1904)ILR 31 Cal 305 : 31 IA 24.
1762. *Herumbo Nath Banerjee v Satish Chandra,* (1906) ILR 33 Cal 1175.
1763. *Giridhari Lal v Dhirendra,* (1906) ILR 34 Cal 427; cf *Strapp v Bull,* [1895] 2 Ch 1; Re *Glasdir Copper Mines Ltd,* [1906] 1 Ch 365.
1764. *Giridhari Lal v Dhirendra,* (1906) ILR 34 Cal 427.
1765. *Moran v Mittu Bibee,* (1877) ILR 2 Cal 58; *Baldeo v Miller,* (1903) ILR 31 Cal 667.
1766. *Hari Mohan v Girish Chandra,* (1877) 1 Cal LJ 152.
1767. *Shahebzada v Hills,* (1908) ILR 35 Cal 388; *Poovamalingam Servai v Veerayi,* 92 IC 1055 : AIR 1926 Mad 186.
1768. See section 78 and notes thereon.
1769. See section 79 and notes thereon

case of damage by fire, to the restoration of the premises. If the transfer is a mortgage, the mortgagor, as the insured would receive the insurance money, and the mortgagee would have the right to require it to be applied as the section directs, in reinstating the security;[1770] and he can do so against a creditor of the mortgagor who has attached the insurance money.[1771] If the mortgagor failed to do so the mortgagee would have the right, under section 68(b), to sue for his mortgage money. In the case of a lease the lessor would receive the insurance money, and the lessee would under this section require the lessor to restore the property. If the property were wholly destroyed or rendered unfit for the purpose for which it was leased, the lessee has the option of avoiding the lease under section 108(e), and in that case he would have no right under this section.

In *Gnana Sundaram v Vulcan Insurance Co,*[1772] the Rangoon High Court held that a contract to purchase confers upon the intending purchaser an insurable interest; but it is submitted that this is a misapplication of the English doctrine of equitable ownership.

The purchaser cannot himself claim the insurance money from the insurance company.[1773]

50. Rent *bona fide* paid to holder under defective title.—No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

ILLUSTRATION

A lets a field to *B* at a rent of ₹ 50, and then transfers the field to *C. B,* having no notice of the transfer, in good faith pays the rent to *A. B* is not chargeable with the rent so paid.

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(2) Rent Paid in Advance 284
(3) Good Faith 284

(1) Rents Paid *Bona Fide*

This section protects rents paid bona fide to a holder under a defective title. Similar provisions occur in section109 of TP Act, and in section 148 of the Agra Tenancy Act (Uttar Pradesh Act 12 of 1881); and as regards to actionable claims, in section 130 of TP Act. In a Bombay case,[1774] the lessor's interest passed on his death first to his brother and then to his sister, but the lessor's widow collected the rents when the person entitled was the sister. Nevertheless, as the payments were made in good faith and without notice of the sister's interest, the tenant was not chargeable. A mortgage of tenanted property operates as an assignment of the lessor's interest, and the mortgagee is entitled to recover the rent from the date of the mortgage; but rents paid bona fide to the mortgagor without notice of the mortgage are protected.[1775]

1770. Re *Barker, Ex parte Gorely,* (1864) 4 De GJF & Sm 477.
1771. *Sinnott v Bowden,* [1912] 2 Ch 414 : [1911-3] All ER Rep 753.
1772. *Gnana Sundaram v Vulcan Insurance Co,* (1931) ILR 9 Rang 452 : 134 IC 221 : AIR 1931 Rang 210.
1773. *V Chetty Firm v Motor Union Insurance Co,* 67 IC 777 : AIR 1923 Rang 6.
1774. *Kaveriamma v Lingappa,* (1909) ILR 33 Bom 96 : 1 IC 654; *Chatri v Bahadur Singh,* (1888) All WN 45.
1775. *Cook v Guerra,* (1872) LR 7 CP 132; *Kiran Chandra v Dutt & Co,* (1925) 29 Cal WN 94 : 85 IC 522 : AIR 1925 Cal 251; *Tiloke Chand Surana v JB Beattie & Co,* (1926) 29 Cal WN 953 : 94 IC 538 : AIR 1926 Cal 204; *Rustomji v Keshavji,* (1926) 28 BomLR 1162 : 98 IC 436 : AIR 1926 Bom 567; *Butto Kreosto v Govindram Marwari,* (1939) IC 132.

The illustration refers to the case of a transfer by a lessor, as to which section 109 enacts that if the lessee not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

There is no statutory obligation on the assignee to give notice of the assignment to the lessee, but if he omits to do so and the lessee pays rent to the assignor, the assignee will not be entitled to recover it from the lessee.[1776] On the other hand, if the assignee of the lessor gives notice to the lessee, he will be entitled to the rent after the assignment.[1777]

(2) Rent Paid in Advance

In order to get the benefit of section 50 the tenant must have paid the rent, as rent, and not in advance, for a payment in advance is treated as a loan.[1778] The reason is that section refers to the fulfilment of an obligation imposed by law to pay rent, while payment in advance is a loan to the landlords with an agreement that on the day when the rent becomes due such loan will be treated as the fulfilment of the obligation. Rent that is payable in advance by the terms of the lease is of course paid as rent, and not as a loan.[1779]

The definition of "lease" in section 105 is wide enough to cover a lease accompanied with payment of advance rent. As the rent note was registered under the Registration Act, 1908, the plaintiff must, by virtue of the definition of "notice", be deemed to have notice of all the contents of the registered document. Since the defendant tenant had paid in advance the rent to the predecessor in title of the plaintiff, section 50 of the TP Act (rent bona fide paid to holder under defective title not to be charged again) operates so as to protect the defendant tenant in such cases. Section 18 of the Bombay Rent, Hotel and Lodging House Rents Control Act, 1947 does not prevent the application of section 50, and plaintiff could not recover the rent claimed by them.[1780]

(3) Good Faith

The payment is not protected unless it is made in good faith. In *Sivaswami Odayar v Subramania Aiyar*[1781] the court of execution erroneously refused to stay a sale although the judgment debtor had applied under the Provincial Insolvency Act to be declared insolvent. The Official Receiver declined to recognise the sale and granted a lease of the property that had been sold. The lessee paid rent in good faith to the Official Receiver and was not chargeable again with rent by the court auction purchaser. But if a tenant knowing that there is a dispute between two persons claiming to be landlords, arbitrarily chooses to pay one, he does so at his own risk.[1782] A payment to the transferor after notice is not a valid payment.[1783]

1776. *Tiloke Chand Surana v JB Beattie,* (1926) Cal WN 953; *Kiran Chandra v Dutt & Co,* (1925) 29 Cal WN 94; *Madan Mohan v Holloway,* (1884) ILR 12 Cal 120, p 555.
1777. *Collector v Hursoondery,* (1864) WR 6; *Ram LalvMahadeo,* 63 IC 587.
1778. *Ram Lal v Mahadeo,* 63 IC 587; *Tiloke Chand Surana v JB Beattie,* (1926) 29 Cal WN 953 : 94 IC 538 : AIR 1926 Cal 204; *Official Assiginee v Abdul Hussein,* 107 IC 209 : AIR 1928 Sau 95; *Cook v Guerra,* (1872) LR 7 CP 132; *De Nicholls v Saunders,* (1870) LR 5 CP 589; *Pale Zabaing Rural Co-operative Society v Maung Thu Daw,* (1931) ILR 9 Rang 470 : 135 IC 646 : AIR 1931 Rang 292; *Govind Rao v Gopal Rao,* (1901) CPLR 65; *Rameshwar Lal v Butto Kristo Rai,* (1934) ILR 13 Pat 396 : 152 IC 992; *Kantha Bhatt v Chotey Lal,* (1959) ILR 9 Raj 190 : AIR 1960 Raj 19.
1779. *Toon Chan v PC Sen,* 24 IC 693.
1780. *Lachmandas Bansilal Rathod v Sumberlal Surajmal Gandhi,* (1973) 75 Bom LR 678.
1781. *Sivaswami Odayar v Subramania Aiyar,*(1932) ILR 55 Mad 316 : 62 Mad LJ 68 : 136 IC 338 : AIR 1932 Mad 95.
1782. *Gambhiraya v Sakharam,* 101 IC 647 : AIR 1927 Nag 237.
1783. *Nobin Chandra v Surendra,* (1905) 7 Cal WN 454; *Peary Lal v Mudhoji,* (1913) 17 Cal LJ 372 : 19 IC 865; *Mohammad Azim v Pateshwari Prasad,* AIR 1943 Oudh 105 : (1942) Oudh WN 613 : 203 IC 361.

51. Improvements made by *bona fide* holders under defective titles.— When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

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(1) Improvements by Holder of Defective Title

This section is an application of the equitable maxim that he who seeks equity must do equity.

The equity involved in this section was enforced by the Privy Council in *Kidar Nath v Mathu Mal,*[1784] a case from Punjab, and not governed by the TP Act. A Hindu widow sold property in which she had only a widow's estate without legal necessity, and the reversioner, at whose instance the sale was set aside and the vendee evicted, was put on terms to compensate the vendee for the improvements he had made. The section was applied by the Privy Council in a case in which a Hindu widow made a gift to a stranger of property inherited by her, and the donee sold the property, and the purchaser effected improvements believing in good faith that he was the owner.[1785]

The section is almost identical with section 2 of the Mesne Profits and Improvements Act, 1855. There are similar provisions with reference to tenants' compensation in the Bengal Tenancy Act.

1784. *Kidar Nath v Mathu Mal,* (1913) ILR 40 Cal 555 : 18 IC 946 : 15 Bom LR 467 : (1913) 17 Cal WN 797 : 25 Mad LJ 176 (PC); *Quaim v Ghulam Din,* 146 IC 36 : AIR 1933 Lah 540.

1785. *Narayanaswami Ayyar v Rama Ayyar,* 57 IA 305 : 128 IC 261 : AIR 1930 PC 297.

The section does not rest upon estoppel, and, therefore, stands clear of the line of cases headed by *Ramsden v Dyson*[1786] in which the owner is put on equitable terms by the doctrine of estoppel by acquiescence.

(2) Scope of the Section

The scope of the section is limited, as it applies to a transferee who in good faith believes himself to be absolutely entitled. It is essential not only to plead that the transferor thought that he was absolutely entitled to the property, but also that the transferee knew that the transferor so thought and was led by the transferee's inaction so to think.[1787] Where a husband builds on the land belonging to his wife knowing he has no right to do so, the latter is entitled to the building.[1788] Section 51 of the TP Act has no application where the transfer of land granted was null and void under section 4(1) of the Karnataka Scheduled Castes/Scheduled Tribes Act, 1978.[1789]

As a general rule, improvements made to the property by a life tenant thereof attach to the estate, and pass to the reversioner or remainderman at the expiration of the life estate without any liability on his part to make compensation thereof. The same holds true of improvements made by a purchaser from one who holds a limited interest, for it is presumed that such purchaser knows the title which he acquires.

Lessee

A lessee cannot appeal to this section,[1790] even if he is a permanent lessee.[1791] When a Hindu widow granted a permanent lease, the lessee, when evicted by the reversioner, was not entitled to compensation for improvements he had made, for he could not have believed himself to be absolutely entitled.[1792] In a case[1793] decided by Madras High Court it was held that a perpetual lessee is entitled to the benefit of this section, but it is submitted that the judgment confuses the rule in this section with the doctrine of equitable estoppel. The correctness of this decision has since been doubted in a later Madras case[1794] where J Wadsworth referred to the author's comments in the last sentence with approval. A lessee may, however, be entitled to relief under the rule of estoppel by acquiescence.[1795]

1786. *Ramsden v Dyson,*(1865) LR 1 HL 129. See also note "Acquiescence" below.
1787. *Govardhan v Mukharai,* (1949) ILR Nag 465.
1788. *KK Das v Amina Khatun,* (1940) ILR 1 Cal 161 : (1940) 44 Cal WN 247 : 189 IC 161 : AIR 1940 Cal 356.
1789. *Chennappa v State of Karnataka,* AIR 1993 Kant 188, p 193. See section 2 of the Government Grants Act, 1895, which excludes applicability of the Transfer of Property Act, 1882; also see *Serajuddin v State of Orissa,* AIR 1969 Ori 152.
1790. *Nundo Kumar v Banomali Gayan,* (1902) ILR 29 Cal 871; *Narasayya v Raja of Venkatagiri,* (1914) ILR 37 Mad 1 : 7 IC 202; *Naina Pillai v Ramanathan,*(1917) 33 Mad LJ 84 : 41 IC 788; *Buneshwar v Lal Bahadur,* 51 IC 380; *BanmalivNihal,* 48 IC 354; *Rajrup Kunwar v Gopi,* (1925)ILR 47 All 430 : 87 IC 44 : AIR 1925 All 261; *Madan Gopal vSundaram,* 189 IC 735 : AIR 1940 Rang 172; *Darbari v Raneeganj Coal Assn,* (1943) ILR 22 Pat 554 : AIR 1944 Pat 30; *Subhan v Madhavrao,* (1951) ILR Nag 895 : AIR 1952 Nag 394; *Hiralal v Bastocella Colliery Co,* (1957) ILR AP 331; *Bastocella Colliery Co v Bandhu Beldar,* (1961) ILR 39 Pat 140 : AIR 1960 Pat 344; *Gokulapathy v KRV Sarma,* (1971) 2 Mad LJ 320 : AIR 1972 Mad 54; *Board of Wakf v Subramaniam Naicker,* (1976) An WR 391 (lessee cannot claim in good faith an absolute title).
1791. *Rajrup Kunwar v Gopi,* (1925) ILR 47 All 430; *Preumal Gramani v Mahomad Kasim,* 28 IC 840; *Venkatappier v Ramaswami,* (1919) Mad WN 548 : 52 IC 517; *Ambika Devi v Scahita Nandan,* (1960) ILR AP 289; *contra Raja Pratab v Debi Pershad,* (1905) 8 OC 13.
1792. *Rajrup Kunwar v Gopi,*(1925) ILR 47 All 430; *Sidha Natha v Har Narain,* 170 IC 508 : AIR 1937 Oudh 446. This decision reverses the decision at p 75 of the same report.
1793. *Subba Rao v Veeranjaneyaswami,* 126 IC 279 : AIR 1930 Mad 298.
1794. *Pandarasannadhi v Anantha Krishnaswami,*(1939) 48 Mad LW 894 : (1938) Mad WN 1236 : 183 IC 609 : AIR 1939 Mad 247.
1795. See note "Acquiescence" below.

Mortgage

The improvements made by a mortgagee *qua* mortgage is now codified in section 63A.

Law prior to insertion of section 63A: An assignee of the equity of redemption with knowledge of the mortgage cannot invoke section 51 as he could never have believed that he was absolutely entitled to the property.[1796] A mortgagee is not a person absolutely entitled, but in some cases it has been held that he may in good faith believe himself to be absolutely entitled.[1797] As to the facts which may induce such a belief, the cases are not consistent. In *Gopi Lal v Abdul Hamid*,[1798] a mortgage of 1859 contained a stipulation that in default of payment within two and a half years, the mortgagee was to be the owner of the property. The suit for redemption was filed nearly 60 years after the due date, but the court observed that the rule "once a mortgage always a mortgage" was as clear in 1859 as it was today, that the mortgagee could not have believed himself to be absolutely entitled, and so refused compensation for a building which the mortgagee had erected. However, in a somewhat similar case from Madras,[1799] where a condition converting a mortgage into a sale was held to be a clog on the equity of redemption, the mortgagee who was misled by the condition into believing himself to be the absolute owner, was allowed compensation for improvements. Compensation was also allowed in a Punjab case,[1800] where the mortgagee who made improvements was misled by a term of the mortgage that after five years the transaction was to be treated as a sale. In *Narayan v Ganesh*,[1801] the Bombay High Court allowed compensation to a mortgagee who was misled by an erroneous order of the court, and believed himself to be absolutely entitled. In *Ramappa v Yellappa*,[1802] the mortgagee was not allowed compensation. Justice Madgavkar said:

> In regard to improvements, section 51 of the Transfer of Property Act does not appear to have been relied upon in the lower courts. But in any case, the respondents must be taken to have had notice of the existence of Kristappa (one of the mortgagors) so that they could not be said to have believed in good faith that they were entitled to the whole.

Other Bombay cases seem to have been decided irrespective of this section, and to refer to improvements made by a mortgagee qua mortgagee. In one case,[1803] a Hindu widow mortgaged property without legal necessity, and the mortgagee with her consent reconstructed a building on the mortgaged property which had been destroyed by floods. On the death of the widow, the reversioner was allowed to redeem without compensating the mortgagee. But in a subsequent case,[1804] where the facts were similar, CJ Macleod said that though the position of the mortgagee was not the same as that of a person who thinks he has an absolute title to the property by sale, yet there was an equity in his favour.

1796. *Santhankumar v Indian Bank*, [1967] 2 SCR 613, p 617 : AIR 1967 SC 1296 : [1967] 2 SCJ 36.
1797. *Pandulal v G Daniel*, AIR 1951 Ajm 16; *Sidde GowdavNadakala*, (1952) ILR Mys 384 : AIR 1952 Mys 117.
1798. *Gopi Lal v Abdul Hamid*,(1928) 26 All LJ 887 : 116 IC 91 : AIR 1928 All 381; *Hansraj v Somni*, (1922) ILR 44 All 665 : 67 IC 314 : AIR 1922 All 261; *BechuvBhabhuti Prasad*, (1930) ILR 52 All 831 : 124 IC 731 : AIR 1931 All 201; *Bimal Chandra v Manmath Nath*, AIR 1954 Cal 345.
1799. *Pandiyan v Vellayappa*, (1917) 33 Mad LJ 316 : 42 IC 438.
1800. *Mussammat Ram Kaur v Partab Singh*, (1919) PR 58 : 51 IC 689; *Ludha Mal v Jagannath*, (1888) PR 123.
1801. *Narayan v Ganesh*,(1926) 28 Bom LR 993 : 97 IC 700 : AIR 1926 Bom 599.
1802. *Ramappa v Yellappa*,(1928) ILR 52 Bom 307 : 109 IC 532 : AIR 1928 Bom 150.
1803. *Vrijbhukandas v Dayaram*, (1908) ILR 32 Bom 32; *Parashar v Ganu*, (1903) 5 Bom LR 643.
1804. *Shiddappa v Pandurang Vasudeo*, (1923) ILR 47Bom 696 : 72 IC 626 : AIR 1923 Bom 385.

(3) Conditions to be fulfilled

Two conditions must be fulfilled before the equity enacted in this section arises. These are:

(1) the person evicted must be a transferee; and

(2) he must have made the improvements believing in good faith that he was absolutely entitled.

(4) Transferee

The following are instances of transferees who have been given the benefit of the section: a purchaser who purchased bona fide in ignorance of a mortgage;[1805] a purchaser from a de facto guardian of a minor who erroneously believed that the guardian had authority to sell;[1806] a purchaser of a life estate who believed that his vendor was absolutely entitled;[1807] a purchaser who was put in possession of a larger area than he was entitled to and who in ignorance of the mistake made improvements on the excess area;[1808] a transferee under an oral sale of immovable property worth ₹ 100 or more;[1809] and the successors-in-title of the last surviving coparcener of a Hindu joint family who were divested by reason of a subsequent adoption.[1810] However, when a tenant raises a plea of estoppel under the section, it is incumbent upon him to show that the conduct of the landlord whether consisting of abstention from interference or in active intervention, was sufficient to justify the legal interference that he had by plain implication contracted that the right of tenancy under which the lessee originally obtained possession should be changed into a perpetual right of occupation.[1811]

ILLUSTRATIONS

(1) *A* purchased the property of a Mahomedan minor from his mother who was acting as de facto guardian, believing in good faith that she had authority to sell. When *A* was evicted by the minor he was entitled to compensation for improvements that he had made.[1812]

(2) A grantee of land from a *Tahsildar*, believing himself to be absolutely entitled, improved the land by laying out a casuarina plantation. The Collector revoked the grant and evicted the grantee, but the latter was entitled to compensation for the improvements.[1813]

In all these cases, the rule was applied when the transferee was evicted by the better title. But the principle of the section was applied to a case[1814] where there was no direct eviction, and no better title. A purchaser had erected a building on land which was subject to a mortgage of which she was unaware. The court directed the mortgagee to pay the cost of the improvement as a condition precedent to bringing the property to sale in enforcement of his mortgage.

Again, a purchaser who had made improvements to property which he was under covenant to reconvey was allowed compensation when sued in specific performance of his covenant.[1815]

1805. *Narayana Rao v Basarayappa*, AIR 1956 SC 727.
1806. *Harilal v Gordhan*, (1927) ILR 51 Bom 1040 : 105 IC 722 : AIR 1927 Bom 611 (Hindu guardian); *Durgozi Row v Fakeer Sahib*, (1907) ILR 30 Mad 197 (Mahomedan guardian).
1807. *Nanjamma v Nacharammal*, (1907) 17 Mad LJ 622.
1808. *Natesa Thevan v District Board of Tanjore*, 95 IC 789 : AIR 1926 Mad 921.
1809. *Topanmal v Chanchalmal*,188 IC 223 : AIR 1940 Sau 77.
1810. *Mahadeo v Rameshwar*, (1968) 70 Bom LR 89 : AIR 1968 Bom 323.
1811. *Cheddi Manjhi v Mahipal*, AIR 1951 Pat 600, p 601.
1812. *Durgozi Row v Fakeer Sahib*,(1907) ILR 30 Mad 197.
1813. *Chennapragada v Secretary of State*, (1925) 48 Mad LJ 682 : 90 IC 555 : AIR 1925 Mad 963.
1814. *Kalyan Das v Jan Bibi*, (1929) ILR 51 All 454 : 112 IC 765 : AIR 1929 All 12.
1815. *Chinakkal v Chinnathambi*, (1934) 67 Mad LJ 635 : 152 IC 634 : AIR 1934 Mad 703.

In a Bombay case,[1816] a de facto guardian of a minor sold the minor's house to the defendant who, believing that he had become absolutely entitled, pulled down the house, and built a new one. The guardian had no authority to sell and when the minor attained majority and evicted the defendant, the latter was allowed compensation for the improvement. The case was exactly under the section, for the minor had the better title and had evicted the transferee who had made improvements in good faith. Chief Justice Marten, however, observed that the section applied even when the evictor is the transferor. This dictum was not necessary as the minor was not the transferor, his case being that the guardian did not represent him. It is submitted that the dictum is too broadly stated, for if the evictor were the transferor, other considerations would arise, and the transferor might be estopped from derogating from his own grant.

In an Allahabad case,[1817] a Hindu father sold his son's share in a house without legal necessity, and when the vendee was evicted by the son he was allowed compensation for improvements made in good faith. Justice Ashworth seemed to think that section 51 would neither apply to a defeasible title, nor to a defective title. It is submitted that this is a distinction without a difference. The case was one of eviction by better title.

The section is not applicable to a son governed by the Dayabhaga law, who makes improvements on the ancestral property.[1818] Nor is the section applicable to a case in which a person makes improvements on the land of another, not under a mistake as to his right or where he is not encouraged in such a mistake by the inactivity of the owner of the land. The section does not apply where an allottee of a plot by government erroneously enters upon and improves another plot.[1819]

The section is of course not applicable to improvements made by the transferor, and when a purchaser from a Hindu widow is evicted by the reversioner, he cannot claim compensation for improvements made by the widow.[1820] It has been held by the Calcutta High Court[1821] that the section does not apply to a person who has not himself made the improvements, but has purchased the property from the improver, the Madras High Court has, however, expressed a contrary view.[1822]

A purchaser making improvements with the knowledge that the property does not belong to him cannot claim the benefit of section 51.[1823] Similarly, the section has no application to a case where the person making improvements does not hold under a perpetual lease, and does not claim an absolute title to the land.[1824] Benefit of section 51 cannot be availed of by a person who was merely in permissive possession of the licensee,[1825] whose licence was terminated, and was not a bona fide occupant in his own right.[1826] Similarly, where a person takes the possession of the property under an oral agreement of sale but never attempted to get it enforced through any judicial proceedings; did not pay the money to the owner despite enjoying the property for a long time, he cannot claim relief under this section but would be entitled to remove the improvements made by him in the property.[1827]

1816. *Harilal v Gordhan,* (1927) ILR 51 Bom 1040 : 105 IC 722 : AIR 1927 Bom 611.
1817. *Lachmi Prasad v Lachmi Narain,* (1927) 25 All LJ 926 : 107 IC 36 : AIR 1928 All 41.
1818. *Dhanna Das v Amulyadhan,* (1906) ILR 33 Cal1119.
1819. *Ijjabba v Ijjnabha,* AIR 1964 Mys 24.
1820. *Meenatchi v Manicka,* 24 IC 918.
1821. *Nagendrabala Dasee v Punchanan Mourie,* (1934) ILR 60 Cal 1388 : 150 IC 42 : AIR 1934 Cal 290.
1822. *Mohamed Naziruddin v Govindarajulu,* (1971) Mad LJ 28 : AIR 1971 Mad 44.
1823. *Stateof J& K v Ghulam Rasool,* (1978) Kash LJ 260.
1824. *Ponnia Pillai v Pannai,* AIR 1947 Mad 282.
1825. *Durga Devi v Beni Prasad,* AIR 2008 (NOC) 570 (AP).
1826. *Lucy George v Nagpur Roman Catholic Diocesan Corporation (P) Ltd,* AIR 1986MP 27, p 29.
1827. *Brijgopal Lumani v Mothey Anja Ratna Rajkumar,* AIR 2010 (NOC) 570 (AP).

Trespasser

A trespasser is not a transferee, and is not entitled to compensation for improvements,[1828] made on government land.[1829] If, however, a tresspasser acting bona fide erects a structure, he is upon ejectment, entitled to remove the materials.[1830] If he, in good faith, plants trees, he is entitled to its usufruct thereof. The owner can claim compensation for the use, and occupation of the land in which the trees are planted.[1831] Where there was no evidence that the plaintiff had encouraged the defendant to trespass and to incur expenses, the trespasser must be evicted.[1832]

There are no equities in favour of a trespasser,[1833] or of a person fraudulently in possession.[1834] In fact, the construction of buildings by such a person is only an aggravation of the trespass for which the appropriate remedy is an injunction for their removal.[1835] However, a person who encroached by mistake on adjoining land and cleared it of jungle, believing it to be his own, was held to be entitled to compensation when evicted.[1836]

In a Madras case, in a suit for declaration and possession of vacant land, the allegation was that the defendant had trespassed on the land, and had put up superstructures on it. However, nothing had been done by the owner of the land to stop it. This acquiescence of the owner, resulted in the owner being held liable to compensate him.[1837]

Similarly, a person cannot be held to be a bona fide purchaser for valuable consideration on the basis of defective title to attract the provisions of section 51 of the Transfer of Property Act, 1882, and therefore, where the property is mortgaged to third party for valuable consideration through a registered deed, in absence of enquiry as regards to a valid transfer of title subsequent purchaser of such property cannot be held to be a bonafide purchaser for valuable consideration and would not be entitled to demand protection under this section.[1838]

(5) Good Faith

The words "believing in good faith that he is absolutely entitled to" are important portions of the section.[1839] In order to entitle an occupant of land to claim compensation, as a general rule, it is necessary that he must have held possession under colour of title, his possession must not have been by mere permission of another, but adverse to the title of the true owner and he must be under an honest belief that he has secured good title to the property in question and is the owner thereof.[1840]

1828. *Daya Ram v Shyam Sundari,* [1965] 1 SCR231, p 237 : AIR 1965 SC 1049 : [1966] 1 SCJ 6; *Secretary of State v Dugappa,* 95 IC 789 : AIR 1926 Mad 921; *LA Creet v Gangaraj,* (1937) ILR 1 Cal203 : 64 Cal LJ 280 : AIR 1937 Cal 129; *Alexander KC v State of Kerala,* AIR 1965 2 Ker 173 : (1966) ILR Ker 72; *Mohammed A Kadar v District Collector,* (1971) 2 Mad LJ 267 : AIR 1972 Mad 56.
1829. *KC Alexandar v State of Kerala,* AIR 1973 SC 2498; *Emerald Valley Estate Ltd Badagulli v State of Kerala,* AIR 2001 Ker 29.
1830. *Krishna Prasad v Adyanath Ghatak,* AIR 1944 Pat 77.
1831. *Pannalal v Gokarna Das,* (1949) ILR All 757.
1832. *Arjun Lal Gupta v Mriganka Mohan Sur,* AIR 1975 SC 207, p 208 : (1974) 2 SCC 586.
1833. *Mudhoo Soodun v Juddooputty,* (1869) 9 WR 115; *Thakoor Chunder v Ramdhone,* (1868) 6 WR 228; *Ganga Din v Jagat,*(1914) 12 All LJ 1026 : 25 IC 198.
1834. *Musadee Mahomed v Meerza Ally,* (1854) 6 MIA 27, p 50; *Sadashiv v Dhakubai,* (1881) ILR 5 Bom 451; *Murlidhar v Parmanand,* (1932) 34 Bom LR 164 : 137 IC 560 : AIR 1932 Bom 190.
1835. *Jethalal v Lalbhai,* (1908) ILR 28 Bom 298.
1836. *Bhupendra v Pyari,* 40 IC 464.
1837. *RS Muthuswami Gounder v A Annamalai,*(1981) 1 Mad LJ 258.
1838. *Vasanthamma v Siddaveerappa,* AIR 2011 Kant 54: LNIND 2010 KANT 360 : 2010 (3) KCCR 2047.
1839. *Ismail Hajee Essa Trust v Muslim Educational Society (Registered),* 2017 (1) KHC 916 : 2017 (1) KLJ 962 : 2017 (1) KLT 843; *Durga Devi v Beni Prasad,* AIR 2008 (NOC) 570 (AP).
1840. *Emeral Valley Estate Ltd, Badaguli v State of Kerala,* AIR 2001 Ker 29, para 13.

Good faith is here used in the sense of the phrase as defined in the General Clauses Act, 1897, ie, "A thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not." It will be observed that the requirement of reasonable care, which occurs in sections 38 and 41, is omitted in this section. That requirement would be appropriate, for if the defect in title were due to want of authority or ostensible ownership and reasonable care had been exercised, the defective title would be cured by estoppel and the question of compensation could not arise.[1841] The expression "believing in good faith" merely means honestly believing.[1842] Honest belief is not incompatible with negligence,[1843] or with a mistake of law.[1844] On the other hand, as said by Lord Selbourne in *Agra Bank v Barry,*[1845] omission to investigate title may be evidence, if it is not explained, of a design, inconsistent with bona fide dealing, to avoid knowledge of the title. Accordingly, it has been said that if a person consciously avoids making an inquiry, though he may have a belief in the matter, it would not be a belief in good faith.[1846] Thus, a purchaser from a Hindu widow who omits to making inquiry as to the circumstances justifying the sale cannot be said to believe in good faith that he has acquired an absolute title.[1847] Similarly, a person having notice of the property being subject to a mortgage and without making enquiry as regards to valid transfer of title cannot demand payment of improvements made by him over alleged property as a subsequent purchaser.[1848] However, this is not a rule of law, for the state of a man's mind is a question of fact[1849] and in exceptional cases, a purchaser from a Hindu widow who sold without necessity, or after her estate was divested by an adoption, has been held to have believed in good faith in his absolute title.[1850] It has been observed that good faith may be inferred from the very fact that the transferee expended a large sum of money on the improvements.[1851]

Compensation has also been allowed where the gift was for the religious benefit of the widow's husband's soul, and the donee believed himself to be absolutely entitled.[1852]

1841. See the judgment of J Mukerji in *Lachmi Prasad v Lachmi Narain,* (1927) 25 All LJ 926 : 107 IC 36 : AIR 1928 All 41.
1842. *Chennapragada v Secretary of State,* (1925) 48 Mad LJ 682 : 90 IC 555 : AIR 1925 Mad 963; *Narayana Aiyar v Sankaranarayana Aiyar,* 24 IC 940; *Moitheensa v Apsa Bivi,* (1913) ILR 36 Mad 194 : 12 IC 444; *Furzund Ali v Aka Ali,* (1879) 3 Cal LR 194.
1843. *Nanjappa v Peruma,* (1909) ILR 32 Mad 530 : 4 IC 18; *Rama Aiyar v Narayanaswami Aiyar,* (1926) 51 Mad LJ 313 : 96 IC 483 : AIR 1926 Mad 609; *Shahabuddin v Vahidbux,* (1920) 14 SLR 12 : 56 IC 492; *Narayana Aiyar v Sankaranarayana Aiyar,* 24 IC 940.
1844. *Harilal v Gordhan,* (1927) ILR 51 Bom 1040 : 105 IC 722 : AIR 1927 Bom 611; *Durgozi Row v Fakeer Sahib,* (1907) ILR 30 Mad 197; *Rama Aiyar v Narayanaswami Aiyar,*(1926) 51 Mad LJ 313; *Sidde Gowda v Nadakala,* (1952) ILR Mys 384 : AIR 1952 Mys 117.
1845. *Agra Bank v Barry,* (1874) LR 7 HL 135, p 157.
1846. *Abhoy Churn Ghose v Attarmoni,* (1910) 13 Cal WN 931 : 31 IC 415; *Shubratan v Shabbirali,* 187 IC 317 : AIR 1940 Oudh 266. See *Bemal Chandra Das v Manmatha Nath,* (1954) 58 Cal WN 760 : AIR 1954 Cal 345.
1847. *Nanjappa v Peruma,*4 IC 18; *Kandarpa v Jogendra Nath,* (1910) 12 Cal LJ 391 : 6 IC 141; *Nandi v Sarup Lal,* (1917) ILR 39 All 463 : 40 IC 71; *Hans Raj v Somni,* (1922) ILR 44 All 665 : 67 IC 314 : AIR 1922 All 194; *Muddasami Sidappa v Lakshmi,*(1915) Mad WN 631; *Etizad Husain v Bani Bahadur,* 45 IC 242; *Suleman v Perichavala,* 86 IC 195 : AIR 1925 Mad 670; *Jogeshwar v Janki Bai,* 95 IC 265 : AIR 1926 Nag 384; *Raj Kishore v Jaint Singh,* (1914) ILR 36 All 387 : 23 IC 364; *Kochunni Kartha v Raman,* (1966) ILR 2 Ker 211 : AIR 1967 Ker 22.
1848. *Vasanthamma v Siddaveerappa,* AIR 2011 Karn 54 : (2010) 3 KCCR 2047.
1849. *Girdharlal v Jethmal,* AIR, 1963 Pat 177.
1850. *American Baptist Mission v Amalanadhuni,* 48 IC 859; *Gangadhar v Rachappa,* (1929) 31 Bom LR 453 : 119 IC 182 : AIR 1929 Bom 246; *Narayanaswami Aiyyar v Rama Aiyyar,* (1930) ILR 53 Mad 69 : 57 IA 305 : 128 IC 261 : AIR 1930 PC 297.
1851. *Ram Charan v Bhagwan Dei,* AIR 1955 All 339.
1852. *Panachand v Manoharlal,* (1917) ILR 42 Bom 136, p 144 : 43 IC 729.

A person who makes improvements in anticipation of a grant cannot be said to have believed himself to be absolutely entitled.[1853] A person who is aware that his title is terminable is not entitled to the benefit of the section.[1854] The test is whether the transferee had acted in the bona fide belief that he was absolutely entitled.[1855]

A purchaser with notice of a prior contract of sale by his vendor is not entitled to compensation for improvements when evicted.[1856] Improvements made pending litigation are not made in good faith, for the party knows he is running a risk and if he is in possession under a decree, he must be aware that the decree may be reversed on appeal.[1857]

(6) Court Sale

The section does not apply to a purchaser at a court sale,[1858] and a purchaser at a court sale who has made improvements is entitled to compensation irrespective of any question of bona fides, when the judgment is reversed and the sale becomes invalid.[1859]

(7) Operation of Law

Section 51 applies to inter vivos transfers. It does not apply to a transfer made by operation of law. In *Harishchandra Hegde v State of Karnataka,*[1860] land was granted by the government in favour of one person who in turn sold it to the transferee, who allegedly invested a lot of money for improvement of the land. However, by section 5 of the Karnataka Scheduled Caste and Scheduled Tribe (Prohibition of Transfer of Certain Land) Act, 1978, all lands were resumed and restored to the original grantee. The Supreme Court held that if a judicial order is passed restoring the land back to a member of the scheduled tribe in terms of the purpose and object of the said Act, the provisions of the TP Act cannot be applied since the latter is governed by a special statute.

(8) Option as to Compensation

The transferee may, on eviction, be compensated in two ways:

> Either by being paid the value of the improvements; or by buying out the better title at a valuation of the property irrespective of the improvements.

It is settled law that the option as to the mode of compensation is that of the evictor, who can either pay the value of the improvements and take the land, or sell the land instead of evicting the transferee.[1861] A mortgagee who has erected a building on the property mortgaged and who was not entitled to the benefit of the section was allowed by the Allahabad High Court to remove the building materials.[1862] It is submitted that this is correct, for the equity under this section does not

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1853. *Davaramani v Padda Bhinaka,* (1915) Mad WN 148 : 28 IC 51.
1854. *Onkar Mal v Secretary of State,* 56 IC 813. See also *Harnaman v Dasondhi,* (1920) ILR 1 Lah 210 : 56 IC 733.
1855. *Sitha v Samiuddin,* 42 IC 428; *Ramappa v Yellappa,* (1928) ILR 52 Bom 307 : 109 IC 532 : AIR 1928 Bom 150.
1856. *Haradhan v Bhagabati,* (1914) ILR 41 Cal 852 : 23 IC 214; *Ramaji v Manohar,* (1960) 62 Bom LR 322 : AIR 1961 Bom 169.
1857. *Velusami v Bommachi,* (1913) 25 Mad LJ 324 : 21 IC 219; *Raman Ittiyathi v Pappy Bhaskaran,* AIR 1990 Ker 112, p 118.
1858. *Lalta Prasad v Bramhanand,* AIR 1950 All 449.
1859. *Moitheensa v Apsa Bivi,* (1913) ILR 36 Mad 194 : 12 IC 444.
1860. *Harishchandra Hegde v State of Karnataka,* (2004) 9 SCC 780 : AIR 2004 SC 315.
1861. *Rama Aiyar v Narayanaswami Aiyar,* (1926) 51 Mad LJ 313 : 96 IC 483 : AIR 1926 Mad 609; *Narayan v Ganesh,* (1926) 28 Bom LR 993 : 97 IC 700 : AIR 1926 Bom 599; *Motichand v British India Corporation,*(1932) 30 All LJ 54 : 136 IC 78 : AIR 1932 All 210; *Kasipathi v Subba Rao,* (1961) ILR Mys 62; *Nararatnamba v Ramayya,* AIR 1963 AP 177.
1862. *Hans Raj v Somni,* (1922) ILR 44 All 665 : 67 IC 314 : AIR 1922 All 194; *Venkatappier v Ramaswami,* (1919) Mad WN 548 : 52 IC 517.

affect the right recognised before the TP Act in *Paramanick's* case.[1863] The Rangoon High Court had disagreed on the ground that this section is an exception to the principle *quicquid plantatur solo, solo credit.*[1864] But this maxim does not generally apply in India.[1865] In a case[1866] where the evictor did not have the means to pay for the improvements, the Allahabad High Court made an order requiring him to sell the property. A transfer was made by a limited owner, which was challenged by the reversioners. Questions arose regarding improvements. Compensation was valued by the trial court, but the high court (on appeal) remanded the case to the trial court, to give opportunity to the plaintiffs to make a choice under section 51. On appeal, the Supreme Court held that as the transferee had made valuable constructions involving an expense of 5 to 6 lakh rupees, in the circumstances, it would not be equitable to re-open the matter of compensation, and to call upon the transferee to pay the present market price. Further, the acceptance, by the high court, of the amount fixed by the trial court was, in the circumstances of the case, held to amount to a choice within the first part of section 51.[1867]

(9) Improvements

Ordinary operations of agriculture such as manuring and levelling land are not improvements within the meaning of this section.[1868] Section 63A refers to improvements by a mortgagee, and the phrase there includes necessary repairs. But under this section repairs are not improvements,[1869] and it has been held that putting a new staircase into an old house is an ordinary repair, and not an improvement.[1870]

A silence by the owner for a period of 12 years after the possession was taken by the defendants under an oral agreement will not extinguish the rights of the owner in his property but the defendants would be liable to remove all improvements made by them in property.[1871]

(10) Valuation

The valuation of improvements would be, as pointed out in *Kidar Nath v Mathmal*[1872] not the amount expended in making the improvement, but the extent to which the value of the property as a marketable subject has been enhanced thereby. It has been observed by a single Judge of the Bombay High Court that a transferee is even entitled to the general rise in prices since the date of transfer;[1873] *sed quaere.*

The valuation has to be made as on the date of actual eviction, and not the date of the exercise of the option by the real owner.[1874]

(11) Executing Court

The executing court cannot go behind the decree fixing compensation according to the Kerala High Court.[1875]

1863. *Paramanick* case, (1868) 6 WN 228.
1864. *Maung Aung v Ma Nyun,* 117 IC 56 : AIR 1928 Rang 141.
1865. See note "English and Indian law of fixtures" under section 3.
1866. *Lachmi Prasad v Lachmi Narain,* (1927) 25 All LJ 926 : 107 IC 36 : AIR 1928 All 41.
1867. *Brahma Sanathan Dharam Mahamandal v Prem Kumar,* AIR 1985 SC 1102.
1868. *Sudala Muthu v Sankara,* 24 IC 879; *Mariappa Thevar v Kaliammal,* AIR 1971 Mad 198.
1869. *Meenatchi v Manicka,* 24 IC 918, p 920; *Bimal Chandra Das v Manmatha Nath,* (1954) 58 Cal WN 760 : AIR 1954 Cal 345.
1870. *Sidramappa v Shidappa,* (1929) 31 Bom LR 461 : 119 IC 650 : AIR 1929 Rang 230.
1871. *Brijgopal Lumani v Mothey Anja Ratna Rajkumar,* AIR 2010 (NOC) 570 (AP).
1872. *Kidar Nath v Mathmal,* (1913) ILR 40 Cal 555 : 19 IC 946; *Kunhi v Kunkan,* (1896) ILR 19 Mad 384; *Gangadhar v Rachappa,* (1929) 31 Bom LR 453 : 119 IC 182 : AIR 1929 Bom 246.
1873. *Shripati Raoji v Vishwanath,* (1955) ILR Bom 1033 : 57 Bom LR 840 : AIR 1955 Bom 457.
1874. *Narayana Rao v Basarayappa,* AIR 1956 SC 727.
1875. *Ammalu v Kothambari Vellachi,* (1974) ILR Ker 116.

(12) Crops

If the transferee has grown crops upon the land in the bona fide belief that he is absolutely entitled, he has the right to remove them on eviction. Ancillary to that right he has the right of free ingress and egress to gather and carry them away. This right constitutes no bar to eviction, but after the eviction the transferee has the right to carry away the crops.[1876] A similar right is reserved to a lessee of uncertain duration when evicted for no fault of his own (section 108(i)).

The ordinary rule is that the right to growing crops passes with the sale of the land and when a mortgagee in possession brings the land to sale, he cannot recover the value of the crops he has grown, from the purchaser.[1877]

(13) Lien

The transferee has no lien on the land for the value of improvements.[1878]

(14) Mesne Profits

Even if a transferee is not entitled to compensation under this section, yet if a decree for mesne profits is passed against him, he will be entitled to credit for profits due to his improvements. This is expressly enacted in section 2(12) of the Code of Civil Procedure 1908, and for the reason that mesne profits are in the nature of damages. An instance of such an order is to be found in the case of *Raja Rai Bhagwat Dayal v Ram Ratan Sahu.*[1879]

(15) Equitable Estoppel by Acquiescence

In some cases[1880] section 51 has been treated as an extension of the equitable doctrine of estoppel by acquiescence. In spite of a superficial similarity, the two cases rest on totally different principles of foundation. Estoppel by acquiescence occurs when the person having the better title knows a fact unknown to the other persons acting in violation of the right which that fact gives, and does not inform them about it, but lies by and lets them run into a trap.[1881] The distinction between this class of case and section 51 is as follows:

(1) Estoppel by acquiescence looks to the conduct of the prospective evictor, while section 51 looks to the conduct of the person evicted.

(2) Estoppel by acquiescence does not merely put the evictor upon equitable terms, but compels him to make good his representation and prevents him from eviction. Section 51 merely puts the evictor upon equitable terms as to compensation. The one denies the right; the other admits the right, but raises a plea in mitigation of it.

(3) Estoppel by acquiescence rests on the doctrine of estoppel, while section 51 rests on the maxim that he who comes unto equity must do equity.

(4) To invoke the concept of estoppel, defendant has to plead each act or omission that constitutes representation from the plaintiff and consequential acts by the defendant and prove them. However, section 51 can be invoked when the

1876. *Deo Dai v Ram Autar,* (1886) ILR 8 All 502.
1877. *Ramalinga v Samiappa,* (1890) ILR 13 Mad 15.
1878. *Dharma Das v Amulyadhan,*(1906) ILR 33 Cal 1119, p 1130.
1879. *Raja Rai Bhagwat Dayal v Ram Ratan Sahu,* (1922) 24 Bom LR 336 : (1922) 26 Cal WN 257 : 65 IC 69 : AIR 1922 PC 91.
1880. *Cf Bhupendra v Pyari,* 40 IC 464; *Collier v Baron,* (1906) 2 Nag LJ 34; *Gangadhar v Rachappa,* (1929) 31 Bom LR 453 : 119 IC 182 : AIR 1929 Bom 246; *Subba Rao v Veeranjaneyaswami,*126 IC 279 : AIR 1930 Mad 298.
1881. *Russell v Watts,* (1883) 25 Ch D 559, p 576.

defendant who is found to have made improvements on the property is neither a trespasser, nor has he pleaded and established estoppel.[1882]

(16) *Ramsden v Dyson*

In *Ramsden v Dyson,*[1883] Lord Kingsdown said:

> The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord, but he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation.

This principle was applied by the Privy Council in *Forbes v Ralli.*[1884] In that case, the landlord granted a lease to the defendant "for the purpose of erecting buildings for trade." The defendant then asked permission to erect a residence for his manager. The plaintiff replied that the lease was a permanent lease which gave the tenant the right to erect buildings, but that the rent was liable to enhancement. Relying on this assurance, the defendant built the residence. The plaintiff then sought to evict the defendant, but the Privy Council held that whatever the nature of the tenancy in its inception, the plaintiff was estopped from questioning its permanency. Mr Ameer Ali delivering the judgment of the Board said:

> Estoppel prevents the plaintiff from evicting from their holding the defendants, whom he, the plaintiff, induced by his representation and conduct to believe that they had a fixity of tenure, although not of rent, in the lands that had been leased to them. It gives effect to the representation that induced them to act as they did.

The equity *of Ramsden v Dyson*[1885] has been approved by the Supreme Court in *Collector of Bombay v Bombay Municipal Corporation*[1886] and *UOI v Indo-Afghan Agencies,*[1887] though the latter was a case more of promissory estoppel.

The rule in *Ramsden v Dyson* is, in India, subject to the exception that a party building on the land of another is allowed to remove the building. The right of course does not exist, when the action is malafide and tortious, but when there is acquiescence and bona fide belief.[1888] In *Lala Beni Ram v Kundan Lall,*[1889] the Privy Council has observed that:

> the owner of land cannot sue for ejectment where he sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference with the view of claiming the building when it is erected.

The Supreme Court has also held that:

> no man, who knowing fully well that he has no title to the property spends money on improving it can be permitted to deprive the original owner of his right to possession of the

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1882. *Syed Ale Mossa Raza v Razia Begum,* AIR 2003 AP 2 : (2004) 1 ALD 19 : (2003) 1 ALT 100.
1883. *Ramsden v Dyson,*(1866) LR 1 HL 129, p 170.
1884. *Forbes v Ralli,* (1925) ILR 4 Pat 707 : 52 IA 178, p 187 : 87 IC 318 : AIR 1925 PC 146; *Ahmad Yar Khan v Secretary of State for India,* (1901) ILR 28 Cal 693 : 28 IA 211; *Algarswami Kone v TJ Andhoni,* (1961) 1 Mad LJ 158 : AIR 1961 Mad 293.
1885. *Ramsden v Dyson,* (1866) LR 1 HL 129.
1886. *Collector of Bombay v Bombay Municipal Corporation,* [1952] SCR 43 : AIR 1951 SC 469 : [1951] SCJ 752.
1887. *UOI v Indo-Afghan Agencies,* [1968] 2 SCR 366 : AIR 1968 SC 718 : [1968] 2 SCA 31.
1888. *Abdul Razak v Nandlal,* (1938) ILR Nag 506.
1889. *Lala Beni Ram v Kundan Lall,* (1899) ILR 21 All 496 : 26 IA 58.

property except upon the payment for the improvements which were not effected with the consent of that person.[1890] Where the owner of the property kept quiet for several months when the trespasser was putting up a portion of his main building, acquiescence may be presumed.[1891] In *Nundo Kumar v Banomali Gayan,*[1892] the doctrine is explained to be outside the scope of section 51.

English cases where this rule has been applied are cases where the true owner stood by while his manager forged a mortgage;[1893] where the true owner permitted an adjoining owner to build a garage on his property, which the latter believed to be his own;[1894] and where a lessee, who erroneously represented that a portion of the property was part of the property demised to him, was forced, under a covenant to repair, that portion even though it was found to be outside the lease.[1895]

(17) Implied Contract and Equitable Estoppel

There is a class of cases which is sometimes referred to as equitable estoppel, although it is really one of implied contract. The defendant has a limited interest as lessee or mortgagee and is aware of the plaintiffs rights, but the plaintiff's conduct has led him to believe that those rights will not be enforced against him, and the defendant has erected buildings or altered his position in consequence of such belief. In such a case, a promise to compensate the defendant is implied. In *Lala Beni Ram v Kundan Lall,*[1896] yearly tenants erected substantial buildings and then contended that they could not be evicted, but the Privy Council rejected this contention saying that in order to raise the equitable estoppel against the lessors it was encumbent on the lessees "to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation." In many such cases, the conduct of the landlord is construed as an implied agreement to compensate the tenants when evicted.[1897] Where a mortgagee spent money in repairing a well, the consent of the mortgagor was implied.[1898] Similarly, when the original grant was lost and the tenant had been 25 years in possession and had erected buildings to the knowledge of the lessor, the court presumed that the grant was of a permanent tenancy for building purposes.[1899] However, if there is no implied promise, and the tenant had made improvements or erected buildings merely in the hope that he will not

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1890. *Madanappa (RS) v Chandramma,* [1965] 3 SCR 283 : AIR 1965 SC 283. See also *Ismail Khan Mahomed v Jaigun Bibi,* (1900) ILR 27 Cal 570; *Nundo Kumar v Banomali Gayan,* (1902) ILR 29 Cal 871; *Etizad Hussain v Bani Bahadur,* 45 IC 242; *Narasayya v Raja of Venkatagiri,* (1914) ILR 37 Mad 1 : 7 IC 202; *B Stocking v Tata Iron and Steel Co,* (1917) 2 Pat LJ 600 : 41 IC 175; *Syed Ali Kazemini v Manik Chandra,* (1923) 27 Cal WN 969 : 80 IC 580 : AIR 1924 Cal 156; *Shyam Kresto v Ganesh,*124 IC 634; *Karan Singh v Budh Singh* : AIR 1938 All 342 : (1938) All LJ 465 : 176 IC 135; *Budsu Dubari Lal Mudi v Raneeganj Coal Association,* (1943) ILR 22 Pat 554 and *Subodh Chandra v Bhagwandas,* (1946) 50 Cal WN 851 : AIR 1947 Cal 353; *Venkata Swami v Muriappa Mudaliar,* AIR 1950 Mad 83.

1891. *S Palanvelu v K Veradammal,* AIR 1977 Mad 342 : (1978) 1 Mad LJ 212.

1892. *Nundo Kumar v Banomali Gayan,* (1902) ILR 29 Cal 871.

1893. *Fuing Kai Sun v Chan Fui Hing,* AIR 1951 Cal 489 : (1951) 2 TLR 47; and see *Ward v Kirkland,* [1967] Ch 194 : [1966] 1 All ER 609.

1894. *Hopgood v Brown,* [1955] 1 All ER 550 : (1955) 1 WLR 213 (CA).

1895. *Perrot (JF) & Co Ltd v Cohen,* [1951] 1 KB 705 : [1950] 2 All ER 939 (CA).

1896. *Lala Beni Ram v Kundan Lall,* (1899) ILR 21 All 496 : 26 IA 58, p 63.

1897. *Dattatrya v Shridhar,* (1893) ILR 17 Bom 736; *Yeshwadabai v Ramchandra,* (1894) ILR 18 Bom 66; *Ramchandra v Vishnu,* (1920) 22 Bom LR 948 : 58 IC 323; *Kunhammed v Narayanan,* (1889) ILR 12 Mad 320; *Mahalatchmi AmmalvPalani Chetti,* (1871) 6 Mad HC 245.

1898. *Durga Singh v Naurang,* (1895) ILR 17 All 282.

1899. *Yeshwadabai v Ramchandra,* (1894) ILR 18 Bom 66.

be dispossessed, the landlord cannot be deprived of his right to take back his property with all the improvements imprudently made by the tenant.[1900] Thus, in special circumstances, he may be allowed to remove all improvements made by him in the property.[1901]

52. Transfer of property pending suit relating thereto.—During the [pendency][1902] in any Court having authority[1903] [1904][[within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by [the Central Government][1905][***][1906] of [any][1907] suit or proceeding which is not collusive and in which any right of immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

[1908][*Explanation.*—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed off by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]

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1900. *Naunihal v Rameshar,* (1894) ILR 16 All 328.
1901. *Brijgopal Lumani v Mothey Anja Ratna Rajkumar,* AIR 2010 (NOC) 570 (AP).
1902. Subs. by Act 20 of 1929, sec. 14, for "active prosecution".
1903. Subs. by the A.O. 1950, for "in the Provinces or established beyond the limits of the Provinces".
1904. Subs. by Act 3 of 1951, sec. 3 and Sch., for "within the limits of Part A States and Part C States" (w.e.f. 1-4-1951).
1905. Subs. by the A.O.1937, for "the Governor General in Council".
1906. The words "or the Crown Representative" rep. by the A.O. 1948.
1907 Subs. by Act 20 of 1929, sec. 14, for "a contentious".
1908. Ins. by Act 20 of 1929, sec. 14.

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(1) Amendments

This section has been amended by the amending Act 20 of 1929.

(2) State Amendment: Gujarat and Maharashtra

Section 52 was amended in Bombay by Bombay Act 4 of 1939 to read as follows:

52. (1) During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, *if a notice of the pendency of such suit or proceeding is registered under section 18 of the Indian Registration Act, 1908,* the property *after the notice is so registered* cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

(2) Every notice of pendency of a suit or proceeding referred to in sub-section (1) shall contain the following particulars, namely:—

(a) the name and address of the owner of immovable property or other person whose right to the immovable property is in question;

(b) the description of the immovable property the right to which is in question;

(c) the Court in which the suit or proceeding is pending;

(d) the nature and title of the suit or proceeding; and

(e) the date on which the suit or proceeding was instituted.

Explanation: (As in the original Act.) This amendment was declared by Bombay Act 57 of 1959 to be in force in the whole of the then recoganised State of Bombay and is, therefore, in force in the whole of the present State of Gujarat and Maharashtra. Under section 2 of the Bombay Act of 1939, however, the amended section only *applies* to immovable properties situated wholly or partly in Greater Bombay; but the State Government is empowered to extend its application to other areas by notification. A suit regarding immovable properties situated

outside areas so notified is not, of course, affected by the amendment.[1909] In view of the amendment, the rule of *lis pendens* under section 52 of the Act will operate in the notified areas provided the *lis* is registered in the manner required by the local amendment.[1910]

The Bombay Amendment requiring publication of notice of *lis pendens* and also registration under the Registration Act is alsoapplicable to state of Gujarat and therefore a transaction entered into after such amendment will require publication of notice of *lis pendens* and also registration under the Registration Act.[1911]

(3) Lis Pendens

The section enacts the doctrine of lis pendens which is expressed in the maxim "*utlite pendente nihil innovetur.*"[1912] It imposes a prohibition on transfer or otherwise dealing of any property during the pendency of a suit, provided the conditions laid down in the section are satisfied.[1913] The scope of the section is discussed in the undernoted cases.[1914] The principle on which the doctrine rests is explained in the leading cases of *Bellamy v Sabine,*[1915] where LJ Turner said:

> It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo,* subject again to be defeated by the same course of proceeding.

The principle of "lis pendens" is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit.[1916] The litigating party is exempted from taking notice of title acquired during pendency of litigation. Where part of the land was acquired during the pendency of the litigation and the land formed the suit property vesting of the acquired landand taking its possession would not affect any right due to pendency of litigation. Land owners having right to receive compensation and the state would be bound by the final decree.[1917] An alienation during the pendency of the suit would be subject to the decision of the suit.[1918] The Supreme Court has held that transfer pendente lite is neither illegal nor void ab initio but remains subservient to right eventually determined by court in pending litigation. The decision of the court in a suit is binding not only on litigating parties but also on those

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1909. *Anand Nivas Pvt LtdvAnandji Kayanji,* [1964] 4 SCR 892 : AIR 1965 SC 414; *Kanbi Vaju Vasta, Botad v Kanbi Popat Vasta,* AIR 1985 Guj 184, p 186.
1910. *Sunil D Chedda v Suresh Babsilal Seth,* AIR 1992 SC 1200, p 1201 : 1993 Supp (1) SCC 323.
1911. *Prem Chand J Panchal v Shahjahabanu Liyakat Khan Pathan,* AIR 2011(NOC) 251 (Guj).
1912. *Amit Kumar Shah v Farida Khatoon,* AIR 2005 SC 2209 :(2005) 11 SCC 403.
1913. *Devraj Dogra v Gyan Chand Jain,* (1981) 2 SCC 675, p 683.
1914. *Ramdhane v Kedarnath,* 173 IC 828 : AIR 1938 Cal 1; *Hiranya Bhusan v Gouri Dutt,* (1943) 76 Cal LJ 191 : 208 IC 75 : AIR 1943 Cal 207. For analysis of section 52, see *Dev Rai Dogra vGyan Chand Jain,* (1981) 2 SCC 675, p 683.
1915. *Bellamy v Sabine,* (1857) 1 De G & J 566, pp 578, 584; *Lakshmandas v Dasrat,* (1882) ILR 6 Bom 168; *Basappa v Bhimangowda,* (1928) ILR 52 Bom 208 : 108 IC 17 : AIR 1928 Bom 65; *Dodey Ram v Gulkando,* 118 IC 660 : AIR 1929 All 601.
1916. *Shiv Chand Tyagi v Addl Commissioner, Meerut,* AIR 2018 (NOC) 47 (All): LNINDORD 2017 ALL 429; *KN Aswathnarayana Setty (D) through LRs v State of Karnataka,* AIR 2014 SC 279 : JT 2013 (15) SC 194 : 2013 (14) SCALE 565 : 2014 (1) SCJ 621 : 2014 (1) ShimLC 371; *Haji Abdul Mateen v Sheikh Haji Firozuddin,* AIR 2014 Del 111: LNIND 2014 DEL 960; *M T Kempegowda v G K Ramesh Kumar,* (2011) 3 Kant LJ 59 : (2011) 1 AIR Kant R 786.
1917. *Shiv Chand Tyagi v Addl Commissioner, Meerut,* AIR 2018 (NOC)47 (All): LNINDORD 2017 ALL 429.
1918. *Chandrapal Guruwani v Saraswati Bai Guruwani,* AIR 2017 Chh 57.

who derive title pendente lite.[1919] In a Calcutta case, J Mookerjee speaking of the application of the doctrine of suits for specific performance of contracts to transfer immovable property, said that if, when the jurisdiction of the court had once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to litigation, and justice would be defeated.[1920] Delhi High Court held that the principle of section 52 applies even where the TP Act does not apply, because the section is based on justice, equity and good conscience.[1921] Similar is the view of the Gujarat High Court.[1922] Where an interest larger than that possessed by the transferor is transferred during the pendency of litigation, the transfer is affected by the principle of lis pendens. The transferee would still be a representative-in-interest of the judgement debtor.[1923]

Section 52 creates only a right to be enforced to avoid a transfer made *pendente lite,* because such transfers are not void, but voidable—and that too, at the option of the affected party to the proceedings, pending which, the transfer is effected. Ex hypothesi, the right accrues only to such parties, and in such circumstances as are expressly envisaged under section 52. One who claims the right must establish the same, before he can enforce it. It in essence forbids transferring rights in third party during the pendency of litigation. If any decree or order is passed in such proceedings any transfer of right during "inter regnum" shall be determined as *non est* in the eyes of law.[1924] The right contemplated under section 52, no doubt, can be used both as a sword and a shield, depending on such facts as to (i) what right or interest is transferred; (ii) who the affected party is; and (iii) how and, in what manner the"transfer" is likely to "affect" any party to the pending "proceeding". It can be used as a shield in a subsequent of the same proceeding between the same parties. Any person who would like to use it as a sword must, however, first establish his right to do so when, in any subsequent proceedings, objection is taken to his claim to do so. Indeed, if the transfer was not avoided by any of the parties to the earlier proceeding likely to be affected by such transfer, the transferee is not prevented from claiming that the right to avoid the transfer was lost, and that nothing survived to be enforced.[1925] Story in his work titled *Equity Jurisprudence* says, in a passage that is frequently quoted by the courts in India, that the effect of the maxim is not to annul the conveyance, but only to render it subservient to the rights of the parties to the litigation.[1926] The section merely declares what was already law, for the doctrine was acted upon in many cases before the passing of the TP Act.[1927] Transferees *pendente lite* are not entitled to claim rights in the suit property by claiming to be *bonafide* purchaser for value without notice, because, there is an absolute bar to transfer of a suit property pendente lite by virtue of section 52. Merely because a person did not know of pendency of a suit, and therefore did not or could not seek to be impleaded, it cannot mean that the bar of section 52 will not

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1919. *Thomson Press (India) Ltd v Nanak Builders Investors P Ltd,* AIR 2013 SC 2389 : JT 2013 (3) SC 289 : 2013 (3) SCALE 26 : (2013) 5 SCC 397.
1920. *Jahar Lal Bhutra v Bhupendra Nath,* (1922) ILR 49 Cal 495 : 67 IC 108 : AIR 1922 Cal 412; *Nathaji v Nana,* (1907) 9 Bom LR 1173.
1921. *Lov Raj Kumar v Major Daya Shankar* (Dr), AIR 1986 Del 364.
1922. *Narendrabhai Chhaganbhai Bharatia v Gandevi Peoples Cooperative Bank Ltd,* AIR 2002 Guj 209 : (2002) 22 GLH 588 : (2002) 2 GLR 218.
1923. *Sayar Bai vYashoda Bai,* AIR 1983 Raj 161.
1924. *Sunder Lal Bhatia v Charan Lal Bhatia,* AIR 2010 J&K 16 at 18 : (2010) 1 JKJ 75.
1925. *Ramjidas v Laxmi Kumar,* AIR 1987 MP 78.
1926. *Commentaries on Equity Jurisprudence,* 3rd English Edn, section 406, p 106; *Liladhar Uttamchand v Shivaji Ganesh,* (1936) ILR Nag 22 : 165 IC 550 : AIR 1936 Nag 125.
1927. *Tarakant v Puddomoney,*(1866) 10 Mad IA 476 : 5 WR 63; *Umamoyi v Tarini Prasad,* (1867) 7 WR 225; *Digamburee v Eshan,* (1871) 15 WR 372; *Raj Kishen v Radha Madhub,* (1874) 21 WR 349; *Ram Kishen v Doole Chand,* (1874) 22 WR 547; *Sami Ayyan v Ammai Ammal,* (1871) 6 Mad HC 234; *Manual v Sangapalli,* (1872) 7 Mad HC 104; *Balaji v Kushalfi,* (1874) 11 Bom HC 24; *Gulabchand v Dhondi,* (1874) 11 Bom HC 64; *Lala Kali Prosad v Buli Singh,* (1877) ILR 4 Cal 789; *Pranjivan v Baju,* (1880) ILR 4 Bom 34; *Lakshmandas v Dasrat,* (1882) ILR 6 Bom 168; *Parvati v Kisan singh,*(1882) ILR 6 Bom 567.

operate. The transferee *pendente lite* cannot use the provision pertaining to filing objections under O 21 rule 97, rule 99 etc. of Code of Civil Procedure, against the judgment and decree.[1928]

If the parties pray for a permission to transfer the proeprty pendente lite, the Court while granting permission may authorize transfer pending the suit upon such terms as it may deem just.[1929]

(4) Notice how far Material—State Amendments

Lord Cranworth in *Bellamy v Sabine* explained that the doctrine did not rest on the ground of notice. His Lordship said:

> It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.

These judgements were quoted and followed by the Privy Council in *Faiyaz Husain KhanvPrag Narain,*[1930] which is the leading case on the doctrine of lis pendens in India. The doctrine of lis pendens is intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court in which the dispute on rights or interests in immovable property is pending, by private dealings that may remove the subject matter of litigation from the ambit of the power of the court to decide a pending dispute, or which may frustrate its decree.[1931]

The rule is, therefore, based not on the doctrine of notice, but on expediency, ie, the necessity for fine adjudication.[1932] It is immaterial whether the alienee *pendente lite* had, or had not, notice of the pending proceeding.[1933] This is, of course, no longer the case in England, or in Gujarat and Maharashtra, where the doctrine only affects transactions *pendente lite* if the *lis* has been duly registered.[1934]

The principle of lis pendens, embodied in section 52, being a principle of public policy, no question of good faith or bona fides arises.[1935] The defence of bona fide transferee for value without notice is not available.[1936] As section 52 forbids to transfer right in third party during pendency of litigation therefore the sale is illegal even if the purchaser pendente lite had no idea of status quo.[1937] Similarly where during the pendency of a suit for specific performance, the suit land was purchased, this transfer would be hit by rule of lis pendens and the question of good faith, essential for establishing any relief would be irrelevant.[1938] A transferee pendente lite cannot seek the protection of section 41 as he cannot be considered a bonafide transferee without

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1928. *Haji Abdul Mateed (D) through his LRs v Sheikh Haji Firozuddin,* AIR 2014 Del 111.
1929. *Harsh Vardhan Singh v Ranveer Singh,* 2010 SCC OnLine Raj 2303; *Sarita Gopalkumar Chand v Madgy,* (2010) 5 AIR Bom R (NOC 489) 139: 2010 (5) All MR 843; *Sanjay Passi v Iqbal Chand Khurana,*(2010) 117 DRJ 209(Delhi).
1930. *Faiyaz Husain Khan v Prag Narain,* (1907) ILR 29 All 389 : 34 IA 102.
1931. *Rajendar Singh v Santa Singh,* AIR 1973 SC 2537 : [1974] 1 SCR 381 : (1973) 2 SCC 705.
1932. *Setappa Goundan v Muthiah Goundan,* (1908) ILR 31 Mad 268; *Dinonath v Shama Bibi,* (1901) ILR 28 Cal 23; *Hakim Singh Charan Das,* (1903) PR 80; *Achut v Shivajirao,* (1937) 39 Bom LR 224 : 170 IC 172 : AIR 1937 Bom 244.
1933. *Maharaj Bahadur v Shaikh Abdul Rahim,* (1922) ILR 1 Pat 5 : 62 IC 900 : (1922) ILR AP 394; *Krisaji Pandharinath v Anusayabai,* (1959) ILR Bom 94 : AIR 1959 Bom 475; *Rappel Augusthi v Gopalan,* AIR 1970 Ker 188.
1934. *Prem Chand J Panchal v Shahjahabanu Liyakatkhan Pathan,* AIR 2011 (NOC) 251 (Guj).
1935. *Mohd Ali Abdul Chanimomin v Bisaheri Kom Abdulla,* AIR 1973 Mys 131.
1936. *Ceean International Pvt Ltd v Ashok Surana,* AIR 2003 Cal 263 : (2003) 2 Cal LT 322.
1937. *Sunder Lal Bhatia v Chaman Lal Bhatia,* AIR 2010 J&K 16; *Abdul Wahid v Hameed Mian,* AIR 2010 (NOC) 931 (Del); *Parveen Kumar v Baljinder Kaur,* AIR 2010 P&H 40.
1938. *Parveen Kumar v Baljinder Kaur,* AIR 2010 P&H 40.

notice.[1939] Similarly, where the property is sold during the pendency of the restraint order, the suit filed by the subsequent purchaser would be dismissed more so because all the parties belonged to the same village and he had notice of the pendency of the litigation.[1940]

It has been held by the Supreme Court that a plea of lis pendens will be allowed to be raised even though the point is not taken in the pleadings or raised as an issue.[1941] However, Madras High Court has held that the plea of lis pendens cannot be raised for the first time in second appeal in absence of any issue framed by the trial court and appellate court.[1942]

Registration

It need hardly be said that it makes no difference to the operation of the rule that the transfer is by registered deed while the suit is on an unregistered instrument.[1943]

(5) Lis pendens between co-defendants

At the same time, the party whose rights are affected must be a party between whom and the party alienating, there is an issue for decision. As in res judicata, the rule of lis pendens will not apply between co-defendants, unless the relief claimed in the suit involves a decision between them.[1944] This is illustrated by the following case.[1945] The plaintiff sued for a declaration that he was not bound by his sale to *A*, nor by *A*'s mortgage to *B*. In the suit, *A* and *B* made common cause against the plaintiff and a decree was passed affirming the sale, but declaring that the plaintiff had a lien for unpaid purchase money in priority to *B*'s mortgage. During the pendency of the suit, the property was purchased in execution of a money decree against *A*. After the suit, *B* filed a suit, to enforce his mortgage and contended that the execution purchase was barred by lis pendens from disputing it. But the court held that the rule of lis pendens did not apply, as there was no issue between *A* and *B*.

(6) Compromise or Consent Decree

The fact that a suit results in a consent decree is no bar to the application of the doctrine of lis pendens.[1946] As was observed in a Calcutta case:[1947]

1939. *Lakhwinder Singh v Dilbagh Singh,* AIR 2010 (NOC) 1113 (P&H) : 2010 (3) RCR (Civil) 564.
1940. *Dharam Singh v Bhag Singh,* AIR 2013 HP 89 : JCNO HP 2013 0210 : LNIND 2013 HP 75.
1941. *Nagubai Ammal v B Shama Rao,* [1956] 1 SCR 451, pp 460-2 : AIR 1956 SC 593 : [1956] SCJ 665.
1942. *Kamalammal v Senthil,* AIR 2003 Mad 337.
1943. *Bhagwandas v Nathu Singh,* (1884) ILR 6 All 444; *Pir Baksh v Kadir Baksh,* (1898) PR 32.
1944. *Nand Keolyur v Sultan Jehan,* (1952) ILR 31 Pat 722 : AIR 1952 Pat 58.
1945. *Krishnaya v Mallya,* (1918) ILR 41 Mad 458 : 44 IC 471. And see *Natha Dhoja v Ramchand,* (1941) 43 Bom LR 301 : 22 IC 407 : AIR 1946 Bom 402.
1946. *Annamalai Chettiar v Malayandi,* (1906) ILR 29 Mad 426; *Mati Lall v Preo Latt,* (1908) 13 Cal WN 226 : 31 IC 696; *Tinoodhan v Trailokha,* (1912) 17 Cal WN 413 : 13 IC 177; *Tangor Majhi v Jaladhar,* (1910) 14 Cal WN 322 : 5 IC 691; *Bharat Ramanuj v Srinath Chandra,* (1922) ILR 49 Cal 220 : 66 IC 273 : AIR 1922 Cal 358; *Parvathi Ammal v Govinda Raja,* (1924) 45 Mad LJ 682 : 76 IC 876 : AIR 1924 Mad 359; *Ramdulari v Upendranath,* (1925) ILR 4 Pat 619 : 90 IC 251 : AIR 1925 Pat 462; *Bhagirathi v Raj Kishore,* (1930) 28 All LJ 766 : 122 IC 887 : AIR 1930 All 354; *Jhuna v Munshi Tara Chand,* 6 IC 168; *Raghubar v Ghasite,* (1910) 13 OC 98 : 6 IC 750; *Basappa v Bhimangowda,* (1928) ILR 52 Bom 208 : 108 IC 17 : AIR 1928 Bom 65; *Periamurugappa v Manicka,* (1926) 49 Mad LJ 68 : 87 IC 213 : AIR 1926 Mad 50; *Sat Narain v Badri,* 107 IC 556 : AIR 1928 Oudh 146; *Dhiraj Singh v Dina Nath,* 8 IC 288 : 6 Nag LR 140; *K Janardanam v Motor Industries Private Ltd,* (1975) 1 An WR 264; *Mohammad Aleem v Maqsood Alam,* AIR 1989 Raj 43, p 46.
1947. *Bharat Ramanuj v Srinath Chandra,* (1922) ILR 49 Cal 220, p 229 : 66 IC 273 : AIR 1922 Cal 358. See *Shiam Lal v Sohan Lal,* (1928) ILR 50 All 290 : 106 IC 255 : AIR 1928 All 3; *Nathu v Ramchand,* AIR 1946 Bom 462; *Hiranya Bhusan v Gouri Dutt,* AIR 1943 Cal 227 : 76 Cal LJ 191 : 208 IC 75; *Venkateshwar Pal v Kunju Vaya,* AIR 1952 Tr & Coch 309; *Ganapakiam v Ponnian Nadar,* AIR 1955 Tr & Coch 3.

> unless a compromise is collusive, the very fact that there is a compromise shows that the suit was in its origin and nature contentious, otherwise there would be nothing to compromise.

However, if the compromise had not been fairly and honestly obtained, the suit which ended in the compromise will not operate as a lis pendens.[1948] If, however, the suit is withdrawn and a compromise is then recorded in a conveyance between the parties, such compromise would not be protected by the doctrine of lis pendens.[1949] It is hardly necessary to add that when a compromise includes matters which do not relate to the suit, the compromise would not be protected as to such extraneous matter. The broad principle underlying the section is to maintain the status quo unaffected by the act of any party to the litigation pending its determination and the expression—"decree or order" includes a decree or order made pursuant to the agreed terms of compromise. When a mortgage was effected by one of the parties during the pendency of a suit between the parties in which the claim to the property was the subject matter of the suit, it was held to be bad.[1950] In a partition suit, a compromise decree was passed. During the pendency of suit, a transfer by way of gift was made. The transferor who was the plaintiff in the suit had admitted the claim of contesting the opposite party regarding the share in property. It was held that the transferee could not claim any right. The fact that it was a compromise decree, did not matter. The transferee is as much bound by the decree, as when he was a party to the suit. He puts himself in "privity with the suit", and cannot be treated as a stranger.[1951]

(7) Not Collusive

The substitution of the words "any suit or proceeding which is not collusive" for the words "a contentious suit or proceeding" does not import any change in the law. It only gives effect to the judgment of the Privy Council in *Faiyaz Hussain Khan v Prag Narain,*[1952] and these are the very words used by Sir Lawrence Jenkins in *Krishnappa v Shivappa.*[1953] Thus, if during the pendency of a collusive maintenance suit by a Hindu wife against her husband, a person bona fide purchases the property of her husband, the charge subsequently created in favour of the wife on such property cannot be allowed to prevail against the purchaser's superior rights.[1954] The doctrine, therefore, comes into operation from the very moment of the institution of a bona fide suit which is in no way collusive.[1955] Merely because the defendant in the suit admitted the plaintiff's claim, it would not render the suit non-contentious within the meaning of the section, as it stood before the amendment.[1956]

A collusive suit, it has been held by the Supreme Court,[1957] differs from a fraudulent suit. The court referred to the definition of "collusion" in Wharton's *Law Lexicon* and observed:

> In such a proceeding, the claim put forward is fictitious, the contest over it is unreal and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the court in his favour and against his opponent by practicing

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1948. *Juthan v Parasnath Singh,* 151 IC 70 : AIR 1934 Pat 270; *Earannama v Nathu-Gowda,* AIR 1952 Mys 26.
1949. *Subramanion Chetty v Mohan Ali,* 52 IC 624.
1950. *Gouri Dutt v Sukur Mohammed,* 75 IA 165 : 50 Bom LR 675 : AIR 1948 PC 147.
1951. *Amarnath v Deputy Director, Consolidation,* AIR1985 All 163.
1952. *Faiyaz Hussain Khan v Prag Narain,* (1907) ILR 29 All 339 :34 IA 142.
1953. *Krishnappa v Shivappa,* (1907) ILR 31 Bom 393.
1954. *Gouri Dutt v Sheikh Sukur Mohammed,* AIR1948 PC 147 : 75 IA 165.
1955. *Shafiquallah v Samiullah,* (1930) ILR 52 All 139 : 123 IC 101 : AIR 1929 All 943; *Ram Narain v Nawab Sajjadali Khan,* AIR1946 Oudh 99; *Nanjammal v Eswaramurthi,* (1955) ILR Mad 519 : (1954) 1 Mad LJ 530 : AIR 1954 Mad 592.
1956. *Gharbhoya Bhimji v Deodata Bihari,* (1937) ILR Nag 452 : 172 IC 389 : AIR 1937 Nag 400.
1957. *Nagubai Ammal v B Shama Rao,* [1956] 1 SCR 451 : AIR 1956 SC 593 : [1956] SCJ 655 : [1956] SCA 959.

> fraud on the court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings, the combat is a mere sham, in a fraudulent suit it is real and earnest.[1958]

A suit may be collusive in its very inception, or a decree may be obtained by collusion in a suit which has honestly begun. Where the parties to a suit entered into an agreement for the express purpose of defeating the rights of a transferee and obtained a decree in terms of the agreement, the rule of lis pendens did not apply.[1959] Where a compromise decree passed in an appeal arising from a partition suit did not indicate shares allotted to each branch and it showed that in spite of knowledge that properties were alienated during the pendency of civil suit, the party praying for setting aside such alienation insisted for allotment of alienated portion in its favour and there was delay of four years in presentation of the said decree before trial court despite knowledge of fact that mutation of properties was effected in name of alienees, it was held that decree was obtained in collusion and hence, section 52 is not applicable.[1960] With reference to the word "contentious" in the old section, it has been suggested that the doctrine of lis pendens does not apply to friendly suits brought by agreement of parties to obtain a declaration by the court of their rights.[1961] However, such suits are neither fraudulent, nor collusive, and there can be no doubt but that they fall within the scope of the section. A collusive proceeding is binding on the immediate parties, but not on their transferees.[1962]

(8) Suits Decided Ex Parte

It is now settled law that, in the absence of fraud or collusion, the doctrine of lis pendens applies to a suit which is decided ex parte.[1963]

(9) During the Pendency—Explanation

The section has now been simplified by the omission of the words "active prosecution," and it applies to transfers during the entire "pendency" of the suit. The question then arises, for what period is the suit pending. There are many decisions on this point, but these have lost much of their importance, for the question is, to a great extent answered by the explanation now added by the amending Act 20 of 1929; and the rule laid down in the explanation has been applied as a rule of justice, equity and good conscience in Punjab, where the TP Act is not in force.[1964] The explanation was added to affirm the correct view to be taken regarding the application of the rule of lis pendens.[1965]

In applying the doctrine of lis pendens, the period for which the proceeding is considered to be pending would be deemed to continue till expiration of period of limitation prescribed

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1958. [1956] 1 SCR 451, p 463; *Ahmedbhoy v Vulleebhoy*, (1883) ILR 6 Bom 703; *Chenvirappa v Puttappa*, (1887) ILR 11 Bom 708; *Nuzbat-ud-Daula v Dilband Begam*, (1913) 16 OC 225 : 21 IC 570; *Bharat Ramanuj v Srinath Chandra*, (1922) ILR 49 Cal 220 : 66 IC 273 : AIR 1922 Cal 358.
1959. *Periamurugappa v Manicka*, (1926) 49 Mad LJ 68 : 87 IC 213 : AIR 1926 Mad 50; *Nuzbat-ud-Daula v Dilband Begam* 21 IC 570.
1960. *Ravanagouda Siddanagouda v Basavantraya Madivalappa*, AIR2002 Kant 96 : 2002 Civil CC 263 : (2001) 6 Kar LJ 545.
1961. *Jogendra v Fulkumari*, (1900) ILR 27 Cal 77; *Kathir v Maremadissa*, (1915) ILR 38 Mad 450 : 20 IC 976.
1962. *Nuzbat-ud-Daula v Dilband Begam*, 21 IC 570.
1963. *Krishnappa v Shivappa*, (1907) ILR 31 Bom 393; *Brojo Kishoree v Meajan Biswas*, (1908) 13 Cal WN 1138 : 3 IC 791; *Durga Prasad v Madho Prasad*, (1908) 8 Cal LJ 53; *Ram Bharose v Rampal Singh*, (1920) ILR 42 All 319 : 58 IC 484; *Bhagirathi v Raj Kishore*, (1930) 28 All LJ 766 : 122 IC 887 : AIR 1930 All 354.
1964. *Kanshi Ram v Kesho Ram*, AIR1961 Punj 299.
1965. *Kulandaivelu v Sowbagyammal*, AIR1945 Mad 350. See *Suresh Singh v State of Bihar*, AIR1994 Pat 34.

for filing appeal.[1966] The suit would be deemed to be pending till the final disposal of the case and would not come to an end upon the disposal of the first appeal and a transfer of the suit property after the disposal of the first appeal would be hit by doctrine of lis pendens as the pendency would continue till the decree is satisfied.[1967]

(10) Commencement of Suit

A suit is commenced by the filing of a plaint, and appeals and execution proceedings are a continuation of the suit. A miscellaneous proceeding commences with the presentation of a petition or application. Where an application to sue *in forma pauperis* is admitted, it relates back to the date of presentation of the application to the court,[1968] but not so if it is rejected.[1969] In decisions before the explanation was enacted, it had been held that when a plaint is presented in a higher court, and is returned for presentation to the court of the lowest grade competent to try it, the suit is pending from the time of the first presentation, for section 15 of the Civil Procedure Code 1908 is only a matter of form.[1970] Similarly, it had been held that an alienation effected in the interval between the presentation of a plaint to a lower court and its rejection and re-presentation before a court of higher grade competent to try it, is affected by lis pendens.[1971] It is submitted that the later case is no longer good law after the amending Act of 1929, for the explanation clearly provides that a suit is deemed to commence from the date it is presented or instituted in a court of competent jurisdiction. Where there is inherent lack of jurisdiction in a court, any decree pronounced by it would be a nullity,[1972] and alienation made pending such proceedings cannot, it is submitted, be affected by section 52. The position may well be different where the proceedings are instituted in a higher court, for the failure to institute them in the court of the lowest grade competent to try it, may be regarded as a mere irregularity. This view has been adopted in two cases decided after 1929.[1973]

On the other hand, it has been held that if the plaint is insufficiently stamped and is rejected and is then re-presented after making good the deficiency, an alienation between the two dates of presentation would not be subjected to lis pendens.[1974] If however, the court does not return the plaint, but recovers the deficit fee, the principle of lis pendens would apply.[1975] If a suit is dismissed for default and then restored, the order of restoration relates back and a transfer after dismissal and before restoration is subjected to lis pendens.[1976] However, an amendment of the plaint will not relate back for the purpose of lis pendens.[1977] So also, if a suit is instituted into a wrong court which had no jurisdiction

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1966. *Jagan Singh v Dhanwanti*, (2012) 2 SCC 628: LNIND 2012 SC 58 : 2012 3 MLJ 370 SC : 2012 (1) SCALE 497.
1967. *S Malleshwarrao v Bokka Venkateshwarrao*, AIR 2013 Kant 88: 2013 (2) AKR 248.
1968. *Nagubai Ammal v B Shama Rao*, [1956] 1 SCR 451 : AIR 1956 SC 593 : [1956] SCJ 655; *Ambika Pratap v Dwarka Prasad*, (1908) ILR 30 All 95; *Pattumadammal v Nanjappa*, (1939) 49 Mad LW 241 : (1939) Mad WN 311 : 184 IC 824 : AIR 1939 Mad 275; *Jogarao v Chinnayya*, (1936) 71 Mad LJ 201 : 164 IC 1006 : AIR 1936 Mad 853; *Bimala Bala Debi v Sanat Kumar Chaudhury*, (1960) 65 Cal WN 701.
1969. *Sahandrabai v Shri Deo Radha Ballabhji*, AIR 1938 Nag 30.
1970. *Tangor Mahji v Jaladhar*, (1909) 14 Cal WN 322 : 5 IC 691; *Asutosh Roy v Ananta Ram*, 50 IC 727.
1971. *Ma Than v Maung Ba Gyan*, (1927) ILR 5 Rang 101 : 101 IC 797 : AIR 1927 Rang 145.
1972. See *Mulla Code of Civil Procedure*, 13th Edn, pp 124-129.
1973. *Nathusingh v Anandrao*, (1941) ILR Nag 652; *Govinda Pillai v Aiyappan Krishnan*, (1957) ILR Ker 5 : AIR 1957 Ker 10.
1974. *Mohendra Nath v Parameswar*, 60 IC 439.
1975. *Shivshankarappa v Shivappa*, AIR 1943 Bom 27.
1976. *Ashutosh Ray v Ananta Ram*, 50 IC 727; *Narayan Laxman v Vishnu Waman*, (1957) 59 Bom LR 205 : AIR 1957 Bom 117.
1977. *BR Rangaswami v Upparaje Gowda*, AIR 1962 Mys 189.

and was returned for presentation to the proper court, an alienation effected before its presentation to the proper court is not affected by lis pendens.[1978] In an Allahabad case,[1979] the suit was to cancel a deed of gift, but the plaint omitted reference to a particular property which the defendant sold before it was included in the suit by an amendment of the plaint. The court held that the sale was not affected by the doctrine of lis pendens. Where, however, the property is transferred after an application has been made for amendment to include the property, but before the order for amendment has actually been made, the section will apply, for the order for amendment will relate back to the date of the application. This will be so even when the transfer is made by the heir of a deceased defendant before such heir has been brought on record.[1980]

(11) Conclusion of Suit—Appeal and Execution

An appeal or execution proceeding is a continuation of the suit, and lis pendens continues during the appeal or execution.[1981] The explanation to section 52 of the TP Act indicates that the pendency of a suit would encompass the stage after the final decree till complete satisfaction and discharge of such decree or order. It is, therefore, obvious that legislature for different contingencies had thought it fit to extend the scope and ambit of the terminology "suit" even for covering the execution proceedings with decree passed in such suits.[1982] A lease from a decree holder will not bind his adversary if the decree is reversed on appeal.[1983] Even after the dismissal of a suit, a purchaser is subject to lis pendens, if an appeal is afterwards filed.[1984] There is a case from Bombay which seemed to hold that lis pendens terminated with the decree.[1985] With this exception, cases under the old section recognized that lis pendens may continue after the decree. A suit for sale on a mortgage is pending after the preliminary decree for sale,[1986] and until the security is realised for the satisfaction of the judgment creditor.[1987] A suit for foreclosure is pending until the decree is absolute for foreclosure.[1988] A suit to enforce a mortgage by sale continues after the decree nisi for sale or the preliminary decree for sale, and a

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1978. *Nathu Singh v Anandrao*, 186 IC 688 : AIR 1940 Nag 185.
1979. *Wali Bandi v Tabeya Bibi*, (1919) ILR 41 All 534 : 50 IC 919; *Ramchandra v Bhagwan*, 57 IC 652.
1980. *Nallakumara v Pappayi*, AIR1945 Mad 219, p 221.
1981. *Mahommad Hanif v Khairatasli*, (1940) ILR 20 Pat 346, p 353 : 192 IC 45 : AIR 1941 Pat 577 and the cases referred to therein; *Narayan Laxman v Vishnu Waman*, (1957) 59 Bom LR 205 : AIR 1957 Bom 117; *Hakim Mohammad v Sahab Collector Bahadur*, AIR1958 All 24; *Parshotam v Bai Moti*, AIR1963 Guj 30; *Narendrabhai Chhaganbhai Bharatia v Gandevi Peoples Cooperative Bank Ltd*, AIR2002 Guj 209 : (2002) 22 GLH 588 : (2002) 3 GLR 218.
1982. *Ghantsher Ghosh v Madan Mohan Ghosh*, AIR 1997 SC 471 : (1996) 11 SCC 446.
1983. *Radhika v Radhamani*, (1884) ILR 7 Mad 96.
1984. *Dinonath v Shama Bibi*, (1900) ILR 28 Cal 23; *Gobind Chunder v Guru Churn*, (1888) ILR 15 Cal 94; *Sukhdeo v Jamna*, (1901) ILR 23 All 60; *Settappa Goundan v Muthia*, (1908) ILR 31 Mad 268; *Motichand vBritish India Corporation*, (1932) 30 All LJ 54 : 136 IC 78 : AIR 1932 All 210; *Krishnaji Pandharinath v Anusayabai*, (1959) ILR Bom 94 : 60 Bom LR 1083 : AIR 1959 Bom 475.
1985. *Venkatesh v Maruti*, (1888) ILR 12 Bom 217. See also the judgment of J Bakewell in *Ramasami v Govinda*, (1916) 31 Mad LJ 839 : 38 IC 1; *Govindappa v Hanumanthappa*, (1915) ILR 38 Mad 36, p 39 : 17 IC 420.
1986. *Chunni LalvAbdul Ali*, (1901) ILR 23 All 331; *Bhugwan v Nilkanta*, (1904) 9 Cal WN 171; *Surjiram v Barhamdeo Persad*, (1905) 2 Cal LJ 202; *Madaneswar v Mahamaya Prosad*, (1911) 15 Cal WN 672 : 9 IC 1027; *Braja Nath v Joggeswar*, (1909)9 Cal LJ 346 : 1 IC 62; *Ammayi M v C Sitaramayya* 87 IC 714 : AIR 1925 Mad 1039; *Chunder Koomar v Gopee Kristo*, (1873) 20 WR 204.
1987. *Bepin Krishna v Priya Brata*, (1921) 26 Cal WN 36 : 66 IC 345 : AIR 1921 Cal 730; *Ramasami v Govinda*, (1916) 31 Mad LJ 839 : 38 IC 1.
1988. *Parsotam v Chheda Lal*, (1907) ILR 29 All 76; *Premsukh Das v Peerkhan*, 95 IC 979 : AIR 1926 Nag 21 : 23 Nag LR 86.

purchaser,[1989] or a lessee;[1990] or a subsequent mortgagee;[1991] after a preliminary decree for sale takes subject to the rights of the auction purchaser at the execution sale. A theatre was attached in execution of a decree against the owner. A lease of the theatre executed in favour of a company during the attachment, was held to be hit by the doctrine of lis pendens and also by section 64, Code of Civil Procedure 1908. In this case, the plaintiff was the holder of a mortgage decree in respect of the theatre as also the assignee of the money decree in execution of which the theatre was attached.[1992] Similarly, where the property was attached following non redemption of an equitable mortgage, an alienation pending such attachment would be hit by *lis pendens*.[1993] A third person purchasing property from judgment debtor during pendency of proceedings cannot have a right to object execution in view of section 52.[1994] Legal representatives of original judgment debtor cannot raise objection for transfer of property to the auction purchaser by claiming tenancy right in such property specially when alleged lease created in favour of legal representative was subseuqent to the passing of the decree.[1995]

A single judge of the Punjab and Haryana High Court has held[1996] that an appeal by special leave under art 136 of the Constitution being an "extra-ordinary" appeal, a transfer pending the grant of such leave would not be affected by lis pendens. This view was, however, reversed by the same high court in a later judgment.[1997]

ILLUSTRATIONS

(1) *A* mortgaged property to *B*. *B* sued on the mortgage and obtained a decree nisi for foreclosure. Before the decree was made absolute, *A* sold the property to *C*. The decree for foreclosure was made absolute and it was held that *C* was not entitled to redeem. If he had purchased before the suit, he would have been entitled to redeem though not made a party. But as his purchase was *pendente lite*, he was bound by the decree.[1998]

(2) *A* mortgaged property to *B*. *B* sued *A* on the mortgage and obtained a decree for sale. While this decree was in execution, *A* leased the property to *C* for 10 years. *B* brought the property to sale and purchased it himself. As *C*'s lease was affected by the rule of lis pendens, it was held that *B* was entitled to evict *C*.[1999]

(3) *A* mortgaged property to *B*. *B* sued on his mortgage and obtained a preliminary decree for sale. *A* then made a usufructuary mortgage of the same property in favour of C. *B* obtained a

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1989. *Samal v Babaji*, (1904) ILR 28 Bom 361; *Har Shanker v Shew Gobind*, (1899) ILR 26 Cal 966; *Brojo Kishoree v Meajan Biswas*, (1908) 13 Cal WN 1138 : 3 IC 791; *Sami Nath v Thakur Prasad* 100 IC 294 : AIR 1927 All 309; *Mousing v Amantara* 26 IC 879; *Naba Krishna v Mohit Kali* 9 IC 840; *Mirza Abid v Munnoo Bibi*, (1927) ILR 2 Luck 496 : 102 IC 72 : AIR 1927 Oudh 261; *Lachiram v Bholu* 82 IC 452 : AIR 1925 Nag 132; *Dhiraj Singh v Dina Nath*, (1910) 6 Nag LR 140 : 8 IC 288.

1990. *Thakur Prasad v Gaya*, (1898) ILR 20 All 349; *Ramasami v Govinda*, (1916) 31 Mad LJ 839 : 38 IC 1; *Madan Mohan v Raj Kishori*, (1917) 21 Cal WN 88 : 39 IC 182; *Nisar Husain v Sundar Lal*, (1928) ILR 50 All 202 : 104 IC 292 : AIR 1927 All 657; *Maganlal v Lakhiram*, (1968) 9 Guj LR 161 : AIR 1968 Guj 193.

1991. *Nagendra v Sarat Kamini*, (1922) 26 Cal WN 386 : 66 IC 879 : AIR 1922 Cal 235; *Wazir Hussain v Beni Madho* 126 IC 389 : AIR 1930 Oudh 362.

1992. *Supreme Court Films Exchange Ltd v HH Maharaja Sir Srinath Singhji Dee*, (1975) 2 SCC 530 : AIR 1975 SC 1810; *Nalli Textiles v Minor Krishnan*, AIR 2003 Mad 11 (NOC) : 2002 AIHC 4152.

1993. *K S Dhillon v Punjab Financial Corporation*, AIR2012 P&H 75.

1994. *Kadali Pullayya v Kadali Narasamma*, AIR 2002 AP 45 (NOC) : 2001 AIHC 4220.

1995. *Muppidi Aora Reddy v Bollareddy Ramakrishna Reddy*, AIR2003 AP 294.

1996. *Mewa Singh v Jagir Singh*, AIR1971 P&H 244.

1997. *Dalip Kaur v Jeewan Ram*, AIR1996 P&H 158 : (1996) 113 PLR 138.

1998. *Parsotam v Chheda Lal*, (1907) ILR 29 All 76.

1999. *Nisar Husain v Sundar Lal*, (1928) ILR 50 All 202 : 104 IC 292 : AIR 1927 All 657; *Ram Rup v Special Manager, Court of Wards, Balrampur Estate*, (1934) ILR 9 Luck 365 : 147 IC 910 : AIR 1934 Oudh 55.

final decree for sale and in execution, the property was sold and purchased by *D*. *C*'s usufructuary mortgage was invalid as against *D* under the rule of lis pendens. *D* was entitled to recover possession from *C* and to recover also all rents collected by *C* from the date of *D*'s purchase.[2000]

(4) *A*, as executor of the deceased owner mortgaged an entire *taluk* to *B*. Afterwards *C*, an co-sharer of one-fourth in the *taluk* mortgaged his one fourth share to *D*. *B* filed a suit on his mortgage but did not implead *D*. During the pendency of B's suit, *E* purchased one-sixth share from one of the co-sharers. *B* obtained final decree for sale in his suit and purchased the property in the court sale, and transferred his interest to *E*. *D* then filed his suit on his mortgage and obtained a final decree for sale and purchased the mortgaged property, ie, one-fourth share himself at a court sale. *D* then filed a suit against *B* and *E* for redeeming *B*'s mortgage of the whole *taluk*. Held that as between *B* and *D*, *D* was entitled to redeem the whole *taluk* and not merely the one-fourth share, because not having been impleaded as a defendant in *B*'s suit, his right of redemption remained intact. Held further that, *E* having purchased one-sixth share during the pendency of *B*'s suit, as between *B* and *E*, *E*'s right was subject to *B*'s rights as purchaser in the court sale in execution of the final decree in *B*'s suit but as between *D* who was not a party to *B*'s suit and there was no question of lis pendens and *E*'s right to redeem remained intact and *E* having stepped into *B*'s right, *D* could only be entitled to redeem five-sixth of the *taluk*.[2001]

A purchaser from a defendant, who is being sued for possession and against whom a decree for possession and mesne profits is made, takes subject to the decree, and the decree for mesne profits may be executed against him as from the date on which he enters into possession.[2002] Where, however, the decree for mesne profits does not create a charge on the properties transferred, it is a mere money decree, and cannot affect the transfer.[2003]

The explanation enacts what had already been decided, namely, that the doctrine of lis pendens applies not only during the pendency of the suit, but also of the appeal which finally disposes off the suit; and if the decree is executory, until satisfaction of the decree by execution or until further execution is barred by limitation.[2004]

(12) Application for Review or Revision

The explanation would appear to exclude applications for review or revision. An alienation in the interval between a final decree and an application for review or revision would not, it seems, be subject to the rule of lis pendens. However, an alienation while such an application was pending would no doubt be subject to the order made thereon. There is one case on the point, but it is a curious case, for although the application for review was successful, and a money decree was altered into a mortgage decree, yet the court refused to apply the principle of the section as there had been a delay in applying for a review.[2005]

(13) Writ Petition

Any action taken during the pendency of writ petition shall be hit by the principle of lis pendens.[2006] It has been held that a proceeding instituted under Articles 226 and 227 of

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2000. *Nagendra v SaratKamini*, (1922) 26 Cal WN 386 : 66 IC 879 : AIR 1922 Cal 235.
2001. *Amulya Krishna v Raruli Pioneer Co-operative Bank Ltd*, (1940) 70 Cal LJ 397 : 187 IC 416 : AIR 1940 Cal 150; see also, *Mahomed Juman Mia v Akali Mudiani*, (1943) 47 Cal WN 682 : 77 CLJ 162 : 210 IC 67 : AIR 1943 Cal 577.
2002. *Midnapore Zemindari Co v Naresh Narain*, (1912) ILR 39 Cal 220 : 11 IC 129; *Damodar v Miller*, (1921) 6 Pat LJ 166 : 61 IC 735 : AIR 1921 Pat 102.
2003. *Ahmed Ali v Banguluni Veeralla*, AIR 1959 AP 280.
2004. *Ghanshyam Das v Ragho Singh*, (1931) ILR 10 Pat 234 : 130 IC 257 : AIR 1931 Pat 64; *Abdul Muhammad v Seethalakshmi*, 130 IC 666 : AIR 1931 Mad 120; *Aravamudhu Ayyangar v Zamindarini Srinath Abiramvalli Ayah*, (1934) 66 Mad LJ 566 : 150 IC 930 : AIR 1934 Mad 353.
2005. *Naggappa Chetty v Maung Po Gwe*, 12 IC 849.
2006. *Chetak Electric & Iron Industries v Rajasthan Finance Corpn*, AIR1998 Raj 42.

the Constitution which is not collusive and in which only a right to immovable property is directly and specifically in question, will be a proceeding attracting section 52 of the TP Act, and as such the property concerned cannot be transferred or otherwise dealt with by any party to the proceeding so as to affect the rights of any other party thereto under an order which may be passed therein, except under the authority of the high court, and on such terms as it may impose.[2007]

(14) Meaning of Proceeding

A proceeding before a settlement officer is not a proceeding which can operate as a lis pendens under this section.[2008] However, a Registrar of Co-operative Societies is a court, and a proceeding under rule 14 of the Co-operarive Societies Act, 1912 operates as a lis pendens.[2009] The principle of the section has been applied to revenue proceedings by the Orissa High Court.[2010] However, the Madhya Pradesh High Court has held that since the restitution proceedings which were filed before the revenue court for restoration of possession were not in the nature of suit and the restitution application was neither the continuation of the suit, nor an application for execution of any decree and is only a summary proceeding, sale during the pendency of such proceeding is not affected by the doctrine of lis pendens.[2011]

(15) Any Party

These words are not merely descriptive, but refer to the time when the transaction takes place. A puisne mortgagee who is not joined as a party in a prior mortgagee's suit is not a party and an assignment by him during the suit is not affected by lis pendens although the assignee is subsequently joined in the suit.[2012] A transferee *pendente lite* is a representative in interest of the transferor who is a party to the suit and is also a person bound by the decree, even though he was not made a party to the suit.[2013] No person who has entered into possession through the party obtaining an ex-parte decree or order can resist or obstruct restitution on the ground that he is a bona fide transferee without notice.[2014]

During the pendency of the suit for sale filed by a mortgagee, three of the defendant mortgagees were declared insolvents, and their share vested in the official receiver. A decree was passed in the suit without impleading the official receiver. It was held that a sale by the official receiver was not bad on the ground of lis pendens.[2015]

A party to a suit whose name is struck off as a party by consent is not bound by the decree, actually or constructively, and is not, therefore, affected by the doctrine of lis pendens.[2016]

The plea of lis pendens cannot, however, be availed of by the person who himself transfers the property *pendente lite*.[2017] The same principle has been applied to involuntary sales, where

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2007. *Goudappa Appoya Patil v Shivari Bhimappu Pattar*, AIR1992 Kant 71, p 76.
2008. *Jaglal Rai v Makhna Kuar*, (1888) All WN 246.
2009. *Velayudu Mudali v Co-operative Rural Credit Society*, (1934) ILR 57 Mad 426 : 66 Mad LJ 90 : 148 IC 1098 : AIR 1934 Mad 40.
2010. *Nata Padhan v Banchha Baral*, AIR 1968 Ori 36.
2011. *Gowardhan v Ghasiram*, AIR 2002 MP 130.
2012. *Sheoratan Koer v Kamla Prasad*, (1932) ILR 11 Pat 415 : 139 IC 78 : AIR 1932 Pat 270; *Dolandas v Dadubhai*, AIR1947 Sau 181.
2013. *Khemchand Shankar Choudhari v Vishnu Hai Patil*, (1983) 1 SCC 18, p 21; *Parmeshari Din v Ram Charan*, (1937) All LJ 1376 : 39 Bom LR 1019 : (1937) 41 Cal WN 1130 : (1937) 2 Mad LJ 359 : 169 IC 657 : AIR 1937 PC 260; *Narayan Laxman v Vishnu Waman*, (1957) 59 Bom LR 205 : AIR 1957 Bom 117.
2014. *Chanda Sab v Jam Shed Khan*, AIR1993 Kant 338, p 346.
2015. *Pulavarthi Ammanna v Bommiredi*, (1949) ILR Mad 904.
2016. *Maqbool Alam Khan v Mst Khoderija*, [1966] 3 SCR 479 : AIR 1966 SC 1194 : [1967] 1 SCJ 63.

the interest of the plaintiff in the suit property was sold in execution of a money decree, and purchased by the defendant.[2018]

(16) Any Other Party

ILLUSTRATION

A brought a suit against *B* as a legal representative of the deceased *C* and obtained a decree. Subsequently, *D* who was another legal representative of *C*, filed a suit for a declaration that the decree passed against *B* was not binding on the property of *C*. During the pendency of that suit, the property was sold in execution of the decree in the first suit. It was held that section 52 had no application as *D* was not any other party, but a legal representative of *C*.[2019]

It may be true that a decree for injunction compels personal obedience, and in appropriate cases would not be enforced against the legal representatives. However, this proposition must have a qualification, and the qualification is that when the injunction relates to doing or not doing something in a property that was the subject matter of the earlier suit, and the act of complaint was on the basis of ownership of an adjacent property or a right claim in the property of the other side, then such a decree for injunction would be binding not only against the judgement debtor personally, but against all those who claim through him.[2020] A transferee of a transferee from the judgment debtor is also bound by the principle of lis pendens since at best, he can step into the shoes of his vendor.[2021]

Call it the principle of lis pendens or call it by any other name, the policy of our law is that normally an assignee or a legal representative is bound by the decree obtained by the assignor or the predecessor in interest. This is the policy underlying our procedure, and is recognised by section 146; O 21, rule 16 and the explanation to that rule; section 11 and section 50 of the Code of Civil Procedure 1908; and section 52 of the TP Act.[2022] Even without impleading the assignee *pendente lite*, the suit could proceed with his vendor on record. The decree in the suit will bind the assignee *pendente lite* as well.[2023]

However, the Apex court in *Bengal Ambuja Housing Development Ltd v Pramila Sanfui*,[2024] held that temporary injunction can be granted against only the parties to the suit property, and therefore the sale of the suit property by not the parties to the suit but their heirs is not hit by section 52 of the Transfer of Property Act, 1882.

(17) Affect the Rights

The purchaser *pendente lite* is bound by the result of the litigation.[2025] If the other party has assented to the transfer, he cannot afterwards object to it on the ground oflis pendens.[2026] In an Allahabad case,[2027] *A* sued to recover possession of an immovable property from *B*. While this suit was pending, *A* mortgaged the property to *C*. The suit for possession ended in

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2017. *Shiam Lal v Sohan Lal*, (1928) ILR 50 All 290 : 106 IC 255 : AIR 1928 All 3; *Rabindra Nath v Sarat Chandra*, (1970) ILR 2 Cal 117 : 74 Cal WN 952 : AIR 1971 Cal 159.
2018. *Jogesh Chandra Mondal v Tarulata Ghose*, (1955) 60 Cal WN 1089.
2019. *Kanagasubhu v Poornath*, AIR 1947 Mad 458.
2020. *Rajappan v Sankaran Sudhakaran*, AIR 1997 Ker 315 : (1997) 1 KLJ 508.
2021. *Vijayalakshmi Leather Industries, (P) Ltd v K Narayanan*, AIR2003 Mad 203 : 2003-1-LW 772 : (2003) 1 MLJ 530.
2022. *Chothy Theyyathan v John Thomas*, AIR 1997 Ker 249.
2023. *Munnootam Kuzhiyil Vayaloli Balan Nambiar v Thekkedath Sankara Kurup*, (ILR) 2014 (1) Ker 342.
2024. *Bengal Ambuja Housing Development Ltd v Pramila Sanfui*, AIR 2015 SC 3729: LNIND 2015 SC 537 : 2015 (10) SCALE 69.
2025. *Shib Chandra v Lachmi Narain*, (1929) ILR 51 All 686 : 56 IA 339 : 119 IC 612 : AIR 1929 PC 243.
2026. *Tiloke Chand Surana v Beattie & Co*, (1924) 29 Cal WN 953 : 94 IC 538 : AIR 1926 Cal 204.
2027. *Shiam Lal v Sohan Lal*, (1928) ILR 50 All 290 : 106 IC 255 : AIR 1928 All 3.

a compromise, by which half the property was allotted to *A* and the other half to *B*, and one of the terms of the compromise was that *B* should discharge the mortgage. *C* then sued to enforce his mortgagee's half share and was of course liable; but as the mortgage was executed *pendente lite*, the half share of *B* was not liable. If *B* had assented to the mortgage, his share would have been liable. But his agreement to discharge the mortgage was subsequent to the mortgage and created a personal liability, not to *C*, but to *A*. *C* could recover on the personal liability against *A* and then *A* could sue *B* for an indemnity.

A compromise of a dispute as to the transfer of an equity of redemption, after a redemption suit had been filed, was held not to affect the rights of the mortgagee, as both the transferor and the transferee were parties to the redemption suit.[2028] Acompromise of a partition suit by which a father surrenders his interest to his minor sons and appoints trustees to manage the property for their benefit and to pay the family debt, is not within the scope of this section.[2029]

In a Madras case,[2030] a creditor sold property of a deceased debtor in execution of a decree against the widow as his legal representative. The sale was held pending by a legatee in which his right to represent the deceased debtor was established. The court held that as the widow was also a legal representative of the deceased and as the legatee claimed the property as representing the deceased, his rights were not affected. This is true, but the legatee's suit was to establish a personal right, and could not operate as a lis pendens. The section expressly provides for all cases of decrees in a suit relating to immovable property, whether they involve a mortgage or a charge or recovery of possession. It makes no exception in favour of a bona fide transferee for value without notice.[2031] The principle is of public policy, and no question of good faith arises.[2032] An estoppel under section 41 cannot override the provisions of section 52.[2033]

Section 52 is, of course, not attracted where a transfer is in pursuance of a document, and the decree is subject to the said document, as such a transfer does not affect the rights of any person under the decree.[2034]

Section 52, does not make the transaction void. It merely makes any right created by it inoperative against the party to the suit.[2035] The doctrine of lis pendens does not prohibit a transfer; it however mandates the transferee will be bound by decree that may be passed against his transferor. Thus a purchaser *pendente lite* cannot question the legality of decree

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2028. *Krishnaji v Motilal*, (1929) 31 Bom LR 476 : 122 IC 66 : AIR 1929 Bom 337.
2029. *Chhotabhai v Dadabhai*, (1934) 36 Bom LR 738 : 152 IC 715 : AIR 1935 Bom 54.
2030. *Chatturbhujadoss v Rajamanicka*, (1930) 60 Mad LJ 97 : 129 IC 469 : AIR 1930 Mad 930.
2031. *Kulandaivelu v Sowbagyammal*, AIR1945 Mad 350.
2032. *Mohd Ali Abdul Chanimonninv Bisahemi Kom Abdulla*, AIR1973 Mys 131; See *Shanu Ram v Bashestar Nath*, (1966) 68 Punj LR 44; *Balwinderjit Kaur v Financial Commr (Appeals), Punjab*, AIR 1987 P&H 189, p 190 : (1986) 90 PLR 184.
2033. *Shafiqullah v Samiullah*, (1930) ILR 52 All 139 : 123 IC 101 : AIR 1929 All 943; *Gendmal v Laxman*, (1944) ILR Nag 852 : AIR 1945 Nag 86; *Kanshi Ram v Kesho Ram*, AIR1961 Punj 299.
2034. *Dhanse D Kalal v Vasudeo*, (1971) ILR Bom 530 : 73 Bom LR 293 : AIR 1971 Bom 151.
2035. *Nagubai Ammal v B Shama Rao*, [1956] SCR 451, p 472 : AIR 1956 SC 593 : [1956] SCJ 655; *Shamrao Bapuji v Kamalnayan*, (1947) ILR Nag 942 : AIR 1948 Nag 316; *Sri Jagannath Mahaprabhu v Praval Chandra Chatterjee*, AIR 1992 Ori 47, p 51 disagreeing with the view expressed in *Lakshmanan v Komal*, AIR 1959 Ker 67 that the effect of section 52 is to render void as against the decree holder transfer or other dealing with the suit property *pendente lite* and overruling *Pranakrushna v Umakanta Panda*, AIR1989 Ori 148; *Padmaja v Erattil Sanjeev*, AIR 2007 (NOC) 70 (Ker).

and propriety of the court in passing such a decree.[2036] The transfer is good and operative as between the parties thereto except to the extent that it might conflict with rights decreed under the decree or order.[2037] The apex court has held that the effect of section 52 is not to wipe out the transfer altogether but to subordinate it to the rights based on the decree in the suit. As between the parties to the transaction, however, it was perfectly valid and operated to vest the title of the transferor in the transferees.[2038]

The purpose of section 52 is not to defeat any just and equitable claim, but only to subject them to the authority of the court which is dealing with the property to which claims are put forward.[2039]

The Supreme Court repelling the contention that purchase *pendente lite* was void and conferred no title, has held that the words "so as to affect the rights of any other party thereto under any decree or order which may be made therein", make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order. The effect of section 52 is not to wipe such sale out altogether, but to subordinate it to the rights based on the decree in the suit. It is in this view that transfers *pendente lite* have been held to be valid and operative as between the parties thereto.[2040] It appears that the decision of the Supreme Court in *Nagubai's* case was not noticed by a Full Bench of the Kerala High Court[2041] when it held that the transfer of a suit property *pendente lite* was void as against the decree holder. The Orissa High Court has disagreed with this view expressed by the Full Bench of the Kerala High Court holding that a transferee *pendente lite* to the extent he has acquired interest from the defendant is vitally interested in the litigation and though the plaintiff is under no obligation to implead him, the court has discretion in the matter and an alienee would ordinarily be joined as a party to enable him to protect his interests.[2042]

(18) Transfer before Suit

A transfer, including a mortgage,[2043] before the suit is not subject to lis pendens.[2044] In *Umesh Chunder v Zahoor Fatima,*[2045] property was sold in execution of a decree of a prior mortgagee. The plaintiff claimed under puisne mortgages, executed, some before, and some after, the prior mortgagee's suit. He had not been made a party and sued to redeem the prior mortgagee. The Privy Council held that the right to redeem could be exercised only by virtue of the puisne mortgages executed before the suit. As to the puisne mortgages executed during the pendency of the suit, their Lordships said:

> But if the transfer took place *pendente lite,* the transferee must take his interest subject to the incidents of the suit; and one of those is that a purchaser under the decree will get a good title against all persons whom the suit binds.

2036. *A V Raju v H Phoolchand,* AIR 2011 Mad 83; *S N Arora v Brokers and Brokers Pvt Ltd,* AIR 2011 Del 89 : (2010) 118 DRJ 631.
2037. *Nagubai Ammal v B Shama Rao,* AIR 1956 SC 593, p 602; *Bhajan Kaur v Kanwar Devinder Singh,* AIR 1990 P&H 347, p 349.
2038. *Lalitha Kariappa v Sanjeevi, AIR* 2006 Kant 25 : (2006) 1 KCCR 119.
2039. *Jayaram Mudaliar v Ayyaswamy,* AIR1973 SC 569; *K A Khader v Rajamma John Madathil,* AIR1994 Ker 122, p 126.
2040. *Nagubai Ammal v B Shama Rao,* AIR1956 SC 593, p 602.
2041. *Lakshmanan v Kamal,* AIR1959 Ker 67, p 71.
2042. *Jagannath Mahaprabhu v Pravat Chandra Chatterjee,* AIR1992 Ori 47, p 51.
2043. *Kerala Financial Corporation v Syndicate Bank,* AIR1999 Ker 213.
2044. *Cf Joy Chandra v Sreenath,* (1905) ILR 32 Cal 357; *Mahomed Juman Mia v Akali Mudiani,* AIR 1943 Cal 577 : 77 Cal LJ 162 : (1943) 47 Cal WN 682 : 210 IC 677.
2045. *Umesh Chunder v Zahoor Fatima,* (1891) ILR 18 Cal 164 : 17 IA 201, p 212.

A deed of sale executed before the institution of a suit for specific performance of a prior contract for sale of the same property registered thereafter,[2046] an agreement to sell executed in favour of a third party prior to filing of suit for specific performance of an oral agreement to sell,[2047] or a transfer by a person before he is made a party is not affected by the rule of lis pendens.[2048] In *Nirmal Kumar Neogi v Samar Ghosh*,[2049] the suit property included primarily 1/3rd share of *A*. *B* and *C*, created a trust of their 2/3rd share in the property. As this property was transferred prior to the institution of the suit, it was held that such transfer would not be invalidated being transfer pendente lite as the sale deed was executed without affecting the 1/3rd share of the plaintiff which was the subject matter of litigation. But a transfer by a person who is the legal representative of a deceased defendant in a pending suit made prior to his being substituted in the place of the deceased defendant is hit by the doctrine.[2050] The transfer to which the provisions of this section apply is the creation of the mortgage itself, and not the subsequent sale in execution.[2051]

ILLUSTRATION

A makes a gift of land to *B*. *C* sues *A* for possession of the land. While this suit is pending, *B* transfers the land to *D*. *A* dies and *C* obtains a decree for possession against *B* as legal representative of *A*. Is *D*'s title affected by the rule of lis pendens so as to be subject of *C*'s decree? No, because (l) *A*'s gift was before the suit; and (2) *B* was not a party to the suit at the time of the transfer by *B* to *D*.[2052]

The onus of proving that the suit had been filed when the transfer took place is on the person invoking this section;[2053] where the suit was filed on the very day the transfer took place, it must be shown that the plaint was filed earlier for there is no presumption that the plaint must have been filed during the earliest part of the day.[2054]

Where a mortgage deed was existing prior to the suit, but sale deeds were drawn during the pendency of the suit, it was held that the mortgage would merge with the sale of suit land, and the transfer is not prior to the suit.[2055]

Subsequent registration

It matters not that the deed was registered after the suit, if the deed was executed before the filing of the suit.[2056] This is because under section 47 of the Registration Act, 1908, deed operates from date of execution, and not from date of registration.

(19) Right before Suit

When the rule is applied to a transfer *pendente lite*, it will not affect a right existing before the suit. If a puisne mortgagee sues for sale on his mortgage, the property will be sold subject

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2046. *Sadu Sahu v Chandramani*, AIR1948 Pat 60.
2047. *Rajan v Yunuskutty*, AIR 2002 Ker 339.
2048. *Ammayya v Narayana*, 86 IC 187 : AIR 1925 Mad 487.
2049. *Nirmal Kumar Neogi v Samar Ghosh*, AIR 2017 (NOC) 907 (Cal).
2050. *Nallakumara v Pappayi*, AIR 1945 Mad 219.
2051. *Natesa Chettiar v Subbunarayana*, AIR 1945 Mad 91.
2052. *Bala Ramchandra v Daulu*, (1925) 27 Bom LR 38 : 86 IC 126 : AIR 1925 Bom 176.
2053. *Rafiuddin v Brijmohan* 21 IC 602; *Philip v Ithak*, (1959) ILR Ker 820 : AIR 1960 Ker 98.
2054. *Philip v Ithak*, AIR 1960 Ker 98 applying *Subbayya v Yellamma*, (1886) ILR 9 Mad 130; *Narayana Pillai Chandrashekharan Nair v Kunju Amma Thankamma*, AIR 1990 Ker 177, p 179.
2055. *Kasturi Devi v Harbant Singh*, AIR 2000 P&H 271.
2056. *Venkataramana v Rangiah*, (1922) 41 Mad LJ 399 : 70 IC 212 : AIR 1922 Mad 249*dissenting from Tilakdhari v Gour Narain*, (1920) 5 Pat LJ 715, 59 IC : AIR 1921 Pat 150; *Veerakutty v Ramaswami* 32 IC 31; *Guru Rusappa v Santhappa*, (1925) 48 Mad LJ 496 : 87 IC 568 : AIR 1925 Mad 710; *Narayan Prasad v Raj Keshore*, (1951) ILR AP 613; *Sudama Devi v Rajendra Singh*, AIR1973 Pat 199.

to the rights of the prior mortgagee.[2057] A sale in pursuance of a decree on a mortgage executed before the suit is not affected by lis pendens.[2058]

ILLUSTRATION

A mortgages property first to *B*, and then to *C*. *C* sues *A* on his mortgage and pending the suit *A* sells the property to *B*. The sale having been made *pendente lite*, is subject to the decree in *C*'s suit. But *A*'s right under his prior mortgage is not affected.[2059]

A release by the vendee (during a suit for pre-emption) is affected by the rule of lis pendens, even though the sale be to the original vendor,[2060] but if the purchaser has a superior right of pre-emption, that right will not be affected.[2061] It had been held by the Allahabad High Court[2062] that where the purchaser has an equal right of pre–emption, the proper procedure is to divide the property equally. The Lahore High Court had, however, held that the doctrine of lis pendens does not hit a purchase where the purchaser has an equal right of pre-emption;[2063] and this view has been approved by the Supreme Court in *Bishan Singh v Khazan Singh*[2064] as such a sale is a transfer in recognition of a pre-existing and subsisting right; the position would, of course, be different if the pre-existing right had become unenforceable by reason of its being time-barred for in such a case the transfer, though ostensibly made in recognition of such a right, in fact created a new right *pendente lite*.[2065]

A mortgagee who has an express power of sale within the intervention of the court does not lose his remedy on the mortgagor filing a suit for redemption.[2066]

A mere agreement to sell is not sufficient to defeat the suit for another pre-emptor, and a sale executed after the institution of such a suit is bad on the ground of lis pendens.[2067] Such an agreement does not defeat lis pendens; the observations of the Supreme Court in *Bishan Singh v Khazan Singh*[2068] to pre-existing rights must be confined to rights of pre-emption.[2069]

2057. *Kanti Ram v Kutubuddin*, (1895) ILR 22 Cal 33; *Lachmin Narain v Koteshar Nath*, (1880) ILR 2 All 826; *Venkatarama Aiyar v Rangiyan Chetty*, (1924) 46 Mad LJ 258 : 77 IC 504 : AIR 1924 Mad 449.
2058. *Chinnaswami v Darmalinga*, (1932) 63 Mad LJ 394 : (1932) Mad WN 742 : 139 IC 309 : AIR 1932 Mad 566; *Suramma Nayrualu v Surayya*, (1934) 67 Mad LJ 312 : 155 IC 612 : AIR 1934 Mad 585; *Annapurna Dassee v Sarat Chandra*, AIR1942 Cal 394 : (1942) 46 Cal WN 355; *Rusool Saheb v Hameda Bibi*, (1949) 2 Mad LJ 534 : AIR 1950 Mad 189.
2059. *Lachmin Narain v Koteswar*, (1880) ILR 2 All 826.
2060. *Bhikhi Mal v Debi Sahai*, (1925) ILR 47 All 923 : 89 IC 219 : AIR 1926 All 179; *Kehar Singh v Jahangir*, (1925) ILR 47 All 625 : 88 IC 761 : AIR 1925 All 487; *Durga Prosad v Gangadin*, 88 IC 202 : AIR 1925 All 502; *Kedar Nath v Bankey Behari*, 11 IC 645.
2061. *Malik Singh v Shiam Lal*, (1929) 27 All LJ 537 : 118 IC 43 : AIR 1929 All 440; *Mahmud Khan v Khuda Bakhsh*, (1908) PR 26; *Shariff Hussain v Nur Shah*, 123 IC 124 : AIR 1929 Lah 589; *Bhag v Ujagar*, (1931) 22 Punj LR 283 : 135 IC 48 : AIR 1931 Lah 435; *Waziralli v Zaver Ahmed*, AIR 1949 East Punj 193.
2062. *Bachan Singh v Bijal Singh*, (1926) ILR 48 All 221 : 90 IC 238 : AIR 1926 All 180.
2063. *Mool Chand v Ganga Jal*, (1930) ILR 11 Lah 258 : 132 IC 369 : AIR 1930 Lah 356; *Nabir Ganai v Mohd Ismail*, AIR 1960 J & K 112.
2064. *Bishan Singh v Khazan Singh*, [1959] 1 SCR 878 : AIR 1958 SC 838 : [1958] SCJ 1234 disapproving *Kundan Lal v Amar Singh*, (1927) ILR 50 All 61 : 25 All LJ 739 : 103 IC 123 : AIR 1927 All 664.
2065. *Bishan Singh v Khazan Singh*, AIR 1958 SC 838; *Aziz Dar vSona Dar*, AIR 1970 J & K 37.
2066. *Ramakrishna v Official Assignee*, (1922) ILR 45 Mad 774 : 69 IC 407 : AIR 1922 Mad 390; *Jagivan v Shridhar*, (1878) ILR 2 Bom 252; *Sadu Sahu v Chandramani*, AIR 1948 Pat 60.
2067. *Mahomed Sadiq v Ghasi Ram*, (1946) 48 Punj LR 404 : AIR 1946 Lah 322.
2068. *Bishan Singh v Khazan Singh*, AIR 1958 SC 838 : (1959) 1 SCR 878.
2069. *Munnilal v Bhaiyalal*, AIR 1962 MP 34; *Khaja Bibi v Mohammad Hussain*, AIR 1964 Mys 269; *Ali Abdul Ghanmomin v Bisahami*, AIR 1973 Mys 131.

(20) Attachment before Suit

In *Anundo Moyee v Dhonendro Chunder*,[2070] the defendant purchased property in execution of a money decree against the mortgagor while a suit for foreclosure was pending, but the Privy Council held that as the property had been attached in execution proceedings before the execution of the mortgage, the defendant held by title paramount, and was not affected by lis pendens. In this case, however, the property was in the *mofussil* and the decree was a decree for sale made by the Supreme Court at Calcutta in its equity jurisdiction, and as equity acts in personam the decree was in substance a decree that the parties should concur in conveying and selling the property to the purchaser. The court had no jurisdiction over the property and, therefore, the suit could not operate as a *lis pendens*. Otherwise the principle of *Motilal v Karrabuldin*[2071] would have applied, for in that case it was held that an attachment before suit does not prevent the operation of the doctrine of lis pendens.

(21) Transfer after Suit

A transfer after the dismissal of suit would not be hit by the rule of *lis pendens*. In *Amrit Lal Jalan v Haryana Urban Development Authority*,[2072] the appellant's allotment was cancelled, and plot was resumed by the authority on 26 October 1984. The appeal was dimissed on 19 April 1985. Plot was, thereafter, allotted to a third party on 29 January 1986. In the above facts, it was held that the doctrine of lis pendens has no application.

(22) Section 52 Excludes section41

A purchaser *pendente lite* who makes improvements cannot, it is submitted, claim the benefit of section 52. The point was raised but not decided in *Motichand v British India Corporation*.[2073] It was specifically held in a Punjab case that the alienee who is hit by section 52 cannot claim compensation for improvements made by him.[2074]

(23) Indian Court

A suit in a foreign court cannot operate as a lis pendens.[2075] Similarly, the section cannot apply to properties situated outside India.[2076] The section also does not apply, unless the suit is pending in a court exercising jurisdiction in India (excluding Jammu & Kashmir) or a court established outside India under the Foreign Jurisdiction Act, 1947. The Privy Council is not a foreign court for it exercised jurisdiction in British India.[2077] The court must also be a court having jurisdiction, ie, competency to try the suit.[2078] A High Court is empowered under the Letters Patent to try a suit for land in the *mofussil* if part of the land is within the local limits of its jurisdiction and leave of the court has been obtained. In such a case, a mortgage suit for land partly situated in the *mofussil* and filed in the high court will operate as a lis pendens.[2079] But a suit on a mortgage of land in the *mofussil* tried in the Supreme Court of Calcutta in its equity jurisdiction, did not constitute a lis pendens, as the court had no jurisdiction over the land and its decree was in personam, and did not affect title to

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2070. *Anundo Moyee v Dhonendro Chunder*, (1872) 14 Mad IA 101 : 8 Beng LR 122 (PC).
2071. *Motilal v Karrabuldin*, (1898) ILR 25 Cal 179 : 24 IA 170; *Kedra Nath Lal v Sheonarain*, [1970] 2 SCR 204 : AIR 1970 SC 1717.
2072. *Amrit Lal Jalan v Haryana Urban Development Authority*, AIR 1999 P&H 140.
2073. *Motichand v British India Corporation*, (1932) 30 All LJ 54 : 136 IC 78 : AIR 1932 All 120.
2074. *Sardar Kar Bachan Singh v Major S Kar Bhajan Singh*, AIR 1975 Punj 205.
2075. *Palani Chetti v Subramanyan Chetti*, (1896) ILR 19 Mad 257.
2076. *Sivaramakrishna v K Mammu*, (1957) 1 Mad LJ 14 : AIR 1957 Mad 214.
2077. *Bowles v Bowles*, (1884) ILR 8 Bom 571.
2078. *Ali Shah v Hussain*, (1878) ILR 1 All 588; *Nathu Singh v Anandrao*, 186 IC 688 : AIR 1940 Nag 185; *Kurusinga v Narasinha*, (1937) ILR Bom 895 : 39 Bom LR 1287 : 174 IC 116 : AIR 1938 Bom 121.
2079. *Kiernander v Benimadhub*, (1931) ILR 58 Cal 598 : 134 IC 561 : AIR 1931 Cal 763.

immovable property.[2080] Similarly, when a Hindu widow gave a lease of land in the *mofussil* while an equity suit against her husband's executor was pending in the Supreme Court at Calcutta, the lease was not affected by the doctrine of lis pendens as the Supreme Court had no jurisdiction over land in the *mofussil*.[2081] If the court had jurisdiction, it matters not that under section 15 of the Code of Civil Procedure 1908, the suit should have been filed in a court of lower grade.[2082]

(24) Movables

The doctrine of lis pendens does not apply to movables.[2083] If ornaments are pledged pending a suit for their recovery, the pledge does not take subject to the decree.[2084] The provisions of this section cannot apply to standing timber which is not immovable property.[2085]

(25) The right to Immovable Property must be Directly and Specifically in Question

It is of the essence of the rule of lis pendens that a right to immovable property is directly and specifically in question in the suit.[2086] Therefore, when the dispute for money, where no property is in dispute, is referred to arbitration and an award is made creating a charge for payment of the amount and a judgment is passed on such an award, the doctrine of lis pendens does not apply.[2087] Not only must the right to immovable property be directly and specifically in question in the suit, but the description of the property in the pleading must be sufficient to identify the property.[2088] On the other hand, it is not sufficient to specify the property if the right to it is not directly in issue. Thus, when a Hindu widow sued her stepson for maintenance, and merely specified the item of property in his possession, it was held that the suit did not operate as lis pendens.[2089] Where the widow not only specified the property, but claimed that her maintenance should be charged upon it, it was held that the suit did operate as lis pendens.[2090] Though a charge under section 100 of the TP Act does not involve transfer of an interest to immovable property, it creates a right to immovable property for the purpose of executing the decree and a charge within the meaning of section 100, would attract the provisions of section 52.[2091]

The doctrine is not applicable in favour of a third party. Where the only point which arises for decision in the suit was whether a deed of settlement was true or false, it cannot be

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2080. *Anundo Moyee v Dhonendro Chunder*, (1872) 14 Mad IA 101 : 8 Beng LR 122 (PC).
2081. *Bisonath v Radha Kristo*, (1869) 11 WR 554.
2082. *Tangor Majhi v Jaladhar*, (1909) 14 Cal WN 322 : 5 IC 691; see also note (g) above.
2083. *Vasantha Viswanathan v EK Elayalwar*, (2001) 8 SCC 133; *Govind Baba v Jijibai*, (1912) ILR 36 Bom 189 : 13 IC 849; *Wigram v Buckley*, (1894) 3 Ch 483; *Josua Bank Ltd v Asian Bank Ltd*, (1962) ILR 2 Ker 55 : AIR 1962 Ker 309.
2084. *Govind Baba v Jijibai*, (1912) ILR 36 Bom 189. But see *Talari Kevali v Visvanathan*, (1915) 16 Mad LT 158 : 25 IC 133.
2085. *Kumubi Koya v Ahmed Kutti*, AIR 1950 Mad 59.
2086. *Jaynal Abedin v Hyderali Khan*, (1928) ILR 55 Cal 701 : 111 IC 340 : AIR 1928 Cal 441 citing *Ex parte Thornton*, (1867) 3 Ch 178; *Maung Ta Pan v Maung Po Thaw*, 8 IC 1208; *Shanmugharsundaram v Parvathi Ammal*, AIR 1945 Mad 454.
2087. *Abdul Ghaffar v Ishtiaq Ali*, AIR 1943 Oudh 354 : (1944) ILR 19 Luck 1 : (1943) Oudh WN 231 : 210 IC 326.
2088. *Lokenath Sahu v Achitananda*, (1912) 15 Cal LJ 391 : 2 IC 85; *Wali Bandi v Tabeya Bibi*, (1919) ILR 41 All 534 : 50 IC 919.
2089. *Manika Gramani v Ellappa*, (1896) ILR 19 Mad 271.
2090. *Dose Thimmana v Krishna*, (1906) ILR 29 Mad 508; *Krishna Patter v Sinnaponnu*, 25 IC 759; *Seetharamanujacharyulu v Venkatasubamma*, (1930) ILR 54 Mad 132 : 127 IC 809 : AIR 1930 Mad 824.
2091. *H Bira Singh v Okram Onghi Rajkumari Snatambi Devi*, AIR 1984 Gau 85 (NOC).

said that any right to immovable property was in question, and, therefore, section 52 cannot apply. Nor can it be invoked by a party who was not a party to the suit.[2092] A suit for a declaration of a charge upon specific immovable property falls within the purview of this section.[2093]

The property transferred or dealt with must be property actually in litigation.[2094] Thus, if *A* files a suit against *B* to establish a right of pre-emption in respect of a purchase by *B* of property *X*, and *B* during the pendency of the suit acquires property *Y* by gift from another co-sharer, and so himself becomes a co-sharer not liable to be pre-empted, no question of lis pendens can arise, for the property in suit has not been transferred.[2095]

(i) Suit in which no right to immovable property is in question

Suits in which no right to immovable property is in question are outside the scope of the section. Such suits are suits for debt or damages where the claim is limited to a money demand,[2096] or a suit for the recovery of specific movables;[2097] or a suit for an account;[2098] or a suit for rent of an agricultural holding;[2099] or an application for a personal decree under O 34, rule 6 of the Code of Civil Procedure 1908, when the net sale proceeds are insufficient to satisfy the mortgage decree.[2100] A transfer of immovable property during a suit for debt or damages may, however, be attacked under section 53 as a fraud on creditors. *A* sues *B* for debt. During the pendency of the suit *B* makes a gift of his immovable property to *C* in order to put it out of the reach of *A* and other creditors. The transfer by gift is not subject to lis pendens, but it may be attacked as a fraud on creditors under section 53.

(ii) Suit for maintenance

A suit by a Hindu wife for maintenance against her husband is ordinarily a personal suit, and any purchaser of the family property during the pendency of the suit is not affected by the rule of lis pendens.[2101] But the doctrine of lis pendens does apply to a suit for maintenance by a Hindu widow in which either a charge is claimed on specific immovable property[2102] or she claims to have her maintenance made a charge on specific immovable property and a decree is passed creating a charge on such property, for in such a case, a right to immovable property is directly and specifically in question.[2103] The property would, of

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2092. *Shanmugha Samudram v Parvathi Ammal,* AIR 1945 Mad 454; *Indu Bhushan v Sudhakar Choudhury,* AIR 1957 Cal 106.
2093. *Sudhamoyee v Jessore Loan Company,* AIR 1945 Cal 322.
2094. *Hans Nath v Ragho Prasad,* 59 IA 138 : (1932) ILR 54 All 189 : 136 IC 402 : AIR 1932 PC 57; *Thakardas v Jaikishna,* AIR 1938 Lah 448 : 40 Punj LR 763.
2095. See para (ix) below "Suit for pre-emption".
2096. *Laxman v Ramchandra,* (1932) 34 Bom LR : 139 IC 610 : AIR 1932 Bom 301; *Abdul Gaffur v Ishqali,* AIR 1943 Oudh 354 : (1943) Oudh WN 261 : 210 IC 326.
2097. *Govind Baba v Jijibai,* (1912) ILR 36 Bom 189 : 13 IC 849.
2098. *Kasummunissa v Nilratna,* (1881) ILR 8 Cal 79.
2099. *Bahadur Singh v Nari Mollani,* AIR1936 Cal 279.
2100. *Thakur Badra v Hazari Singh,* (1930) ILR 5 Luck 625 : 125 IC 163 : AIR 1930 Oudh 93.
2101. *Gangabai v Pagubai,* (1939) 41 Bom LR 815, p 816 : 185 IC 87 : AIR 1939 Mad 403.
2102. *Nidamanuri Subbayya v Ramalakshmi,* (1951) 1 Mad LJ 143; *Vardammal v AJ Vyas,* (1971) 1 Mad LJ 65 : AIR 1971 Mad 371.
2103. *Seetharamanujacharyulu v Venkatasubhamma,* (1930) ILR 54 Mad 132 : 127 IC 809 : AIR 1930 Mad 824, overruling *Rattamma v Seshachalam,* (1927) 52 Mad LJ 520 : 101 IC 800 : AIR 1927 Mad 502; and in effect *Official Receiver v Subbammu,* 99 IC 564 : AIR 1927 Mad 403; *Ramchandra v Kamlabai,* AIR1 944 Bom 191; *Heranya Bhusan v Gouri Dutt,* (1943) 76 Cal LJ 191 : 208 IC 75 : AIR 1943 Cal 227; *Kallawa v Parappa Sankappa,* (1945) ILR Bom 885 : 47 Bom LR 321 : 225 IC 70 : AIR 1946 Bom 207; *Gangabai v Pagubai,* (1939) 41 Bom LR 815; *Mahesh Prasad v Mundar,* (1953) ILR 1 All 284 : (1951) All LJ 39 : AIR 1951 All 141; *Krishnaji Pandharinath v Ansuyabai,* (1959) ILR Bom 94 : 60 Bom LR 1083 : AIR 1959 Bom 475.

course, be different where no charge is claimed in the plaint at all.[2104] When a decree creating a charge for maintenance remains unsatisfied, the purchaser of the property charged is bound by lis pendens.[2105]

(iii) Creditor's suit against heirs

A creditor's suit against an heir in his representative capacity to recover a debt out of the assets of a deceased debtor does not create a charge so as to affect with lis pendens a mortgage of the heir.[2106] A transfer pending a suit by a Mahomedan woman for dower claiming a charge on her husband's property generally is not affected by lis pendens.[2107] This is because the specific property transferred is not in suit. However, a transfer by an heir pending an administration suit by a Mahomedan widow to recover her dower debt out of immovable property left by her husband and her share in his estate is affected by lis pendens, if a decree is passed in the suit creating a charge on the property for payment of the dower.[2108]

(iv) Administration suit

A suit for the administration of the estate of a deceased person may be brought by a creditor, or an heir, or a residuary legatee under the will of the deceased. The suit again may be brought against an heir in possession of the estate or against the executor or administrator of the estate of the deceased. The general rule as regards administration suits was thus stated by the Privy Council in *Cutterput Singh v Maharaj Bahadoor*:[2109]

> When the estate of a deceased person is under administration by the court or out of court, a purchaser from a residuary legatee or heir buys subject to any disposition which had been or may be made of the deceased's estate in due course of the administration. In fact, the right of the residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after the liabilities of the estate, including the expenses of administration, have been satisfied.

The above passage was quoted by the High Court of Calcutta[2110] in an administration suit by a creditor against the heirs of the deceased, of which the facts are stated in illust (1) below.

As to administration suits against an executor or administrator, the rule followed by the High Court of Rangoon[2111] was as follows:

> Where a creditor or one of the next-of-kin institutes an administration action against an executor or administrator, the mere institution of the action or obtaining of mere administration decree does not ordinarily deprive the executor or administrator of the general power to dispose off assets, unless and until the plaintiff has obtained an order appointing a *receiver* of the estate or at least an *injunction* restraining the executor or administrator from exercising the powers vested in the executor or administrator.

A transfer, therefore, by an executor or an administrator pending the suit, had been held not to be subject to the rule of lis pendens. If the case is governed by section 307 of the Indian Succession Act, 1925, the administrator may not transfer any immovable property without the previous permission of the court by which the letters of administration were

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2104. *Seetharamanujacharyulu v Venkatasubhamma*, (1930) ILR 54 Mad 132.
2105. *Tirthabasi v Trinyuani Dasi*, (1949) ILR Cut 336 : AIR 1951 Ori 306.
2106. *Ram Dhun Dhur v Mohesh Chander*, (1883) ILR 9 Cal 406.
2107. *Abdul Rahman v Inayati Bibi*, 130 IC 113 : AIR 1931 Oudh 63.
2108. *Bazayet Hossein v Dooli Chund*, (1878) ILR 4 Cal 402 : 5 IA 211.
2109. *Cutterput Singh v Maharaj Bahadoor*, (1904) ILR 32 Cal 198 : 32 IA 1, p 16.
2110. *Bepin Krishna v Byomkesh*, (1924) ILR 51 Cal 1033 : 84 IC 880 : AIR 1925 Cal 395; *Bazayet Hossein v Dooli Chund* and *Mahomed Wajid v Tayyuban*, 5 IA 211 : (1879) ILR 4 Cal 402.
2111. *Lee Lim Ma Hock v Saw Ma Hone*, (1924) ILR 2 Rang 4 : 79 IC 729 : AIR 1924 Rang 221; *Ma Kin v Ma Bwin*, (1927) ILR 5 Rang 266 : 103 IC 264 : AIR 1927 Rang 186; *ALAR Chetty Firm v Maung Thive*, 74 IC 54 : AIR 1923 Rang 69.

granted; a transfer without such permission is voidable under the same section at the instance of any other person interested in the property.[2112] *Chutterput Singh v Maharaj Bahadoor,* mentioned above, was applied by the Judicial Committee in a later case.[2113] The suit in that case was to ascertain and administer the trust under a deed. A decree was passed in the suit declaring one of the parties as entitled to a one-sixth share in the surplus income, and that the trustees should have their costs out of the trust property. The beneficiary thereupon mortgaged his share. Under a later order in the suit, part of the property was sold to realise the trustees' costs. It was held that the mortgagee's rights were subject to the sale, and the mortgage was consequently not an encumbrance upon the title of the purchaser. In delivering the judgment of the Board, Viscount Summer said:

> The principle laid down in *Chutterput Singh v Maharaj Bahadoor* applies equally to the suit now in question as to the case of a suit for the administration of the estate of a deceased person, which was the matter then before their Lordships.

ILLUSTRATIONS

(1) *A* lends money to *B* on a pledge of jewels. *B* dies intestate leaving three sons. *A* sues the sons for repayment of the loan, for sale of the jewels, and, if necessary, for administration of *B*'sestate. In April 1919, a decree is passed for sale of the jewels with liberty to apply for an administration order in case there is a deficit on the sale. The jewels are sold and there is a deficit. *A* applies for an administration order. On 2 July 1920, a preliminary decree is made for the administration of the estate. During the pendency of the suit, some of the properties forming part of *B*'s estate are mortgaged by his sons. The mortgages subsequent to 2 July 1920 are subject to lis pendens. The mortgages before that date are not subject to lis pendens. As to these mortgages, the court said that a transfer of property could not be subject to the rule of lis pendens, unless the specific property was mentioned in the pleadings and the right to such property was directly and specifically in question, and that these conditions were not present in the case. The court also observed that it could not be said merely because there was a general prayer, that if it became necessary an order for administration should be made that there was a right to immovable property directly and specifically in question in the suit.[2114]

(2) *A,* an heir of the intestate, filed a general administration suit against another heir in possession of the estate, and the court made a preliminary decree for the administration of the estate. So far there was no lis pendens. But in the course of proceedings before the Commissioner, a plot of land in the possession of *B* was claimed as a part of the estate and the Commissioner reported in favour of the claim. After the report, *B* sold the land. The sale was subject to lis pendensas the Commissioner's report put the right to the land specifically in question.[2115]

(v) Suit for cancellation of the deed of trust

A suit for the cancellation of a deed of trust and for reconveyance of the immovable property specified in the deed is within the rule of lis pendens,[2116] but a suit in which the only question was whether a deed of settlement was true or false, is not a suit within the rule.[2117]

(vi) Suit for specific performance

The rule of lis pendens is applicable to suits for specific performance of contracts to transfer immovable property.[2118] Section 52 of the TP Act is not subject to section 19(b) of

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2112. See in this connection *Ma Chit Su v National Bank of India,* (1925) 30 Cal WN 769 : 91 IC 432 : AIR 1925 PC 261.
2113. *Puran Chand Nahatta v Manmotha Nath Mukherjee,* (1928) ILR 55 Cal 532 : 55 IA 81, p 84 : 108 IC 342 : AIR 1928 PC 38.
2114. *Bepin Krishna v Byomkesh,* (1924) ILR 51 Cal 1033 : 84 IC 880 : AIR 1925 Cal 395.
2115. *K Y Chettyar Firm v Jamila,* (1930) ILR 7 Rang 734 : 121 IC 792 : AIR 1930 Rang 132.
2116. *Bhola Nath v Bhuthnath,* (1925) 40 Cal LJ 393 : 84 IC 490 : AIR 1925 Cal 239.
2117. *Shanmugha Samudram v Parvathi Ammal,* AIR 1945 Mad 454.

the Specific Relief Act, 1963, which provides that specific performance of contract cannot be enforced against the transferee for value, who has paid his money in good faith, without notice of the original contract. The subsequent transferee, even though he may have obtained the transfer without notice of the original contract, cannot set up, against the agreement holder any right defeating the rule of lis pendens, which is founded upon public policy.[2119]

ILLUSTRATION

A was in possession of land as tenant of *B*. But *B* on 8 February 1907, agreed to grant a permanent lease of the same land to *C*. *C* sued for specific performance of the agreement of lease, and while this suit was pending against him, *B* sold the land to *A*. The suit was decreed and *C*'s title as permanent lessee related back to 8 February 1907. The sale to *A* was subject to *C*'s decree, and *C* as assignee of the reversion was entitled to recover rent from *A* from that date.[2120]

(vii) Suit on mortgage

The rule applies to suits on mortgages;[2121] but a suit which is based on a mortgage and in which a money decree is given, is not as long as the decree stands unreversed, a suit in which a right to immovable property is directly and specifically in question.[2122] A lessee from a mortgagor during the pendency of a suit to enforce the mortgage is not entitled to resist the claim for possession of the auction purchaser at the sale in execution of the decree on the mortgage.[2123] He can, however, apply to be joined as a party to the suit, and ask for an opportunity to redeem the property; if he does not, he cannot resist the claim of the auction-purchaser.[2124] However, where the Agra Tenancy Act, 1926 applies, he can only be evicted under the provisions of that Act.[2125] As the rule of lis pendens prevents a mortgagor from creating any lease during the pendency of mortgaged suit so as to effect the right of a mortgagee or the purchaser and amortgagee, who has purchased a mortgaged

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2118. *Gouri Dutt v Sheikh Sukur,* 75 IA 165 : (1948) All LJ 263 : 50 Bom LR 657 : (1948) 52 Cal WN 840 : (1948) 2 Mad LJ 79 : AIR 1948 PC 147; *Jahar Lal Bhutra v Bhupendra Nath,* (1922) ILR 49 Cal 495 : 67 IC 108 : AIR 1922 Cal 412; *Mati Lall v Preo Lall,* (1908) 13 Cal WN 226 : 3 IC 696; *Vedachari v Narasimha,* (1924) 45 Mad LJ 825 : 76 IC 793 : AIR 1924 Mad 307; *Bhaskar v Shankar,* (1924) 26 Bom LR 418 : 80 IC 453 : AIR 1924 Bom 467; *Pancham v Kandhai,* 148 IC 653 : AIR 1934 All 713; *Vraj Kumar v Kunjbiharilal,* AIR 1971 MP 109; *P Lakshmi Ammal v S Lakshmi Ammal,* AIR 1991 Mad 137, p 140; *Joginder Singh Bedi v Sardar Singh Narang,* AIR 1984 Delhi 319 (NOC). See *Sunil D Chedda v Suresh Bansilal Sethi,* (1993) 1 SCC 231 (Supp) wherein the Supreme Court granted time to the appellant for having the list registered in the manner required by the local amendment. See also *Amol v Deorao,* AIR 2011 (NOC) 215 (Bom).

2119. See *Ram Peary v Gawri,* AIR 1978 All 318; *P Lakshmi Ammal v S Lakshmi Ammal,* AIR 1991 Mad 137, p 149.

2120. *Jahar Lal Bhutra v Bhupendra Nath,* (1922) ILR 49 Cal 495 : 67 IC 108 : AIR 1922 Cal 412.

2121. *Faiyaz Husain Khan v Prag Narain,* (1907) ILR 29 All 339 : 34 IA 102; *Shib Chandra v Lachmi Narain,* (1929) ILR 51 All 686 : 56 IA 339 : 119 IC 612 : AIR 1929 PC 243; *Tinoodhan v Trailokya,* (1913) 17 Cal WN 413 : 18 IC 177; *Parvathi Ammal v Govinda Raja,* (1924) 45 Mad LJ 682 : 76 IC 876 : AIR 1924 Mad 359; *Saiyid Zahid Ali v Sadar Begam,* (1910) 13 OC 50 : 5 IC 800; *Durga Prasad v Madho Prasad,* (1908) 8 Cal LJ 153; *Dammar Singh v Nazir-ud-din,* (1889) All WN 91; *Sital Prasad v M Md Maranwatyar Khan,* 149 IC 187 : AIR 1934 All 972; *Radhey Lal v Ram Lal,* 152 IC 1018 : AIR 1935 Oudh 49.

2122. *Chutterput Singh v Maharaj Bahadoor,* 32 IA 1 : (1905) ILR 32 Cal 198; *Raichand v Dattatraya,* (1963) ILR Bom 509 : 65 Bom LR 510 : AIR 1964 Bom 1.

2123. *Nisar Husain v Sundar Lal,* (1928) ILR 50 All 202 : 104 IC 292 : AIR 1927 All 657; *Madan Mohan v Raj Kishori,* (1917) 21 Cal WN 88 : 39 IC 182; *Nageshar Tewari v Gudar Singh,* (1927) ILR 2 Luck 659 : 103 IC 474 : AIR 1927 Oudh 603; *Thakur Prasad v Gaya,* (1898) ILR 20 All 349; *Ramasami v Govinda,* (1916) 31 Mad LJ 839 : 38 IC 1; *Girdharlal v Liladhar,* (1931) 33 Bom LR 1123 : 134 IC 1223 : AIR 1931 Bom 539.

2124. *Mangru v Tarakeshwar Nath,* [1967] 3 SCR 125 : AIR 1967 SC 1390. See *Devraj Dogra v Cyan Chand Jain,* (1981) 2 SCC 675, p 678.

2125. *Aziz Fatima v Mukund Lal,* (1932) 30 All LJ 572 : 139 IC 166 : AIR 1932 All 480.

property in execution of his mortgage decree is entitled to avoid a transfer on the ground that it was mortgaged by the mortgagor during the pendency of a mortgage suit.[2126] A payment of rent by a lessee to a mortgagor on a lease granted pending the mortgagee's suit to enforce the mortgage is not binding on the mortgagee.[2127] A puisne mortgagee who purchases the equity of redemption during the pendency of foreclosure proceedings by a prior mortgagee is affected by lis pendens. If he does not redeem the prior mortgagee, the foreclosure decree may be executed against him.[2128] In a case before the TP Act, an application to file an award directing the sale of mortgaged property was held to operate as a lis pendens.[2129] Where the land was mortgaged by deposit of title deeds, and was sold during the pendency of the litigation, ie, a suit for foreclosure, the same would be hit by doctrine of lis pendens.[2130]

A suit to enforce contribution to a mortgage debt under section 82 of TP Act constitutes a lis pendens and the purchaser of the property pending the suit will be subject to the right of contribution decreed against it.[2131]

(viii) Suit for partition

A partition suit operates as lis pendens[2132] with the result that the purchaser of an undivided share pending the suit takes only that property which is allotted on partition to his vendor.[2133] Since a partition suit between coparceners raises a direct and specific question in immovable property, therefore creation of tenancy during pendency of a partition suit would be hit by the rule of *lis pendens*.[2134] A contrary decision in Calcutta, proceeds on an erroneous view of the word "contentious".[2135] In that case, two defendants granted a lease for seven years of one of the properties pending a suit for partition and the plaintiff to whom the property was allotted by the decree was held to be bound by the lease. This was erroneous and contrary to the principle that any dealing with the property during the pendency of the suit should be without prejudice to the rights of the parties. In a later case, the Calcutta High Court held that if co-sharers mortgage their interests pending a partition suit, the mortgage is subject to, and the purchaser at the sale under the mortgage will be bound by all the proceedings in the partition suit.[2136] Again, in another case,[2137] the same high court applied the rule of lis pendens to a partition suit. A member of an undivided Hindu family consisting of six sons and a mother governed by the Bengal school, sued for partition. One of the sons sold his share to a stranger during the pendency of the suit. On partition, the mother's inchoate right to a share ripened into an absolute right and the vendee was, therefore, entitled only to a seventh share. The mother's right accrues only when the property is partitioned. Therefore, when a mortgagee obtained a preliminary decree for sale before the

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2126. *Sunita Jugalkishore Gilda v Ramanlal Udhoji Tanna*, (2013) 10 SCC 258 : LNIND 2013 SC 754 : 2013 (10) SCALE 519.
2127. *Kiran Chandra v Dutt & Co*, (1925) 29 Cal WN 94 : 85 IC 522 : AIR 1925 Cal 251.
2128. *Ram Charan v Parmeshwar Din*, (1933) ILR 55 All 235 : 1933 All LJ 113 : 144 IC 70 : AIR 1933 All 201.
2129. *Pranjivan v Baju*, (1880) ILR 4 Bom 34.
2130. *K S Dhillon v Punjab Financial Corporation*, AIR 2012 P&H 75.
2131. *Baldeo Sahai v Baij Nath*, (1892) ILR 13 All 371; *Jamuna Devi v Mongol*, (1947) ILR 25 Pat 13, 226 IC 350 : AIR 1946 Pat 306.
2132. *Raghunath Gangadhar Kakade v Ghyan Bahadur Kapse*, AIR 2006 Bom 150 : (2006) 3 Bom CR 802 : (2006) 108 Bom LR 24.
2133. *Jogendra Nath v Debendra Nath*, (1898) ILR 26 Cal 127; *Jogendra v Fulkumari*, (1899) ILR 27 Cal 77; *Basappa v Bhimangowda*, (1928) ILR 52 Bom 208 : 108 IC 17 : AIR 1928 Bom 65; *Nand Kishore v Lallu*, (1930) 28 All LJ 1286 : 132 IC 333 : AIR 1931 All 45; *Chandan v Fakigir*, 27 IC 940; *Khemchand v Mulchand*, 148 IC 731 : AIR 1934 Lah 457; *Subramonia v Subbayya*, AIR 1961 Ker 335; *Sumitra Devi v Sita Sharan Bulna*, AIR 2009 Pat 83.
2134. *Shanker Puri v Lal Puri*, AIR 2011 (NOC) 222 (Raj).
2135. *Shaikh Khan Ali v Pestonji*, (1896) 1 Cal WN 62; *Ramchandra v Jaideo*, 109 IC 566 : AIR 1928 Nag 198.
2136. *Jogendra Nath v Debendra Nath*, (1898) ILR 26 Cal 127.
2137. *Jogendra v Fulkumari*, (1899) ILR 27 Cal 77.

partition suit was filed, and then purchased the property, the purchase was of the interest of all the parties and the mother could not claim a share, for no partition had been effected.[2138]

The Supreme Court has held that execution of *batai patra* during the pendency of suit for partition would not confer any rights as it is hit by the principles of lis pendens.[2139] Private sale of family property by a *karta*, pending a suit for partition instituted by a member, is hit by section 52 and does not bind the family.[2140] When *A* mortgages property pending a partition suit between him and *B*, the mortgage was effective as to the share allotted to *A*, but void as to the share allotted to *B*.[2141]

(ix) Suit for pre-emption

A suit for pre-emption involves a right to specific immovable property and is, therefore, within the section.[2142] No dealing with the property after a pre-emption suit has been filed can affect the rights of the plaintiff.[2143]

ILLUSTRATION

A sells land to *B* in respect of which *C* has a right of pre-emption. *C* files a suit to pre-empt the land, against *A* and *B*. A week after the institution of the suit, *B* re-sells the land to *A*, and files a written statement that *C* has no cause of action. The re-sale was *pendente lite* and could not affect *C*'s rights. *C*'s suit was decreed.[2144]

The customary right of pre-emption, according to the decisions of the Allahabad High Court,[2145] must subsist upto the date of the decree, and this rule received statutory recognition in section 19 of the Agra Pre-emption Act, 1922. Accordingly, an acquisition by the defendant by gift, during a pre-emption suit, of a share in the *mahal* will defeat the plaintiff pre-emptor's suit.[2146] In *Hans Nath v Ragho Prasad*,[2147] the Privy Council pointed out that the doctrine of lis pendens is limited to a dealing with the immovable property actually in suit and, therefore, does not apply to the acquisition by a party of a different property to establish a status of co-sharer not liable to be pre-empted. The Agra Pre-emption Act, 1922 was amended by Uttar Pradesh Act of 1929, section 5 of which enacts that a right of pre-emption cannot be defeated by a gift subsequent to the suit.

Where a plaintiff files a pre-emption suit against the defendant and, while that suit was pending, *B*, who had an equal right of pre-emption as the plaintiff, files a pre-emption suit

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2138. *Baldeo Das v Sarojini Dasi*, (1930) ILR 57 Cal 597 : 126 IC 408 : AIR 1929 Cal 697; *Jamuna Devi v Mangal Das*, AIR 1946 All 306.
2139. *Venkatrao Anantdeo Joshi v Malatibai*, (2003) 1 SCC 722 : AIR 2003 SC 267.
2140. *Jayaram v Avvasami*, AIR 1973 SC 569 : (1972) 2 SCC 200.
2141. *Rangaswami v Sundarpandia*, AIR 1928 Mad 635 : 110 IC 543.
2142. *Madho Singh v Skinner*, (1941) ILR All 433 : 43 Punj LR 587 : 197 IC 227.
2143. *Ghasitey v Gobind*, (1908) ILR 30 All 467; *Kanta Prasad v Ram Jag*, (1914) ILR 36 All 60 : 22 IC 266; (distinguishing *Manpal v Sahib Ram*, (1905) ILR 27 All 544; *Asa Singh v Naubat*, (1921) 19 All LJ 43 : 61 IC 34 : AIR 1921 All 105; *Kahar Singh v Jahangir Singh*, (1925) ILR 47 All 625 : 88 IC 761 : AIR 1925 All 487; *Bhikhi Mal v Debi Sahai*, (1925) ILR 47 All 923 : 89 IC 219 : AIR 1926 All 179; *Bachan Smgh v Bijal Singh*, (1926) ILR 48 All 221 : 90 IC 236 : AIR 1926 All 180; *Hazara Singh v Baba Khan*, (1922) ILR 3 Lah 264 : 69 IC 698 : AIR 1922 Lah 403; *Bhagwan v Nanak Chand*, (1927) ILR 49 All 516 : 100 IC 66 : AIR 1927 All 336; *Harnam Singh v Jiwan*, (1906) PR 7; *Prabhi v Hamira*, (1919) 1 Lah LJ 209; *Kedar Nath v Bankey Behari*,11 IC 645; *Ram Shankar v Nanik Prasad*, (1914) 17 OC 150 : 24 IC 32; *Kubra Bibi v Khdaija*, (1917) 20 OC 13 : 38 IC 582; *Bhagirath v Raj Kishore*, (1930) 28 All LJ 766 : 122 IC 887 : AIR 1930 All 354; *Sheikh Salamat Ali v Nur Muhammed*, (1934) ILR 9 Luck 475 : 149 IC 258 : AIR 1934 Oudh 303; *Mohammad Sadiq v Ghasi Ram*, AIR1946 Lah 322; see also note (19) above "Right before Suit."
2144. *Kahar Singh v Jahangir Singh*, (1925) ILR 47 All 625 : AIR 1925 All 487.
2145. *Baldeo Misi v Ram Lagan*, (1923) ILR 45 All 709 : 77 IC 694 : AIR 1924 All 82.
2146. *Ram Saran v Bhagwat Prasad*, (1929) ILR 51 All 411 : 113 IC 422 : AIR 1929 All 53; *Hans Nath v Ragho Prasad*, 59 IA 138 : (1932) ILR 54 All 189 : 136 IC 402 : AIR 1932 PC 57.
2147. *Hans Nath v Ragho Prasad*, 59 IA 138 : (1932) ILR 54 All 189 : 136 IC 402 : AIR 1932 PC 57.

against the same defendant and the latter suit is compromised, the validity of the compromise decree in favour of *B* is not affected by the doctrine of lis pendens, since *B* had an equal right with the plaintiff.[2148]

(x) Suit for rent

A suit for rent is primarily a suit for money, and does not constitute a lis pendens for no right to immovable property is directly and specially in question.[2149] This is so even when, as between a *zamindar*, a *patnidar* and a *darpatnidar*, the decree for rent is a charge on the property. For, a suit for rent cannot be regarded as a suit to claim a charge on specific property.[2150] A purchase made during the pendency of execution proceedings in a suit for arrears of rent is not affected by the rule of lis pendens.[2151]

(xi) Award proceedings

Where a private award creates a charge for maintenance, the presentation of an application to file the award must be regarded as a plaint, and the commencement of a lis pendens.[2152] Res judicata prevails over the doctrine of lis pendens and once a judgment is pronounced by a competent court in regard to the subject-matter of the suit to which the doctrine of lis pendens applies, that is res judicata and binds not only the parties thereto, but the transferee *pendente lite*.[2153]

(xii) Suit on an unregistered agreement

Where in a suit on an agreement, seeking specific performance and alternatively a charge on the property in question, a compromise decree providing in substance for the relief of charge is passed, the decree comes within the expression "any decree or order, which may be made therein" and the fact that the plaintiffs by the terms of the compromise relinquished their rights under the agreement could not lead to a different conclusion. In the same case, the Privy Council also remarked that the broad purpose of this section is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or strength or weakness of the case on one side or the other in bona fide proceedings. Further, nothing can depend on the question whether a suit was based on a registered or unregistered agreement.

(xiii) Easement suit

The section applies to a decree which relates to easements.[2154]

(26) Suit for Injunction

Where the suit initially was only for an injunction and before it was converted into one for specific performance, the suit property was sold, it was held that the provisions of section 52 could be invoked by the plaintiff who even in the suit as it was initially filed claimed that there was a valid sale agreement in his favour and, therefore, the right to the disputed property was directly and specifically in question.[2155]

2148. *Ram Chand Lal Chand v Khem Chand Lal Chand*, AIR1974 P&H 91.
2149. *Derpal v Karamchand*, (1950) ILR 30 Pat 317 : AIR 1952 Pat 9.
2150. *Jaynat Abedin v Hyderali Khan*, (1928) ILR 55 Cal 701 : 111 IC 340 : AIR 1928 Cal 441; *Dhirendra Nath v Charusashi*, 90 IC 431 : AIR 1926 Cal 191; *Udayu Narayan v Radheshyam*, (1950) ILR Cut 550 : AIR 1950 Ori 36; *Sheikh Bikala v Sheik Ali*, (1950) ILR Cut 486 : AIR 1950 Ori 210.
2151. *Sheolal v Balkrishna*, (1948) ILR Nag 573.
2152. *Kallawa v Parappa Sankappa*, (1945) ILR Bom 885 : 47 Bom LR 321 : 225 IC 70 : AIR 1946 Bom 207.
2153. *Digambarrao v Rangarao*, (1949) 51 Bom LR 623 : AIR 1949 Bom 367.
2154. *Ramanamma v Anthamma*, AIR1955 AP 199.
2155. *Harbaksh Singh Gill v Ram Rattan*, AIR1988 P&H 60, p 64.

(27) Lease by a Mortgagor

As already stated, a lessee from a mortgagor, on a lease granted pending the mortgagee's suit for sale, is not entitled to resist a claim for possession by the auction purchaser at the court sale.[2156] In some cases it has been held that yearly leases by a mortgagor in possession are not within the rule as they are not prejudicial to the mortgagee's security.[2157] A mortgagor in possession has now a statutory power to lease under section 65A and a lease granted by a mortgagor under this statutory power pending a suit by the mortgagee would be subject to the rules of lis pendens, for otherwise it would convert the mortgagee's estate into one expectant on the term created by the lease.[2158]

It is held that section 52 and section 65-A of the TP Act operate in different spheres. Section 52 deals with the cases of transfer or anything otherwise dealing with any immovable property after any suit or proceeding in which any right to such immovable property is directly and specifically in question, has been filed. Section 65-A deals with the powers of the mortgagor to grant a lease of the mortgaged property while the mortgagor remains in lawful possession of the same. Section 65-A is not made subject to the provisions contained in section 52 of the TP Act. If, however, the mortgagor grants a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation.[2159] If a mortgagor in possession executes a lease of the property in the ordinary course of management as the agent or bailee of the mortgagee during the pendency of a suit by the mortgagee to enforce the mortgage, a question may arise whether such a lease is in the eye of law a lease granted by the mortgagee through his agent and, therefore, binding on him. This question was left open by the Supreme Court in the two undernoted cases.[2160]

However, where it was found that such rights could not be affected, it was held that the lease was not invalid.[2161] In *Anaji Thamaji Patil v RB Patil,*[2162] a Full Bench of the Bombay High Court has, in effect, overruled *Ramdas Popatlal v Fakira Pandu*[2163] and held that section 52 prevails over section 65-A. The court, however, held that a simple mortgagee has no right to possession, his rights are not affected by a lease granted by the mortgagor, and such a lease, if granted, pending a suit by the mortgagee, is not hit by section 52.

In *Sunita Jugal kishore Gilda v Ramanlal Udhoji Tanna (D) through LRs,*[2164] the Supreme Court held that Rule of *lis pendens* applies to suit on mortgage section 52 prevents a mortgagor from creating any lease during the pendency of the mortgage suit so as to affect the rights of a mortgagee or the purchaser. Law is well settled that a mortgagee, who has purchased a mortgaged property in execution of his mortgage decree is entitled to avoid a transfer on the ground that it was mortgaged by the mortgagor during the pendency of a mortgage suit.

2156. *Nisar Husain v Sundar Lal,* (1928) ILR 50 All 202 : 104 IC 292 : AIR 1927 All 657; *Madan Mohan v Raj Kishori,* (1917) 21 Cal WN 88 : 39 IC 182; *Nageshar Tewari v Gudar Singh,* (1927) ILR 2 Luck 659 : 103 IC 474 : AIR 1927 Oudh 603.
2157. *Subbaraju v Seetharamaraju,* (1916) ILR 39 Mad 283 : 28 IC 232 following *Radhika v Radhamani,* (1884) ILR 7 Mad 96, p 99; *Ram Dayal v Asghur,* 126 IC 28 : AIR 1930 All 289.
2158. *Ramdas Popatlal v Fakira Pandu,* (1957) 59 Bom LR 46 : AIR 1959 Bom 19.
2159. *Dev Raj Dogra v Gyan Chand Jain,* (1981) 2 SCC 675, p 688.
2160. *Mangru Mahto v Shri Thakur Taraknathji Tarakeshwar Math,* AIR 1967 SC 1390; *Dev Raj Dogra v Gyan Chand Jain,* (1981) 2 SCC 675, p 688.
2161. *Ram Chunder v Maharaj Kunwar,* AIR 1939 All 611.
2162. *Anaji Thamaji Patil v RB Patil,* AIR 1973 Bom 75.
2163. *Ramdas Popatlal v Fakira Pandu,* (1957) 59 Bom LR 46.
2164. *Sunita Jugalkishore Gilda v Ramanlal Udhoji Tanna (D) through LRs,* 2013 10 SCC 258 : 2013 (10) SCALE 519 : JT 2013 (11) SC 460 : 2013 (3) KLJ 799.

(28) Misdescription

A misdescription of the land in the pleadings will prevent the operation of the doctrine of lis pendens;[2165] but not if despite misdescription, the land is sufficiently identified.[2166] An alienee who is aware of the identity of the property will be affected by lis pendens despite the misdescription.[2167]

(29) Transferred or Otherwise Dealt with

The word "transferred" refers to sales, mortgages, leases and exchanges. The phrase "otherwise dealt with" includes such transactions as a release[2168] or a partition,[2169] or a surrender.[2170] They have been held to include a contract of sale,[2171] a partition between co-defendants,[2172] and the putting up of constructions.[2173] They also include the handing over of possession,[2174] but not, according to the Punjab High Court, the forcible taking of possession.[2175] They also apply to any collusive decree,[2176] or compromise[2177] by which the title of a party is affected during the pendency of a suit, for the principle underlying the section is that a litigating party is exempted from taking notice of a title acquired during the litigation. Creation of tenancy rights during the pendency of a suit for partition of the property between coparceners, would be hit by the rule of lis pendens and no right would be created in favour of transferee pendente lite.[2178] The doctrine applies not merely to actual transfers of rights which are subject-matter of litigation but to other dealings with it by any party to the suit or proceeding, so as to affect the right of any other party thereto.[2179] The principle of the section has even been applied when in execution of a decree for an injunction to remove an obstruction to a passage, it is found that another obstruction has also been erected after the suit was filed. This other obstruction was also removed in execution, so that the plaintiff should not be compelled to file another suit.[2180] An adoption, however, stands on a different footing and cannot be treated as a dealing with property *pendente lite*.[2181] An admission before a Sub-Registrar of execution of a sale deed is not a dealing with property.[2182]

2165. *Lokeman Sahu v Achitananda*, (1912) 15 Cal LJ 391 : 2 IC 85; *Wali Bandi v Tabeya Bibi*, (1919) ILR 41 All 534 : 50 IC 919.
2166. *Lokenath Sahu v Achitananda*, (1912) 15 Cal LJ 391; *Venkatarama v Elumalai*, (1923) 44 Mad LJ 357 : 72 IC 464, AIR 1923 Mad 442; *Periamurugappa v Manicka*, (1925) 49 Mad LJ 68 : 87 IC 213 : AIR 1926 Mad 50; *Achut v Shivajirao*, (1937) 39 Bom LR 224 : 170 IC 172 : AIR 1937 Bom 244.
2167. *Bepin Krishna v Priya Brata*, (1921) 26 Cal WN 36 : 66 IC 345 : AIR 1921 Cal 730.
2168. *Prataprao Narayan Pawar v Ramchandra Dalichand Sancheti*, AIR 2008 9NOC 1412 (Bom).
2169. *Sumitra Devi v Sita Sharan Bulna*, AIR 2009 Pat 83 : (2009) 4 PLJR 117; *Raghunath Gangadhar Kakade v Ghyan Bahadur Kapse*, AIR 2006 Bom 150 : (2006) 3 Bom CR 802 : (2006) 108 Bom LR 24.
2170. See, however, *Julam Missir v Pradip Missir*, AIR 1958 Pat 115.
2171. *Kubra Bibi v Khudaija*, (1917) 20 OC 13 : 38 IC 582.
2172. *Ishwar v Dattu*, (1913) ILR 37 Bom 427 : 19 IC 885; *Bhubendra Narayan v Tarupriya*, AIR 1950 Assam 119.
2173. *Mohammed Ismail v Ashiq Hussain*, (1969) All LJ 1055 : AIR 1970 All 648.
2174. *Dhansingh v Sushilabai*, AIR 1968 MP 229.
2175. *Santa Singh v Rajinder Singh*, (1965) ILR 2 Punj 97 : AIR 1965 Punj 415.
2176. *Harnam Singh v Jiwan*, (1906) PR 7.
2177. *Hazara Singh v Bube Khan*, (1922) ILR 3 Lah 264 : 69 IC 698 : AIR 1922 Lah 403.
2178. *Shanker Puri v Lal Puri*, AIR2011 (NOC) 222 (Raj); *Mahfooz Ahmed v Neelmani*, AIR 2010 MP 165: LNIND 2010 MP 176 : 2010 (2) MPLJ 603.
2179. *S N Arora v Brokers & Brokers Pvt Ltd*, (2010) 118 DRJ 631 (DB) : AIR 2011 Del 89.
2180. *Narain Singh v Imam Din*, 154 IC 724 : AIR 1934 Lah 978.
2181. *Rambhat v Lakshman*, (1881) ILR 5 Bom 630.
2182. *Rafiuddin v Brijmohan*, 21 IC 602.

The Supreme Court had held that the act of taking illegal possession of property, or the continuance of wrongful possession of property does not amount to "otherwise dealing with the property" so as to attract section 52, even if the wrong-doer be a party to the suit.[2183]

An extinction of title is also not hit by the doctrine simply because such extinction is during the pendency of the suit. An extinction of title which takes place by an application of the specific and mandatory provisions of the Limitation Act, 1963 falls outside the scope of section 52. It would not be governed by the provisions of the TP Act relating to "transfer" defined by section 3, but by the Limitation Act, 1963 exclusively.[2184]

(30) Involuntary Alienations—Court Sales

Section 52 is limited by section 2(d), and, strictly speaking, does not apply to court sales.[2185] Some old cases do so limit the application of the rule.[2186] However, it is now settled law that though the section itself may not apply to involuntary alienations, the principle of lis pendens applies to such alienation. This is the effect of three Privy Council cases,[2187] which have been approved and followed by the Supreme Court.[2188] That was also the view adopted in a large number of high court cases.[2189]

Merely because a holder of a decree for money is not, as such, a party to a decree in a maintenance suit creating a charge for maintenance on the disputed property; he cannot claim that he is not bound by the decree passed in the suit in which a charge had been prayed for. The decree holder for money cannot contend that he was a bona fide purchaser for value without notice, and the court sale in his favour cannot prevail over the court sale in favour of the purchaser under the maintenance decree.[2190] The principle of the doctrine of lis pendens applies to involuntary sales held for the recovery of revenue demands.[2191] The provisions of section 52 do not apply to an execution sale, but the principle of lis pendens applies. The Allahabad High Court has so held,[2192] following a Supreme Court decision.[2193] The High Court of Punjab and Haryana has, however, held that the doctrine of lis pendens is not applicable where the transfer is not by an act of the parties, but by an order of the Collector under the Redemption of Mortgages (Punjab) Act, 1913. The court points out that the definition of "transfer of property" in section 5 is confined to an act of a party, and does not cover a statutory order.[2194]

2183. *Rajender Singh v Santa Singh,* AIR 1973 SC2537 : [1974] 1 SCR 381 : (1973) 2 SCC 705 : [1975] 1 SCJ 470.
2184. Ibid.
2185. *Lalitha Kariappa v Sanjeevi,* AIR 2006 Kant 25 : (2006) 1 KCCR 119.
2186. *Nuffur Merdha v Ram Lall,* (1871) 15 WR 308; *Ali Shah v Hussain,* (1879) ILR 1 All 588, p 590; *Lalu Mulji v Kashibai,* (1886) ILR 10 Bom 400; *Chunder Nath v Nilakant,* (1881) ILR 8 Cal 690 (reversed in *Nilkant v Suresh Chander,* (1885) ILR 12 Cal 414).
2187. *Nilkant v Suresh Chunder,* (1885) ILR 12 Cal 414 : 12 IA 171 reversing *Chunder Nath v Nilkant,* (1881) ILR 8 Cal 690; *Radhamadhub v Manohar,* (1888) ILR 15 Cal 756 : 15 IA 97; *Motilal v Karrabulam,* (1897) ILR 25 Cal 179 : 24 IA 170.
2188. *Samarendru Nath Sinha v Krishna Kumar,* [1967] 2 SCR 18 : AIR 1967 SC 1440 : [1968] 1 SCJ 68; *Kedarnath Lal v Sheonarain,* [1970] 2 SCR 204 : AIR 1970 SC 1717; *Jayaram Mudaliar Ayyasami,* AIR 1973 SC 569 : (1972) 2 SCC 200. See *Devraj Dogra v Gyan Chand Jain,* (1981) 2 SCC 675, p 678.
2189. See *Mulla Transfer of Property Act,* 5th Edn, p 264, footnote (26). See also *Narayan Govind v Krishna,* (1973) 2 Mys LJ 176 and *Bhai Ishar Das v Govind,* AIR 1975 Raj 45. See also *Chitalia Bros v South Indian Bank,* AIR 1988 Kant 59, p 65; *Radhashyam Routray v Puranjan Mohapatra,* AIR 1987 Ori 142, p 144; *G Purushothama Panikkar v G Mohan,* AIR 1999 Ker 443.
2190. *Eni Ammal MSM Mudaliar,* (1978) 1 Mad LJ 146.
2191. *Varkey Varkey v NM Kurian,* AIR 1982 Ker 222.
2192. *Ram Nivas v Onkar,* AIR 1983 All 310, pp 311 : 316, 317.
2193. *Samarendra Nath Sinha v Krishna Kumar Nag,* AIR 1967 SC 1440.
2194. *Shanti v Chhoto,* AIR 1983 P&H 321, p 323, para 9.

During the pendency of a suit for specific performance of a contract for the sale of certain property, the property was purchased by an auction purchaser in the execution of a decree in a suit filed on the basis of a promissory note. The execution sale, it was held, would be hit by the principle of lis pendens embodied in section 52, and section 2(d) would not exclude the applicability of section 52. The sale was ab initio hit by section 52. Confirmation of the sale by the court could not make the sale valid, and no title could be given to the person in whose favour the sale was confirmed.[2195] However, the doctrine cannot be applied as between parties to suit who are arrayed on the same side, and between whom there is no dispute to be adjudicated upon. It is the duty of the auction purchaser or the decree holder to specify the interest of the judgment-debtor in the property in the sale proceedings. Until this is done, the doctrine cannot be invoked in court sale proceedings;[2196] but in a sale by the Official Receiver of the property of the insolvent in a private sale and is governed by section 52.[2197]

ILLUSTRATIONS

(1) *A* has mortgaged property to *B*. *B* sues *A* on the mortgage and obtains a decree for sale. While *B*'s suit is pending, a third person obtains a money decree against *A* and the property is sold in execution of the money decree and purchased by *C*. *C*'s purchase is subject to lis pendens. In fact, he is the representative in interest of the judgment debtor *A*, and *B*'s decree can be executed against him.[2198]

(2) *A* is a tenant on *B*'s land. *B* mortgages the land to *C*. *C* sues *B* on the mortgage and obtains a decree for sale. *A* purchases the land at the sale on *B*'s decree. While this mortgage suit was pending, *D* purchased the land at a sale in execution of a money decree against *B*. *D* then sues *A* for rent, but as *D*'s purchase was during the pendency of *B*'s suit *A* is entitled to show that this tenancy has merged in his higher title as proprietor.[2199]

Sales for recovery of taxes

As to sales for the recovery of land revenue or other taxes, there is a conflict of decisions. Sales for the recovery of land revenue under section 13 of the Bengal Land Revenue Sales Act, Bengal Act 11 of 1859, have been held to be subject to the rule of lis pendens,[2200] and the Patna High Court has said that there is no distinction between execution sales, and sales for the realisation of government revenue.[2201] On the other hand, the view of the Rangoon High Court is that it would be a dangerous extension of the doctrine to apply it to sales for the recovery of government taxes and local rates.[2202] The Madras High Court has applied lis pendens to sales for the recovery of income tax[2203] and *abkari* dues,[2204] but not to revenue sales which enforce a paramount claim of the Crown.[2205] The Bombay High Court has applied the rule to a sale of the property of an absconding offender under section 88 of the Code of Criminal Procedure

2195. *Sujan Bhan v Guj Rai*, AIR 1981 All 149.
2196. *Rajkishore Lal v Sultan Jehan*, (1952) ILR 31 Pat 722 : AIR 1953 Pat 58.
2197. *Kulandaivelu v Soubagyammal*, AIR 1945 Mad 850; *Sarat Chandra Ghose v Chintamani*, AIR 1948 Pat 111.
2198. *Radhamadhub Holda v Manohar*, (1888) ILR 15 Cal 756 : 15 IA 97 (PC).
2199. *Raj Kishen v Radha Madhub*, (1874) 21 WR 349.
2200. *Har Shankar v Shew Gobind*, (1899) ILR 26 Cal 966; *Bhawani Koer v Mathura Prasad*, (1907) 7 Cal LJ 1; *Mahomed v Hem Chandra*, (1909) 10 Cal LJ 590 : 4 IC 731.
2201. *Mathura Prasad v Desai Sahu*, (1922) ILR 1 Pat 287, p 290 : 65 IC 325 : AIR 1922 Pat 542.
2202. *RMVVM Chettyar Firm v M Subramaniam*, (1927) ILR 5 Rang 458 : 105 IC 258 : AIR 1927 Rang 289; *Abdur Rauf Chowdry v NPLSP Chettyar Firm*, (1929) ILR 7 Rang 113, pp 116, 117 IC 575 : AIR 1929 Rang 175.
2203. *Kadir Mohideen v Muthu Krishna*, (1903) ILR 26 Mad 230.
2204. *Thammayya v Ramanna*, (1926) 51 Mad LJ 475 : 98 IC 201 : AIR 1926 Mad 1161.
2205. *Kadir Mohideen v Muthu Krishna*, (1903) ILR 26 Mad 230; *Thammayya v Ramanna*, (1926) 51 Mad LJ 475.

1898.[2206] The Travancore & Cochin High Court has, however, held that the principle underlying the section is applicable to involuntary sales; it does not apply to revenue sales for arrears of land revenue or other dues which constitute a first charge on the property.[2207]

If property is sold for arrears of government revenue while proceedings in the execution of a money decree are pending, the rule cannot apply, for no right to immovable property is in issue in the suit.[2208] In *Jayaram Mudaliar v Ayyaswami*[2209] CJ Sikri concurring, held that section 52 applies to revenue sales. The effect of the section would, however, depend upon the provisions of law under which a sale is held. Section 52 does not affect pre-existing rights. As such tax laws confer a charge on the property, a purchaser at a revenue sale would not be affected by lis pendens.

Insolvency

The doctrine of *lis pendens* does not apply when the defendant becomes insolvent during the pendency of a suit and the estate vests in the Official Assignee or Official Receiver, as the case may be. In such a case there is no transfer.[2210] So also, in a case when there is a devolution of property in favour of the official receiver under section 28(2) of the Provincial Insolvency Act.[2211] The Official Assignee must be joined as a party under O 22, rule 10 of the Code of Civil Procedure, otherwise he is not bound.[2212]

Attachment

An attachment creates no lien or charge on the property attached, and so an execution purchaser who buys the property after the suit is filed is not protected merely because he had attached the property before the suit was filed.[2213]

Revenue proceeding

A revenue officer acting under the Central Provinces Tenancy Act is a Revenue Court and the proceedings under section 82B of the Act operates as *lis pendens*.[2214]

Sale to protected tenant

It has been held by a single Judge of the Bombay High Court[2215] that a sale to a protected tenant under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, is not affected by lis pendens on the ground that such a sale is involuntary, *sed quaere*.

(31) Lis Pendens in the Same Suit

In a case from Bombay,[2216] CJ Jenkins said that the doctrine "does not defeat a purchaser under a decree or order for sale when the lis pendens is the very suit in which

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2206. *Narayan v Govind*, (1929) 31 Bom LR 345 : 116 IC 271 : AIR 1929 Bom 200.
2207. *Neelakantha v Govinda Pillai*, AIR1954 Tr & Coch 122; *Krishnan v Kumaraswami*, AIR1952 Tr & Coch 61; *Raman Nair v Lakshmi Ammal*, AIR1952 Tr & Coch 96; *Keshvan Karunakara v Raman Keshav*, AIR1952 Tr & Coch 230.
2208. *Mahadeo Saran v Thakur Prasad*, (1909) 14 Cal WN 677 : 6 IC 40.
2209. *Jayaram Mudaliar v Ayyaswami*, AIR 1973 SC 569 : (1972) 2 SCC 200.
2210. *Indian Cotton Co v Ram Charan Lal*, 183 IC 97 : AIR 1939 Nag 128.
2211. *Official Receiver v Jassa Singh*, (1951) 1 Mad LJ 200 : AIR 1951 Mad 687.
2212. *Punithavelu v Bhashyam*, (1902) ILR 25 Mad 406; *SubramaniavRamakrishna*, (1922) 42 Mad LJ 126 : 70 IC 357 : AIR 1922 Mad 335.
2213. *Motilal v Karrabuldin*, (1897) ILR 25 Cal 179 : 24 IA 170; *Kedar Nath Lal v Sheonarain*, [1970] 2 SCR 204 : AIR 1970 SC 1717; *Kinhi v Ahmed*, (1891)ILR 14 Mad 491; *Byramji v Chunilal*, (1902) ILR 27 Bom 266; *People's Co-operative Bank Ltd v P A Pillai*, (1958) ILR Ker 480, AIR 1959 Ker 133; *Kedarnath Lal v Sheonarain*, AIR 1970 SC 1717, p 1721.
2214. *Jairam v Maifujali*, (1948) ILR Nag 324.
2215. *Dnyanu Bana v Gulab Eknath*, (1962) ILR Bom 60.
2216. *Shivlal v Shambhu Prasad*, (1905) ILR 29 Bom 435, p 447.

that decree or order is passed." In that case, a house which belonged to a joint family consisting of an adult and two minors was mortgaged by the adult member. The mortgagee got a decree for sale against all three and sold the house while an appeal by the minor members was pending. The Court of Appeal dismissed the suit as against the minors holding that their interests were not affected. Nevertheless, the court held that the auction purchaser was not affected by *lis pendens*, and dissented from a judgment of J Phear.[2217] This is on the principle that bona fide purchase at sales by a court having jurisdiction are not affected by a subsequent reversal of the decision.[2218] It is on the same principle that restitution cannot be ordered under section 144 of the Code of Civil Procedure 1908 against a bona fide purchaser for value at a sale held by a court having jurisdiction.[2219] In a Calcutta case,[2220] a *darpatnidar* filed a suit to prevent a court sale of a *putni*. The Privy Council held that the *putni* was not saleable; but before that decision was given, the *putni* had been sold. The court held that as the lis pendens was a different suit to that in which the sale had been ordered, the doctrine applied, and the sale was set aside.

Status of transfer pendente lite

A pendente lite purchaser would be entitled to or suffer same legal rights and obligations of his vendor as may be determined by the court. Mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit as the law simply postulates a condition that the alienation will in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court. The transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property pendente lite,[2221] as he is bound by the decree just as much as he was a party to the suit,[2222] and a litigating party is exempted from taking notice of a title acquired during the pendency of the litigation[15]even if he was not aware of the status quo[16]. The alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court,[2223] and the title acquired by the purchase of property would stand extinguished by the sale held in execution of the charge decree by operation of section 52 of the Transfer of Property Act.[2224]

In *Haji Abdul Mateen v Sheikh Haji Firozuddin*,[2225] the Delhi High court has held that a transfer pendente lite is void as against the successful plaintiff and transferee pendente lite cannot claim protection under section 52.

2217. *Indurjeet Koer v Poottee*, (1873) 19 WR 197.
2218. *Nawab Zain-ul-Abdin Khan v Muhammad Asghar Ali Khan*, (1887) ILR 10 All 166 : 15 IA 12.
2219. *Piari Lal v Hanif-un-Nissa*, (1916) ILR 38 All 240 : 34 IC 303.
2220. *Maharaj Bahadur v Surendra Narain*, (1915) 19 Cal WN 152 : 28 IC 898.
2221. *K N Aswathnarayana Setty v State of Karnataka*, AIR 2014 SC 279 : LNIND 2013 SC 1032 : 2013 (14) SCALE 565; *Marakkal v SG Kannappan*, Second Appeal No 1648 of 1997; decided on 22 February 2017; High Court of Madras.
2222. *A Nawab John v V N Subramaniyam*, (2012) 7 SCC 738 : LNIND 2012 SC 376 : 2012 (6) SCALE 143 : 2012 5 SLT 248.
2223. *M T Kempegowda v G K Ramesh Kumar*, (2011) 3 Kant LJ 59 : (2011) 1 AIR Kant R 786; *Yashwanta v Mahadeo*, (2011) 1 Mah LJ 569 : (2011) 1 Bom CR 146 : (2011) 2 ICC 259 : (2011) 101 AIC 319 : (2010) 6 AIR Bom R 225 : 2011 AIR CC 280.
2224. *Fomento Resorts & Hotels v Minguel Martins*, (2009) 3 SCC 571 : LNIND 2009 SC 2947 : 2009 (1) SCALE 758 : 2009 1 JT 470; *R D Cements Industries Pvt Ltd Lko v Collector/DM Lucknow* 2010 Supp All LJ 108; *Ramdeo Chaudhary v Mathura Chaudhary*, 2010 SCC OnLine Pat 231: LNINDU 2010 PAT 518.
2225. *Haji Abdul Mateen v Sheikh Haji Firozuddin*, AIR 2014 Del 111: LNIND 2014 DEL 960.

(32) Authority of the Court

A transfer during the pendency of the suit may be authorized by the court, and the sanction of the court will exclude it from the rule of lis pendens. The sanction must be of the court in which the suit is pending.[2226]

(33) Sale under Order 21, Rule 83 of Code of Civil Procedure 1908

Lis pendens does not apply to sales under this rule.[2227]

(34) Lis pendens in the Code of Civil Procedure 1908

Claim in Execution Proceedings

The rule of lis pendens is recognised in O 21, rule 102 of the Code of Civil Procedure, which does not allow a transferee *pendente lite* of the judgment-debtor to make a claim in execution proceedings. But this bar will not apply if the transferee has a title to possession irrespective of his purchase. This occurs when the purchaser *pendente lite* is subrogated to the rights of a usufructuary mortgagee by redemption of a usufructuary mortgage of a date before the suit.[2228] A transferee *pendente lite* is a representative in interest of the party from whom he got the transfer. Such a transferee is not entitled to raise any claim against the decree or order that may ultimately be passed in the action.[2229]

Right of transferee pendente lite to be made a party in proceedings

Under O 22, rule 10, an alienee *pendente lite* may be joined as party, unless permitting impleadment and recognising the alienation/assignment would amount to defeating the ends of justice and the prevalent public policy.[2230] The plaintiff is not bound to make him a party;[2231] and the alienee has no absolute right to be joined as a party.[2232] But the court has a discretion in the matter which must be judicially exercised,[2233] and an alienee will ordinarily be joined as a party to enable him to protect his interest.[2234]

The Supreme Court has held that a transferee of property, who purchased property during the pendency of suit, and who was entitled to be, but was not brought on record under O 22, rule 10 in a pending suit, is entitled to prefer an appeal against the decree or order passed therein, if his assignor could have filed such an appeal in view of section 146, Code of Civil Procedure 1908.[2235] Further, a lis pendens transferee, though not brought on record under O 22, rule 10, is entitled to move an application under O 9, rule 13 to set aside a decree passed against his transferor, the defendant in a suit.[2236] The Supreme Court in

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2226. *Motilal Shivlal v Poona Cotton and Silk Manufacturing Co*, (1917) 19 Bom LR 602 : 41 IC 246; *Ma Chit Su v National Bank of India*, (1925) 30 Cal WN 769 : 91 IC 432 : AIR 1925 PC 261, p 263.
2227. *Lanka Ram v Sunder Gopala*, (1940) 2 Mad LJ 1038 : 52 Mad LW 862 : (1941) Mad WN 66 : 195 IC 212 : AIR 1941 Mad 208.
2228. *Fatima v Raza Ali*, (1927) ILR Luck 269 : 99 IC 219 : AIR 1926 Oudh 610.
2229. *Narayan v Sankaran*, AIR 1951 Tr & Coch 137; *Pyli v Varghese*, AIR 1956 Tr & Coch 147.
2230. *Surjit Singh v Harbans Singh*, (1995) 6 SCC 50.
2231. *Umamoyi v Tarini Prasad*, (1867) 7 WR 225; *Gulabchand v Dhondi*, (1875) 11 Bom HC 64; *Dammar Singh v Nazir-ud-din*, (1889) All WN 91.
2232. *Lakshan v Nikunjamoni*, (1923) 27 Cal WN 755 : 80 IC 538 : AIR 1924 Cal 188; *Chanan Singh v Warayam Singh*, AIR 1947 Lah 175.
2233. *Veeraraghava v Subha Reddi*, (1920) ILR 43 Mad 37 : 53 IC 428.
2234. *Commercial Bank of India v Subju Saheb*, (1901) ILR 24 Mad 252. This proposition of law was cited with approval in *Sri Jagannath Mahaprabhu v Pravat Chandra Chaterjee*, AIR 1992 Ori 47, p 51. See also, *Kashi Ram v District Judge, Dehradun*, AIR1993 All 83, p 85.
2235. *Saila Bala Dassi v Nirmala Sundari Dassi*, AIR 1958 SC 394 : 1958 SCR 1287. Also see *Jugalkishore Saraf v Raw Cotton Co Ltd*, AIR 1953 SC 376 : [1953] 1 SCR 1369; *Sardar Govindrao Mahadik v Devi Sahai*, (1982) 1 SCC 237.
2236. *Raj Kumar v Sardari Lal*, (2004) 2 SCC 601 : (2004) 2 SCALE 601.

Sarvinder Singh v Dalip Singh[2237] has held that since the alienation *pendente lite* is hit by the doctrine of lis pendens by operation of section 52, alienee cannot be considered to be either a necessary or proper party to the suit. In *Dhurander Prasad Singh v Jai Prakash University*,[2238] which was later followed in *Bibi Zubaida Khatoon v Nabi Hassan Saheb*,[2239] the Supreme Court has held: "Where a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, yet he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the advesary."

The Karnataka High Court has also held that a transferee pendente lite is not entitled to come on record as a matter of right and there is no absolute rule that such a transferee pendente lite should in all cases be allowed to come on record as a party. Such a transferee pendente lite is bound by the decree just as much as he was a party to the suit.[2240] Therefore, no transfer of any immoveable property during the pendency of any suit or proceeding in relation to that property can take place except with the authority of the Court in which such suit or proceeding is pending. Once lis pendens is registered, the subsequent transferee would be bound by the decision, namely, the final order or decree that may be passed by the concerned Court.[2241] In *EN Chandran v Valsan Matathil*,[2242] *A* filed asuit for declaration of title as against *B*, and both *A* and *B* transferred their rights in favour of *C* and *D* during the pendency of the litigation. The contention of *C* that a decree cannot be passed without joining him as a necessary party in the suit was rejected by the court, as he was a transferee pendente lite.

In *Rajeev Berry v Additional District Judge*,[2243] *A*, filed a suit against *B* seeking a permanent injunction restraining *B* from interfering with his peaceful possession. The trial court after filingof the written statement directed the parties to maintain *status quo* over the property in question. However, *A* sold the property to *X* and *X* filed an application seeking permission of his impleadment in the main suit. The court held that since the properly was transferred by the party to the suit during the pendency of the litigation and that too without the permission of the court, *X* was not entitled to be impleaded in the suit for permanent injunction. Where in a suit for specific performance, the vendor subsequently entered into an

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2237. *Sarvinder Singh v Dalip Singh*, (1996) 5 SCC 539 : (1996) 6 SCALE 59.
2238. *Dhurander Prasad Singh v Jai Prakash University*, (2001) 6 SCC 534 : AIR 2001 SC 2552.
2239. *Bibi Zubaida Khatoon v Nabi Hassan Saheb*, (2004) 1 SCC 191 : AIR 2004 SC 173; see also *Mohanasundaram v Kishan Lal*, AIR 2012 : (NOC) 341(Mad).
2240. *V Chandrashekaraiah v Puttamma*, (2011) 4 ICC 630 : (2010) 4 AIR Kant R 678.
2241. *P R Yelumalai v N M Ravi*, 2015 SCC OnLine SC 274; *M Lakshminarayana v DB Pradeep Kumar*, (2010) 1 UP LJ 192 (DB); *Keval Developers Pvt Ltd v Ashok Govindram Hurra*, 2010 SCC OnLine Guj 8220 August 2, 2010; *Yashwanta v Mahadeo*, (2011) 1 Mah LJ 569 : (2011) 1 Bom CR 146 : (2011) 2 ICC 259 : (2011) 101 AIC 319 : (2010) 6 AIR Bom R 225 : 2011 AIR CC 280; *Bagadia Builders and Developers v Defense Civilians Co-Operative Housing Society*, (2010) 6 Mah LJ 841 : (2011) 2 Bom CR 636 : (2011) 97 AIC 766 : (2011) 4 AIR Bom R 479 : 2011 AIR CC 2424; *Amol v Deorao*, AIR 2011 (NOC) 215 (Bom).
2242. *EN Chandran v Valsan Matathil*, RSA No. 855 of 2016 (B); decided on 6 January 2017 High Court of Kerala; 2017 SCCOnline Ker 48.
2243. *Rajeev Berry v Additional District Judge*, AIR 2011 Utr 12 : (2011) 112 RD 777. See also *Anita Kuwar v Chandra Bhushan Singh*, AIR 2010 Pat 5; *Mahfooz Ahmed v Neelmani*, AIR 2010 MP 165 : (2010) 4 MPHT 44 : (2010) 2 MPLJ 603; *Jayeshkumar Chhakaddas Shah v Mafaji Motiji Thakor*, AIR 2010 (NOC) 387 (Guj); *Shashi Surana v Anant Mishra*, AIR 2010 Raj 148 : RLW 2010 (3) Raj 2478; *Padmavati Estate Pvt Ltd v Kusum Agarwal*, AIR 2009 NOC 583; *Rama Rao v T Raghunathan*, AIR 2008 AP 92 : (2007) 6 ALD 821; *Sunil Kumar Gupta v Kiran Girhotra*, AIR 2008 SC 140 : 2008 (1) PLJR 172 : (2007) 8 SCC 506; *Usha Sinha v Dina Ram*, AIR 2008 SC 1997 : (2008) 7 SCC 144; *Shantilata v Rajaniman Nayak*, AIR 2007 Ori 69 : (2007) 103 CLT 238 : (2007) 1 OLR 287; *Pannala Renuka v Kavali Venkataiah*, AIR 2007 AP 46 : (2006) 6 ALD 761 : (2007) 1 ALT 259; *S Verdangan v V Raja*, AIR 2007 (NOC) 854 (Mad); *Major P T Choudhary v Mohammed Abdul Basheer Khan*, AIR 2007 (NOC)121 (AP); *Kasturi v Iyyamerumal*, AIR 2005 SC 2813 : (2005) 6 SCC 733.

agreement to sell the suit property to two other purchasers to frustrate the rights and title of the plaintiff purchaser, these suit purchasers would not be called bonafide purchasers as purchasing property without leave of the court and it would not vest them with any title. Moreover the said purchasers of the property pendente lite would not have a right of impleadment as the court held that an effective decree can be passed in absence of the subsequent purchaser and he is neither a necessary nor a proper party and thus not entitled to join as a defendant in the suit.[2244]

When an assignee *pendente lite* is joined as a party, the suit is not a new suit, but the same suit continues by or against him and if he is made a party in an appeal, he cannot raise any defence which his assignor could not have put forward.[2245] He, further, cannot take a stand contrary to the one taken by his predecessor-in-interest.[2246]

After the decree, the transferee *pendente lite,* if not joined as a party, is under section 47 of the Code of Civil Procedure 1908, a representative of the judgment debtor in all matters relating to the execution, discharge or satisfaction of the decree.[2247] In a Bombay case,[2248] the plaintiff obtained a decree for partition against his brother, who, however, sold part of the property which was the subject of the suit *pendente lite.* The purchasers were not made parties to the suit, and after the decree the plaintiff filed a fresh suit against the purchasers to recover possession of his share. The court held that the purchasers were not entitled to plead section 47 as a bar to a second suit by the decree-holder, and that section 52 forbid their doing so. In another Bombay case,[2249] the decree was for a personal injunction restraining the judgment debtor from interfering with the rights of the decree-holder as owner of an immovable property. The rule of law is that the decree-holder cannot execute the decree against a purchaser from the judgment debtor as an injunction does not run with the land.[2250] Nevertheless, the court in execution proceedings granted an injunction against the purchaser as he was a purchaser *pendente lite.* Transferee *pendente lite* can be added as proper party, if his interest in the subject matter of the suit is substantial.[2251]

A transferee pendente lite cannot question nor put obstruction in the execution of the court order. He cannot as the judgement debtor call upon the court to decide his obstruction like a suit or question the legality of the decree and propriety of the court in passing such a decree. Thus where a suit presented for recovery of possession of the property covered by a sale deed was decreed in favour of *A* but during execution of the decree the same was resisted by *B*, who was a transferee pendente lite, the suit filed by *B* to challenge the order of the court in the first suit during which he purchased the suit property that was hit by lis pendens would be dismissed.[2252]

(35) Estoppel

A party may be estopped from raising the plea of lis pendens. *A,* in execution of a decree against *B*, brought *B*'s property to sale and purchased it. At *B*'s instance the sale was set aside. *A* filed an appeal against the order setting aside the sale, and pending the appeal *B* sold the

2244. *Mal Chand v Shiv Kumar,* AIR 2017 Raj 86.
2245. *Chunni Lal v Abdul Ali,* (1901) ILR 23 All 331.
2246. *India Umbrella Manufacturing Co v Bhagabandei Agarwalla,* (2004) 3 SCC 178 : AIR 2004 SC 1321.
2247. *Lalji Mal v Nand Kishore,* (1897) ILR 19 All 332; *Sheo Narain v Chunni Lal,* (1900) ILR 22 All 243.
2248. *Basappa v Bhimangowda,* (1928) ILR 52 Bom 208 : 108 IC 17 : AIR 1928 Bom 65.
2249. *Krishnabai v Sawlaram,* (1927) ILR 51 Bom 37 : 29 Bom LR 60 : 100 IC 582 : AIR 1927 Bom 93 followed in *Amrit Lal v Kanti Lal,* (1931) 33 Bom LR 266 : 133 IC 244 : AIR 1931 Bom 280; *Munni Lal Shyamle v Bhaiyalal Hazari,* AIR 1962 MP 34.
2250. *Dhayabhai v Bapalal,* (1902) ILR 26 Bom 140; *Vithal v Sakaram,* (1899) 1 Bom LR 854.
2251. *Gunnanj Saran Baliya v Joyce C Salin,* AIR 1990 Del 13, p 18.
2252. *A V Raju v H Phoolchand,* AIR 2011 Mad 83: LNIND 2011 MAD 190 : 2011 (3) MLJ 666.

property to *C*. *C* deposited the amount of the decree in court. *A* withdrew this amount in full satisfaction of his decree. *A* having elected to take the money was estopped from pleading that the sale to *C* was subject to lis pendens.[2253] Having taken the money he could no longer claim the land. This is on the principle that when a litigant has two remedies which are alternative, his adoption of one bars the other.[2254]

(36) Res Judicata

The rule of res judicata prevents the owner from dealing during lis pendens and once a judgment is pronounced by a competent court in regard to the subject-matter of the suit in which the doctrine of lis pendens applies, the decision is res judicata and binds not only the parties to the suit, but the transferee *pendente lite*.[2255]

If the earlier suit was dismissed for default and no issue was heard and decided finally the plea of res judicata and lis pendens, would not be applicable. In *Marakkal v SG Kannappan*,[2256] the suit, which was pending transfer of the property was dismissed for default and since no right was decided in favour of the appellants in that suit, the transfers pendent lite are held as perfectly valid.

(37) Lis Pendens and Temporary Injunction

Notwithstanding the rule of lis pendens in section 52 of TP Act, there can be occasion for the grant of injunction restraining *pendente lite* transfers in a fit and proper case. Thus, in a suit for specific performance of sale of the property, if the defendant is not restrained by an injunction from selling the property to a third party and accordingly, the third party purchases the same bona fide for value without any notice of the pending litigation and spends a huge sum for the improvement thereof or for construction thereon, the equity in his favour may intervene to persuade the court to decline, in its discretion, the equitable relief of specific performance to the plaintiff and to award damages only.[2257]

Invoking powers under O 39 rules 1, 2, arises only in rare cases where plaintiff demonstrates that rule of lis pendens is inadequate to protect his interests.[2258] While considering balance of inconvenience and irreparable loss, Civil Courts would have to see as to what is the preventive relief sought or what mischief is sought to be prevented. If the title of the pendente lite transferor is recognized or accepted only in regard to a part of the transferred property, then the transferee's title will be saved only in regard to that extent and the transfer in regard to the remaining portion of the transferred property to which the transferor is found not entitled, will be invalid and the transferee will not get any right, title or interest in that portion and it was held that a suit ought not to have been dismissed in entirety even if the sale by the second respondent in favour of appellant was hit by the doctrine of lis pendens.[2259]

2253. *Mangat Rai v Duli Chand*, (1933) ILR 55 All 735 : (1933) All LJ 1488 : 147 IC 932 : AIR 1933 All 579.
2254. *Baikunthu Nath Dey v Salimulla*, (1908) 12 Cal WN 590 : 6 Cal LJ 547; *Scarf v Jardine*, (1882) 7 App Cas 345.
2255. *Digambarrao v Rangarab*, (1949) 51 Bom LR 623 : AIR 1949 Bom 367.
2256. *Marakkal v SG Kannappan*,(2017) 3 MLJ 379.
2257. *Muktakeshi Dawn v Haripada Mazmudar*, AIR 1988 Cal 25, p 27.
2258. *Kachhi Properties, Satara v Ganpatrao Shankarao Kadam*, AIR 2011 (NOC) 185 (Bom) 52 : 2010 (5) All MR 366 : 2010 (5) Bom CR 43 : 2010 (112) Bom LR 3263 : 2010 (5) All MR 366 : 2010 (5) Bom CR 43 : **2010 (112) Bom LR 3263.**
2259. *T G Ashok Kumar v Govindammal*, 2011-1 LW 394; *Azhar Sultana v B Rajamani*, AIR 2009 SC 2157 : 2010 (2) ALT 14 (SC) : 2009 (2) AWC 1546 (SC) : 2009 (4) KCCR 2671 : 2009-3-LW911 : 2009 (3) SCALE 159 : (2009)17 SCC 27 : [2009] 2 SCR 537 : 2009 (3) UC 1941.

However, a temporary injunction cannot be declined on the basis that alienation will be subject to law of lis pendens[2260] and while passing an interim order of injunction under O 39 rules 1 and 2 CPC, the Court is required to consider three basic principles, namely, (i) prima facie case; (ii) balance of convenience and inconvenience; and (iii) irreparable loss and injury.[2261] In *Santokh Singh v Shagun Farm Pvt Ltd*,[2262] the court held that there was unusual delay by the paintiff in filing the court fees and his chances of obtaining the suit for specific performance in his favour were very remote, and therefore, the principle of lis pendens would be inapplicable to the property subject matter of the suit and the defendant, notwithstanding the pendency of the suit which will have to be put to trial, would be entitled to deal with the property.

Section 52 of the Act, and O 39, rules1, 2 operate in different spheres in two different fields. Section 52 does not afford adequate and effective protection as afforded by O 39, rules 1,2.

From the perspective of the litigating parties, the doctrine of lis pendens and order of Temporary injunction have different effects. The apprehension of action under the Code of Civil Proedure 1908 of attachment of property and the punishment of contempt of courts act as a deterrent to the party against whom an order of injunction is running. This deterrent has the further effects of avoiding multiplicity of transactions and proceedings. The doctrine of *lis pendens* does not create such deterrent effect as it does not entail drastic consequences of the attachment of property, detention in civil prison, suit being dismissed or defence being struck off, as the case may be or punishment for contempt of court.

During the pendency of a suit, registration of notice of the pending litigation cannot secure for plaintiff equivalence of what an injunction can secure. Consequences of alienation of suit property in breach of interim injunction renders such alienation illegal and exposes the party to consequences provided under the CPC in addition to the punishment for contempt of court. Hence such registration of notices of pending suit, though desirable as additional safeguard, cannot be preferable or substituted to clamping order of injunction on adversary.

It cannot be laid down as a blanket proposition of law that in each and every case plaintiff is expected to show that the provision of section 52 do not afford adequate protection before injunction to restrain transfer *pendente lite*is issued. Though depending upon the facts of the case, the court can consider imposition of conditions like seeking an undertaking that no equities would be claimed on account of sale or development of property; effecting sale only after putting transferees to notice that their rights would be subject to pending suits or requiring parties to inform the Court promptly of creation of such interest, those conditions can be in addition to or independent of the order of injunction but cannot be in place of or short of granting injunction.[2263]

In a Delhi case, the defendant entered into an agreement to sell and received a sum of ₹ 21,000 as advance, the plaintiff contended that a decree of specific performance of the said agreement be passed and till such time the final decision is taken in the suit, the defendant should be restrained by an order not to sell, alienate or create any third party interest in the property, as in that case the plaintiff will suffer an irreparable injury. The court declined to

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2260. *Rita Toor v Logical Developers Pvt Ltd,* (2010) 3 RCR (Civil) 662 : (2010) 158 PLR 499 : (2010) 158 PLR 499.

2261. *Azhar Sultana v B Rajamani,* AIR 2009 SC 2157 : 2010 (2) ALT 14 (SC) : 2009 (2) AWC 1546 (SC) : 2009 (4) KCCR 2671 : 2009-3-LW911 : 2009 (3) SCALE 159 : (2009)17 SCC 27 : [2009] 2 SCR 537 : 2009 (3) UC 1941

2262. *Santokh Singh v Shagun Farm Pvt Ltd,* CS(OS) 1756/2011 : 2017 (162) DRJ 283, 2017 SCC Online Del 6844.

2263. *Prakash Gobindram Ahuja v Ganesh PandharinathDhonde,* AIR 2017 (NOC) 631 (Bom): 2016 (6) ABR 745 : 2016 (6) Bom CR 262.

grant an injunction against the defendant, and instead, passed an order that in case the defendant intends to transfer, alienate or create third party interest in the property, the intending purchaser/transferee shall be informed in writing about the pendency of this suit.[2264] The Bombay High court also refused a temporary injunction on the ground that section 52 provides adequate protection to parties from transfers *pendente lite* and the occasion for invoking powers under O 39 rules 1, 2 arises only in rare cases where plaintiff demonstrates that the rule of *lis pendens* is inadequate to protect his interest.[2265]

[2266]**53. [Fraudulent transfer.**—(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transfer or shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.]

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2264. *Vinod Saluja v Sita Rani*, (1996) 36 DRJ 529.
2265. *Kacchi Properties, Satara v Ganapatrao Shankarao Kadam*, AIR 2011 (NOC) 185 (Bom).
2266 Subs. by Act 20 of 1929, sec. 15, for the original section.

(1) Amendment

This section was Amended by the amending Act of 1929.

(2) Applicable as Rule of Justice, Equity and Good Conscience

The principle of section 53 has been adopted in the Punjab where the TP Act was not in force,[2267] and was also followed in Bombay before the TP Act was extended to that Presidency.[2268] It has, however, been held that the requirement that any suit filed to set aside a fraudulent transfer must be a representative suit, will not be insisted upon in Punjab as that is a mere technicality.[2269]

(3) Transfer

The transfers referred to in this section are transfers binding between the parties, but voidable in the circumstances stated in the section.[2270] A transfer with a deliberate attempt to defeat the rights of the decree-holder, would be hit by section 53.[2271] A document made to defeat or to delay his creditors is binding on the executant, and those claiming under him.[2272] The transfer is valid until it is set aside, and must not be confused with *benami* or colourable transfers which are merely sham transfers, and not meant to operate between the parties.[2273] In the collusive or *benami* transactions there is no transfer, but the property is merely put in a false name, and generally for the purpose of defrauding creditors. As observed by Sir Lawrence Jenkins in *Mina Kumari v Bijoy Singh,*[2274] the difference is distinct though it is often flurred.[2275] Such colourable or sham deeds do not require to be set aside,[2276] for the real

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2267. *Lakhmi Narain v Tara Singh*, (1901) PR 6; *ChampovShankar Das*, (1912) PR 74 : 14 IC 232; *Ibrahim v Jiwan Das* 75 IC 1043 : AIR 1924 Lah 707; *Mohammad Ishaq v Mohammad Yusaf*, (1927) ILR 8 Lah 544 : 101 IC 172 : AIR 1927 Lah 420; *Tapassi v Raja Ram*, 115 IC 417 : AIR 1930 Lah 136; *Chattru Mal v Majidan*, (1934) ILR 15 Lah 849 : 150IC 888 : AIR 1934 Lah 460; *Gobind Ram v Chhogmal*,152 IC 472 : AIR 1934 Lah 161; *Shallo Devi v Mohinder Singh*, AIR 1971 P&H 325.
2268. *Rangilbhai v Vinayak*, (1887) ILR 11 Bom 666; *Motilal Ravichand v Utam Jagjivandas*, (1889) ILR 13 Bom 434. See also *Musadee Mahomed v Meerza Ally*, (1854) 6 Mad IA 27 and *Suba Bibi v Balgobind*, (1886) ILR 8 All 178; *Zafruf Hasan v Farid-ud-din*, AIR (1946) PC 177 : 47 Bom LR 2391 : (1945) 49 Cal WN 115.
2269. *Badri Dass v Chunilal*, (1961) 63 Punj LR 319 : AIR 1961 Punj 398; *Shallo Devi v Mohinder Singh*, AIR 1971 P&H 325. And see *State of Punjab v Giani Bir Singh*, (1968) ILR 1 Punj 10 : AIR 1968 Punj 479.
2270. *Krishna Kumar v Jai Krishna*, (1917) 21 Cal WN 401 : 29 IC 690; *Bhagwan Lal v Rajendra*,77 IC 1 : AIR 1923 Pat 564, p 567; *Krishnabai v Debi Singh*, 71 IC 409 : AIR 1923 Nag 195; *Ram Rao v Durga Ajodhya Pir Saigh*, (1925) ILR 47 All 83.
2271. *Pujabhai Virabhai Sarvaiya v Jitendra Keshubhai Sutreja*, 2010 SCC OnLine Guj 316; *Surinder Kaur v Parminder Kaur*, (2010) 4 RCR (Civil) 422 : (2010) 4 ICC 779 (P&H).
2272. *Anant Roman v Arunachalam*, AIR1952 Tr& Coch 105.
2273. *Budhermal v Verharam*, AIR1946 Sau 78; *Purna Chandra v Sarojendra*, AIR1953 Cal 251; *Kubra Begum v Jainandan*, (1955) ILR 34 Pat 133 : AIR 1956 Pat 270; *Bandaru Subbaaidu v Alluri Satyanarayana*, AIR 1962 AP 25. For the distinction between collusion and fraud, see *Nagubai Ammal v B Shama Rao*, [1956] 1 SCR 451, p 463 : AIR 1956 SC 593 : [1956] SCJ 655. See however, *Keshab Chandra Nayak v Laxmidhar Nayak*, AIR 1993 Ori 1, p 8; *Yanala Maheshwari v Ananthula Sayamma*, AIR 2007 AP 57 : (2006) 6 ALD 623.
2274. *Mina Kumari v Bijoy Singh*, (1916) ILR 44 Cal 662 : 44 IA 72 : 40 IC 242 : AIR 1916 PC 232.
2275. See for instance *Velachand v Sitaram*, (1925) 27 Bom LR 205 : 86 IC 873 : AIR 1925 Bom 287; *China Mal v Gul Ahmad*, (1923) 5 Lah LJ 435 : 73 IC 719 : AIR 1923 Lah 478.
2276. *Petherpermal v Muniandi*, (1908) ILR 35 Cal 551 : 35 IA 98; *Swaminatha v Rukmani*, 55 IC 766; *Alagappa v Dasappa*, (1913) 24 Mad LJ 293 : 18 IC 332; *Saraswati v Mahabir*, 109 IC 272 : AIR 1928 All 476; *Parkash Narain v Raja Birendra*, (1931) ILR 7 Luck 131 : 133 IC 51 : AIR 1931 Oudh 333; *Mahendra v Suraj Kumar*, AIR 1958 Pat 568.

title is all along with the transferor.[2277] In fact, the challenge based on section 53 involves the admission that the transfer is a real one.[2278]

The judgment debtor got his self acquired land secretly mutated in favour of a son without any document of title. It was held the transfer is not valid, and the son of the judgement debtor cannot raise any objection to attachment of such property in execution of a decree.[2279] Where the plaint itself disclosed that the sale transaction was fictitious and designed to defeat the plaintiffs' creditors, the defendant being a party to that design, it was held that both parties being in *pari delicto* neither of them could be permitted to take advantage of such a fraudulent transaction.[2280] If the transfer was effected by the debtor before the institution of the suit, its validity would not be affected.[2281]

A transfer under which a settlement deed was hurriedly executed in favour of the wife only for the purpose of defeating the suit claim of the decree holder would clearly be a fraudulent transfer in terms of section 53 of the Act of 1882.[2282] Objections to sale in recovery proceedings raised by person conniving with debtor so as to defeat claims of creditor would be dismissed.[2283] Where a company was purchased in good faith and for consideration, the transfer of property in favour of the Company would create indefeasible right in favour of the Company on account of such transfer, which cannot be impaired as the same is preserved by section 53 of the Transfer of Property Act,[2284] but no right would be created on any person on strength of a forged lease deed of public land executed by Estate Officer.[2285]

Collusive Award and Decree

The principle of the section has been extended to a collusive award and decree,[2286] even though section 2(d) excludes transfers by the operation of law from the scope of the TP Act.[2287] The Lahore High Court has applied the principle of section 53 to a collusive award and decree as a rule of justice, equity and good conscience, though the TP Act is not in force in Punjab, on the ground that section 2(d) was a technical provision which did not bind the courts in Punjab.[2288]

Deed of appointment

The exercise of a power of appointment under a settlement is a voluntary transfer, and the appointment will be set aside if made for the purpose of delaying or defeating creditors.[2289]

Marriage settlement

A marriage settlement made to defeat and defraud creditors is voidable under this section.[2290]

2277. *Sheo Gobind Koeri v Ram Asrav Singh,* 180 IC 615 : AIR 1939 Pat 5.
2278. *Chumar v Alima,* AIR 1998 Ker 139.
2279. *Eknath Nana Shinde v Shankarappa Chanborappa Shinde,* AIR 1999 Bom 22 : (1940) ILR All 542 : (1940) All LJ 470 : 190 IC 337; *Jagadamba Pande v Ram Khilawat,* AIR 1942 All 344 : AIR 1942 Lah 309 : 203 IC 81; *Jamnabai v Dattareya,* AIR 1936 Bom 160 : 38 Bom LR 251 : 162 IC 260.
2280. *Sultan Ahmad v Rashid Ahmad,* AIR 1990 All 47.
2281. *Rajan Gopinathan v D Jayashree Nayan,* AIR 2010 (NOC) 388 (Ker).
2282. *Ayitam Venkata Anjani v Ganeshula Uma Parvathi,* 2015 (6) ALD 504 : 2016 (1) ALT 160.
2283. *Sadashiv Prasad Singh v Harender Singh,* (2015) 5 SCC 574 : AIR 2014 SC 1078 : 2014 (2) AJR 461.
2284. *Europlast India Ltd, Re,* 2010 Supp Bom CR 425; (2010) 158 Comp Cas 390.
2285. *Usha Mehta v Govt of AP,* (2012) 12 SCC 419.
2286. *Akramunnissa Bibi v Mustafa-un-nissa Bibi,* (1929) ILR 51 All 595 : 116 IC 445 : AIR 1929 All 238.
2287. *Ramanathan v Unniammal,* (1943) ILR Mad 47 : AIR 1942 Mad 632; *Thiruvengada Mudaliar v T Narayana Reddiar,* AIR 1959 Mad 141.
2288. *Chattru Mal v Majidan,* (1934) ILR 13 Lah 849 : 150 IC 888 : AIR 1934 Lah 460.
2289. *Joshua v Alliance Bank,* (1895) ILR 22 Cal 185.
2290. *Alamelu Achi v Meenakshi,* AIR 1960 Mad 536.

Partition

This section has been applied to cases of partition.[2291] The correctness of these decisions was a question canvassed before the Supreme Court in *Sarin v Poplai,*[2292] but the Supreme Court declined to go into the question. The correct view, it is submitted, is that a partition is not a transfer,[2293] and, therefore, not strictly within the section, but that the principle of the section applies to a fraudulent partition. Where the object of the transfer is not merely to give a sharer his rightful share in the family property, but to effect the partition in such a way that such sharer would be able to defeat the creditors, as for instance, to allot to him properties which the creditors would not be able to touch and which he would be able to keep for himself, it is clearly a transaction which fulfils the requirements of this section.[2294] A reference to arbitration which led to an award and decree for partition by which the father received an allowance in lieu of his share in the family property, was held not to be voidable under this section as there were no debts in existence at the time of the reference, and as the object was not to defeat creditors, but to safeguard the interests of a minor son.[2295] A partition which does not provide for the payment of a Hindu father's debt is mala fide, and may be avoided by a creditor in proceedings in execution of a decree against the father.[2296] Similarly, in a partition in which no property was allotted to the father who was indebted, it was held that the partition was illusory, although the sons were directed to pay the father's debts.[2297] Where there is partition in a joint Hindu family or a release deed by an indebted coparcener, section 53 is attracted, if the object of the allotment of share to such coparcener is to help him defeat his creditors. Even assuming that partition in a Hindu family and release deed by a coparcener in respect of his share does not amount to a "transfer" within the meaning of section 5 and, therefore, is not within the purview of section 53, the principle of the section can be invoked. If the object of a given instrument of a partition or a release deed is not to give a sharer his rightful share in the family properties, but to effect a partition in such a way that such a sharer would be able to defeat the creditors, it would amount to a fraudulent partition.

Where the value of the share paid to the indebted coparcener, on his effecting a release of the share, is so meagre that he would be hardly able to pay about 25 per cent of his total debts, that one circumstance alone would be sufficient to establish that the intention was not merely to release his share in the interest of the suit property, but to defeat and delay the creditors.[2298] However, a partition of joint family property between a Hindu father and his son is not voidable under section 53, even if it is made to avoid attachment by a creditor of the father,[2299] there is nothing fraudulent in the son exercising his right of partition to save his share of the property.[2300]

Partnership

Under the Statute of Elizabeth, an assignment by an outgoing partner of his share to the continuing partner in consideration of a covenant for the payment of the partnership debts

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2291. *Vinayak v Moreshwar,* AIR 1944 Nag 44; *Firm Schwebo v Subbiah,* AIR 1944 Mad 381; *Fazlul Rahim khan v Nawab Kishore,* (1952) All LJ 101 : AIR 1952 All 226. See, however, *Panchali v Panniyodan Manni,* AIR 1963 Ker 66.
2292. *Sarin v Poplai,* [1966] 1 SCR 349 : AIR 1966 SC 432 : [1966] 1 SCJ 199 : [1966] 1 SCA 285.
2293. See note under section 5, "Partition".
2294. *Vinayak v Mureshwar,* AIR 1944 Nag 44; *Rattan Devi v Jagadhar Mal,* AIR 1956 Punj 46.
2295. *Shantilal v Munshilal,* (1932) ILR 56 Bom 595 : 34 Bom LR 862 : 139 IC 820 : AIR 1932 Bom 498.
2296. *Balusami Ayyar Re,* (1928) ILR 51 Mad 417 : 112 IC 541 : AIR 1928 Mad 735.
2297. *Picha Mooppanar v Vetu Pillai,* AIR 1947 Mad 203.
2298. *Sushilabehn v Anandilal Bapalal,* AIR 1983 Guj 126, paras 12 and 14.
2299. *Krishnasami v Ramasami,* (1899) ILR 22 Mad 519; *Kameswaramna v Venkata Subba Row,* (1915) ILR 38 Mad 1120 : 24 IC 474; *Chottelal v Seth Lakmichand,*94 IC 282 : AIR 1926 Nag 355; *Gaya Prasad v Murlidhar,* (1928) ILR 50 All 137 : 104 IC 406 : AIR 1926 All 714.
2300. See *Firm Schwebo v Subbiah,* AIR 1944 Mad 381.

when both the partners, and the firm, were insolvent was set aside as calculated to delay the creditors, both of the partners and of the firm.[2301] It has, however, been held by the Punjab High Court that a deed of dissolution was not a transfer within the meaning of this section.[2302]

Relinquishment

A relinquishment by one coparcener in favour of another cannot be said to be a transfer within the meaning of this section;[2303] unless it is found to be a device to evade creditors.[2304]

Surrender

A surrender of a life-estate has been held to be transfer within the meaning of this section.[2305]

Waqf

A deed of *waqf* executed as a device to put property out of the reach of creditors has been held to be a transfer to which this section applies, the court observing that section 53 does not infringe any rule of Mahomedan law, for under that law no person can make a *waqf* of his entire property without making arrangements for the payment of his debts.[2306] In such a case, it is immaterial that the transfer is valid under Mahomedan law.[2307] It is open to a debtor to prefer one or more creditors over the others in the payment of his debts, and so long as he retains no benefit in the property, the mere circumstance that some creditors stand paid while others remain unpaid, does not attract the provisions of section 53.

Where it was found that the sale of the assets of the company was effected for the purpose of discharging the debts payable by the company and that the consideration was not inadequate, it is immaterial that the transfer was effected in favour of a person who was not a creditor.[2308]

(4) Movable Property

The section does not apply to movable property,[2309] but the principle of the section was extended to a case of an assignment of a decree when a considerable part of the consideration was secretly reserved for the benefit of the assignor.[2310] The Statute of Elizabeth, 13 Eliz, c 5, included movable property, and the principle of that statute was applied to a transfer of movable property by the Privy Council;[2311] and the Rangoon High Court has applied the section as a rule of justice, equity and good conscience to the transfer of movables.[2312]

2301. Re *Edwards-Wood, Ex-parte Mayou,* (1865) 4 De G J & Sm 664.
2302. *Ishwar Dass v Radha Mal,* (1960) 62 Punj LR 224 : AIR 1960 Punj 417.
2303. *Sunderlal v Gursaran,* AIR 1938 Oudh 65.
2304. *Official Assignee v TD Tehrani,* AIR 1972 Mad 187.
2305. *Natha v Dhunbaiji,* (1899) ILR 23 Bom 1; *Shivu Shidda v Lakhmichand,* (1939) 41 Bom LR 1007 : AIR 1939 Bom 496; *Joti Prasad v Bhargava,* (1946) ILR All 341;*Chidambara v Seniappa,* (1965) ILR 1 Mad 691 : AIR 1965 Mad 337; cf *Sadashiv v Trimbak,* (1899) ILR 23 Bom 146.
2306. *Ahmad Husain v Kallu,* (1929) 27 All LJ 460 : 117 IC 97 : AIR 1929 All 277; *Bismillah Begum v Tahsin Ali Khan,* (1930) ILR 52 All 710 : 124 IC 722 : AIR 1930 All 462; *Mohamed Ali v Bismillah Begum,* (1930) 33 Bom LR 155 : (1931) 35 Cal WN 324 : 128 IC 647 : AIR 1930 PC 255; *Har Prasad v Mahomed Usman,* (1942) All LJ 645 : 205 IC 30 : AIR 1943 All 2.
2307. See *Har Prasad v Mahomed Usman,* (1942) All LJ 645.
2308. Ibid. See also *UOI v Rajeswari & Co,* AIR 1986 SC 1748 : [1986] 3 SCR 175 : (1986) 3 SCC 426.
2309. *Chidambaram v Sami Aiyar,* (1907) ILR 30 Mad 6; cf *Motilal v Kashibai,* AIR 1938 Nag 249.
2310. *Chidambaran v Srinivasa,* (1914) ILR 37 Mad 227 : 23 IC 714 (PC).
2311. *Abdool Hye v Mir Mohamed,* (1883) ILR 10 Cal 616 : 11 IA 10.
2312. *Ah Foon v Hoe Lai Pat,* (1932) ILR 9 Rang 614 : 135 IC 651 : AIR 1932 Rang 13.

(5) Voidable

As stated above, the section does not refer to *benami* transfers, ie, to transfers that are colourable or void. The transfers referred to in the section are transfers in fraud of creditors which are valid until they are avoided, and which are voidable at the option of any creditor defrauded, defeated or delayed. If the creditor sues to avoid the transfer, he must file a representative suit on behalf of all the creditors. However, he may manifest an intention to avoid the transaction otherwise than by filing a suit, eg by attaching the property transferred. Accordingly, in a Madras case[2313] CJ Wallis said:

> I am of opinion that it is open to the judgment-creditor by virtue of section 53 of the Transfer of Property Act to attach as the property of the judgment-debtor, property which has been fraudulently transferred to the claimant with intent to defeat or delay creditors. If he knows of the transfer when he applies for attachment, the application is sufficient evidence of his intention to avoid it; if he only hears of the transfer when a claim petition is preferred under O 21, rule 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid.

In a case from Allahabad,[2314] a creditor sued to recover his debt from his debtor and joined as parties persons to whom the debtor had transferred his property by gift, but claimed no relief against the donees and they were "exempted" from the suit. In execution of his decree against the debtor, he attached the property transferred. The donees objected to the attachment and the court held that the creditor was barred by O 2, rule 2, and by the principle of res judicata from pleading that the gift was voidable under section 53. The court said, that the creditor had the option of accepting the transaction or avoiding it—once he decided to do one thing he lost the other option, and could not be allowed to reprobate what he had approbated.

(6) Sham Transfers

A document executed nominally with a view to staying off creditors, with the express understanding that the properties sold would be reconveyed after the pressure of the creditors had subsided, is a sham transaction, the consideration also being inadequate. Such a sale creates no equities in favour of the vendees, while setting aside the sale.[2315] A sham and fictitious transfer is no transfer at all, and need not be set aside under section 53.[2316]

(7) Extent

There is no equity in favour of a party to a fraud and the whole transfer is voidable, and not merely as to the excess. A transaction which is intended to defeat or delay creditors cannot be good in part, and bad in part.[2317] The only exception is where the transferee utilises

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2313. *Ramaswami Chettiar v Mallappa Reddiar*, (1920) ILR 43 Mad 760 : 59 IC 947; *Narratan Lal v Stephen*, 68 IC 369 : AIR 1922 Pat 572.
2314. *Sachitanand v Radhapat*, (1928) 26 All LJ 524 : 116 IC 86 : AIR 1928 All 234.
2315. *Prasad v Govindaswami Mudaliar*, AIR 1982 SC 84.
2316. *Jangali Tewari v Babban Tewari*, AIR 1982 All 316.
2317. *Chidambaram v Sami Aiyar*, (1907) ILR 30 Mad 6; *Palaniappa v Official Receiver*, 25 IC 948; *Bhikabai v Panachand*, (1919) ILR 43 Bom 707 : 52 IC 682; *Visvananda v Venkata*, (1927) Mad WN 1, 99 IC 709 : AIR 1927 Mad 278; disting *Krishna Kumar v Jai Krishna*, (1917) 21 Cal WN 401 : 29 IC 690; *Rajbahadur Mudaliar v Thiruvengada Mudaliar*, 106 IC 651 : AIR 1928 Mad 20; *Sama Row v Doraisami*, (1913) 24 Mad LJ 266 : 18 IC 768; *Mula Ram v Jiwanda*, (1923) ILR 4 Lah 211 : 72 IC 452 : AIR 1923 Lah 423; *Madan Gopal v Lehori Mal Janki*, (1931) ILR 12 Lah 194 : 130 IC 62 : AIR 1930 Lah 1027; *Appalaraju v Krishnamurthy*, 135 IC 582 : AIR 1932 Mad 182; *Janki Das v Gulzar*, (1932) ILR 12 Lah 763 : 131 IC 383 : AIR 1932 Lah 174; *Warayam Singh v Thakur Das*, (1935) ILR 16 Lah 680 : 158 IC 254 : AIR 1935 Lah 404; *Muthuvasu Chettiar v Velu Muruga Nadar*, AIR 1939 Mad 745. But see *Nanjamma v Rangamma*, (1953) 2 Mad LJ 737 : AIR 1954 Mad 173; *Govinda Marar v Sivarama Kurup*, AIR 1972 Ker 68.

the consideration paid for the discharge of a prior encumbrance, and so becomes entitled by subrogation.[2318] Where the transfer is not voidable as a fraud on creditors, but is only a preference to one creditor, effect will be given to the deed to the extent to which it is supported by consideration.[2319]

(8) Creditors

The term "creditor" is correlative to debtor, and signifies a person to whom a debt, that is a liquidated, or specific sum of money is due. In its ordinary acceptation, the term implies a person who has lent money or sold goods to another which has remained unpaid. It includes not only those who have proved their claim and obtained a decree and are designated judgment-creditors, but also ordinary creditors who have still a claim to prove.[2320] A Mahomedan wife is a creditor in respect of her dower debt,[2321] and a genuine gift by a Mahomedan to his wife in lieu of dower, even if it is a preference over other creditors, is not hit by the section;[2322] and so is a deserted Hindu wife in her claim for maintenance.[2323] However, a Hindu wife is not a creditor if she is not entitled to separate maintenance.[2324] A person claiming only an unliquidated sum for damages for tort or breach of contract is not a creditor. An auction-purchaser who is not a decree-holder would not be a creditor entitled to take the benefit of the section.[2325] A subscriber to a "chitty" agreement, on entering into the chitty agreement, does not incur a "debt" for the amount of all the future installments, and in respect of such amount there is no "debtor-creditor" relationship. Neither the prizing of the chitty, nor the execution of the security bond, would give rise to a debt. The prize amount is not received as a "loan", but is received as of right by virtue of the terms of the contract between the parties. Therefore, no "debt" due to the foreman arises by reason of the receipt of the prize amount, or of the execution of the security bond for securing future subscriptions.

Execution of a mortgage by the subscriber in favour of the foreman of a "chitty" is not sufficient to treat the amount under the security bond as a "debt".[2326]

(9) At the Option of the Creditors so Defeated

Where a co-sharer transfers his share to his wife who sues for partition thereof, the other co-sharer dependants cannot raise the plea that the transfer was a sham transaction intended to

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2318. *Palamalai v South Indian Export Co,* (1910) ILR 33 Mad 334 : 5 IC 33; *Ammachukutty v Ammakutty Haji,* 29 IC 583; *Subraya v Perumal,* 43 IC 956; *Visvananda v Venkata,* 99 IC 709 : AIR 1927 Mad 278; *Gangama v Veerappa,* 131 IC 833 : AIR 1931 Mad 513; *NSPRMSP Firm v Alaudin,* 148 IC 539 : AIR 1933 Rang 191.
2319. *Loorthi Odayar v Gopalasami Iyer,* (1924) 46 Mad LJ 125 : 80 IC 147 : AIR 1924 Mad 450; *Rajani Kumar v Gaur Kishore,* (1908) ILR 35 Cal 1051; *Chinai Pitchiah v Pedakotiah,* (1913) ILR 36 Mad 29 : 11 IC 868.
2320. *Ishwar v Devar,* (1903) ILR 27 Bom 146; *China Mal v Gul Ahmad,* (1923) 5 Lah LJ 435 : 73 IC 719 : AIR 1923 Lah 478; *Reese River Silver Mining Co v Atwell,* (1869) LR 7 Eq 347; *Faiz Ali v Harkuar,* 77 IC 50 : AIR 1923 Nag 334; *Gamu v Nathu,* 96 IC 356 : AIR 1926 Nag 494; *Abdulla Khan v Purshottam,* (1947) ILR Bom 807 : 49 Bom LR 875 : AIR 1949 Bom 265.
2321. *Suba Bibi v Balgobind,* (1886) ILR 8 All 178; *Bibi Saira v Bibi Suliman,* 63 IC 111 : AIR 1921 Pat 395; *Umrao Singh v Kaniz Fatima,* (1901) All WN 67; *Amina Bibi v Shaikh Muhammad Ibrahim,* (1929) ILR 4 Luck 343 : 114 IC 504 : AIR 1929 Oudh 520.
2322. *Kulsum Bibi v Shiam Sunderlal,* AIR 1936 All 600 : (1936) All LJ 1027 : 164 IC 515; *Rameshwar Nath v Aftab Begum,* AIR 1936 All 803 : (1936) All LJ 966 : 166 IC 56; *Bansidhar v Nawal Jahan,* AIR 1938 Oudh 44; *Razina Khatun v Abida Khatun,* AIR 1937 All 39; *Faqir Bux v Thakur Prasad,* AIR 1941 Oudh 457.
2323. *Meenakshi Ammal v Ammani Ammal,* 101 IC 610 : AIR 1927 Mad 657.
2324. *Brij Raj v Ram Dayal,* (1932) ILR 7 Luck 411 : 135 IC 369 : AIR 1932 Oudh 40.
2325. *Bai Hakumbu v Dayabhai Rugnath,* AIR 1939 Bom 508 : 41 Bom LR 1104 : 185 IC 655.
2326. *Janardhan Mallan v Gangadharan,* AIR 1983 Ker 178.

defraud his creditors.[2327] The motive of putting the property out of the reach of the creditors does not by itself make the transaction a sham one. As far as the parties are concerned, it is a perfectly valid and binding contract.[2328] It is only open to the creditors to bring a suit for avoiding the sale.[2329] However, where a decree-holder entitled to avoid a transfer of property elects to do so by bringing the property to sale in execution of the decree, that avoidance enures for the benefit of the auction purchaser, even though he is not himselfa creditor or a transferee.[2330]

(10) Subsequent Creditors

The term "creditor" includes not only creditors at the time of the assignment, but also those who subsequently become creditors.[2331] A man who contemplates going into trade cannot on the eve of his doing so, take the bulk of his property out of the reach of those who may become his creditors.[2332] However, a voluntary settlement made bona fide by a person who has ample means outside it to pay his present debts, is not void because it is found afterwards to defeat or delay future creditors.[2333]

ILLUSTRATIONS

(1) A man of extravagant and dissolute habits was persuaded to reform and make a settlement of his property on his wife and children. He subsequently relapsed and incurred debts. The settlement was held not to be voidable by the subsequent creditors.[2334]

(2) *A* obtained a decree against *B* for the possession of certain properties and mesne profits estimated at ₹ 10,000. *B*, a month later, executed a deed of trust settling all the property of which he was then possessed on his wife and children. The settlement was voidable under section 53.[2335]

The distinction between the two illustrations is—in the first, the settlor was not in debt at the time of the settlement and the creditors were subsequent creditors, while in the second, the settlor was in embarrassed circumstances at the time of the settlement, and the present creditor was defeated.

(11) Defeat or Delay Creditors

This section says "creditors" and not "creditor." The intention must be to defeat or delay creditors generally, and not to prefer one creditor to another.[2336] The proceedings invoking the provisions either in section 53 of Transfer of Property Act or in Provincial Insolvency Act are to be instituted in a representative capacity and they are intended to benefit not a particular creditor but to benefit all the creditors of the transferor.[2337] The meaning of the

2327. *Isabi v Abdulla*, AIR 1950 Tr& Coch 60.
2328. *Ronaq Mal v Kasturi Mal*, (1960) ILR 2 Punj 551 : AIR 1961 Punj 423; *Chidambaram Chettiar v Sellakumara*, (1942) ILR Mad 1 : AIR 1941 Mad 903; *Ram Singh, v Soma Devi*,AIR 1988 HP 27, p 30.
2329. *Bai Laxmi v Lalchand*, AIR 1952 Vid Prad 69.
2330. *Nanjamma v Rangappa*, (1953) 2 Mad LJ 737 : AIR 1954 Mad 173.
2331. *Hooseinbhai v Haji Esmail*, (1903) 5 Bom LR 255; *Thomas Pillai v Muthuraman Chettiar*, (1910) ILR 33 Mad 205 : 4 IC 301; *Ram Chand v Mathura Chand*, (1921) 19 All LJ 299 : 60 IC 896 : AIR 1921 All 298; *Rajagopala Chetty v Sivagami*, (1924) Mad WN 869 : 82 IC 945 : AIR 1924 Mad 779; *Ram Das v Debu*, (1930) 28 All LJ 1278 : 128 IC 436 : AIR 1930 All 610; *Nanjamma v Rangappa*, (1953)2 Mad LJ 737 : AIR 1954 Mad 173; *Murli Motiram v Rewachand*, (1946) ILR Kant 141 : 226 IC 240 : AIR 1946 Sau 137.
2332. *Mackay v Douglas*, (1872) 14 Eq 106; Re *Butterworth, Ex parte Russell*, (1882) 19 Ch D 588; *Mohammad Ishaq v Mohammad Yusaf*, (1927) ILR 8 Lah 544 : 101 IC 172 : AIR 1927 Lah 420.
2333. Re *Lane Fax, Ex parte Gimblett*, [1900] 2 KB 508; *Sadashiv v Trimbak*, (1899) ILR 23 Bom 146, p 156; *Umar Sait v UOI*, (1965) ILR 2 Mad 250 : (1965) 1 Mad LJ 59 : AIR 1965 Mad 395.
2334. *Ebrahimbhai v Fulbai*, (1902) ILR 26 Bom 577.
2335. *Nauramn Lal v Stephen*, 68 IC 369 : AIR 1922 Pat 572.
2336. *Bhagwant v Kedari*, (1901) ILR 25 Bom 202; *Amarchand v Gokul*, (1903) 5 Bom LR 142.
2337. *Gopisetti Venkata Lakshmi Narasimharao v Sri Satya Financial Services*, (2010) 93 AIC 658 : (2010) 4 ALD 312.

statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor. This was followed by the Privy Council in *Musahar Sahu v Hakim Lal,*[2338] where the following passage occurs in the judgment of Lord Wrenbury:

> As a matter of law, their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be rendered insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion rightly stated by CB Palles, Re *Moroney,*[2339] where he says:

The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with or without consideration reserved or retained by the debtor to their prejudice. Now, it follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property (although the effect of it, or even the intent of the debtor in making it, may be to defeat an expected execution of another creditor) is not a fraud within the statute; because notwithstanding such an act, the entire property remains available for the creditors, or some or one of them, and as the statute gives no right of ratable distribution, the right of the creditors by such act is not invaded, or affected. The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument, which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid; *Middleton v Pollock.*[2340] As soon as it is found that the transfer here impeached, was made for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy.

This case is now the leading case in India on the question of preference, and the facts of it are sufficiently remarkable, for the debtor filed an affidavit that he did not intend to transfer his properties, and nevertheless transferred them during the pendency of the suit to another creditor in satisfaction of another debt. The first creditor was grossly deceived, but his case was not within the section, for, as Sir Lawrence Jenkins said in delivering the judgment of the Board in *Mina Kumari v Bijoy Singh*:[2341]

2338. *Musahar Sahu v Hakim Lal,*(1915) ILR 43 Cal 521 : 43 IA 104 : 32 IC 343 (PC) affirming *Hakim Lal v Mooshahar Sahu,* (1907) ILR 34 Cal 999; *Solema Bibi v Hafez Mohammad,* (1927) ILR 54 Cal 687 : 104 IC 833 : AIR 1927 Cal 836; *Ma Pwa May v SRMMA Chettyar Firm,* (1929) ILR 7 Rang 624 : 56 IA 379 : 120 IC 645 : AIR 1929 PC 279; *Ladhu Ram v Charnu,* (1929) 11 Lah LJ 251 : 116 IC 317 : AIR 1929 Lah 409; *Atmaram v Dayaram,* 115 IC 330 : AIR 1929 Sau 94; *Amina Bibi v Shaikh Muhammad Ibrahim,* (1929) ILR 4 Luck 343 : 114 IC 504 : AIR 1929 Oudh 520; *Thakur Badri v Hazari Singh,* (1930) ILR 5 Luck 625 : 125 IC 163 : AIR 1930 Oudh 93; *Kalu v Randhir,* (1918) 21 OC 97 : 46 IC 330; *Uttamrao v Gangaram,* 136 IC 237 : AIR 1932 Nag 33; *Tan San Mai v U Kya Zin,* 145 IC 330 : AIR 1933 Rang 162; *Narayana v Official Receiver,* 150 IC 339 : AIR 1934 Mad 294.

2339. Re *Moroney,* (1887) LR 21 Ir 27.

2340. *Middleton v Pollock,* (1876) 2 Ch D 104; *Mila v Mangal Ram,* AIR 1938 Lah 156 : 179 IC 257; *Faqir Bux v Thakur Prasad,* AIR 1941 Oudh 457.

2341. *Mina Kumari v Bijoy Singh,* (1916) ILR 44 Cal 662 : 44 IA 72 : 40 IC 242 : AIR 1916 PC 238; *Amina Bibi v Shaikh Muhammad Ibrahim,* (1929) ILR 4 Luck 343 : 114 IC 504 : AIR 1929 Oudh 520; *Palamalai v South Indian Export Co,* (1910) ILR 33 Mad 334 : 5 IC33; *Muthiah Chetty v Palaniappa Chetty,* (1922) ILR 45 Mad 90 : 70 IC 432 : AIR 1922 Mad 447 reversed on a different point in *Muthiah Chetty v Palaniappa Chetty,* (1928) ILR 51 Mad 349 : 55 IA 256 : 109 IC 626 : AIR 1928 PC 139; *Kalu v Randhir,* (1918) 21 OC 97 : 46 IC 330; *Chettiar Firm v Chettiar Firm,* AIR 1937 Rang 531; *Ratan Devi v Jawarmal,* AIR 1972 Raj 67.

> A debtor, for all that is contained in section 53 of the Transfer of Property Act, may pay his debts in any order he pleases and prefer any creditor he chooses.

A debtor may, therefore, convey property to any creditor in satisfaction of the debt due to him even though the transfer is effected to avoid an impending execution by another creditor.[2342]

A was a creditor of *B*, and in December 1900 filed a suit to recover his debt. During the pendency of the suit in January 1901, he applied for an attachment before judgment of certain properties of *B*. In February, *B* filed an affidavit that he had no intention of alienating his properties, and the application of *A* was accordingly dismissed. Nevertheless, in September, *B* sold the properties to another creditor. The sale defeated *A*, but as it was for adequate consideration and in satisfaction of a genuine debt, and as the debtor reserved no benefit for himself, it was a case of one creditor being preferred to the detriment of another, and the sale was not voidable under section 53.[2343]

The Supreme Court has held that the fact that a debtor wishes to prefer one creditor does not lead to the inference that the intention was to defeat the creditors. In this case, there was in issue a deed of settlement and the allegation was that the deed was executed to evade the payment of sales tax, but there was no sales tax order against the author of the settlement.[2344] Even in a case before the TP Act, the Allahabad High Court held that a genuine sale for a good and valid consideration to one creditor, even if effected to defeat and delay another creditor, apart from cases in which either insolvency or bankruptcy is invoked, is not voidable.[2345] In order that a transaction may fall under section 53, the person alleging so must clearly establish an intention to defeat or delay the creditors generally, and not merely an intention of preferring some creditors to others. The transfer must be such as to remove the property from the creditors, to the benefit of the debtor. There must be a fraudulent intention to defeat or delay the creditors, which has to be found. As a man is presumed to intend the normal and ordinary consequences of his acts, the intention with reference to a particular act resulting in a transaction, should also be adjudged only from the consequences of that act, and in the background of the surrounding circumstances. The transferee must share the fraudulent intent and must actively aid and assist the transferor in carrying out his intention of securing cash to himself to the detriment of the creditors.[2346]

Undue preference in insolvency, is dealt with in section 54, Provincial Insolvency Act, 1920 and section 56, Presidency Town Insolvency Act, 1904. A fraudulent transfer under

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2342. *Mina Kumari v Bijoy Singh*, (1916) ILR 44 Cal 662 : 44 IA 72 : 40 IC 242 : AIR 1916 PC 232; *Kodija Bibi v Shah Muhammad Ibrahim*, (1901) All WN 64; *Mahammad-un-nissa Begum v Bachelor*, (1905) ILR 29 Bom 428; *Rash Mohan v Kristodas*, (1918) 22 Cal WN 982 : 47 IC 412; *VPL Firm v EKSM Chettyar Firm*, 146 IC 954 : AIR 1933 Rang 169; *Daya Ram v Nadir Chand*, AIR 1934 Lah 318; *Mahadeo Lal Jwala Prasad v Bibi Maniram*,(1933) ILR 12 Pat 297 : 145 IC 213 : AIR 1933 Pat 281(transfer in satisfaction of dower debt); *Amina v Lakhmi Chand*, 154 IC 979 : AIR 1934 Lah 705; *Kulsum Bibi v Shiam Sunderlal*, AIR 1936 All 600 : (1936) All LJ 1027 : 164 IC 515; *Rameshwar Nath v Aftab Begum*, AIR 1936 All 803 : (1936) All LJ 966 : 166 IC 56; *Jagdoba v Anandrao*, 167 IC 449 : AIR 1937 Nag 9; *Razina Khatun v Abida Khatun*, AIR 1937 All 39; *Gharbhoya Bhimji v Deolatta Bihari*, (1937) ILR Nag 452 : 172 IC 289 : AIR 1937 Nag 400; *Kasturchand v Wazir Begum*, (1937) ILR Nag 291 : 167 IC 48 : AIR 1937 Nag 1; *Maung Kyaw v Maung Kyaw*, AIR 1937 Rang 471; *Bansidhar v Nawal Jahan*, AIR 1938 Oudh 44; *Ram Ratan v Akhtari Begum*, (1939) ILR 14 Luck 621 : 181 IC 181 : AIR 1939 Oudh 230; *Faqir Bux v Thakur Prasad*, AIR 1941 Oudh 457.

2343. *Masahur Sahu v Hakim Lal*, (1915) ILR 43 Cal 521 : 43 IA 104 : 32 IC 343 (PC).

2344. *Chogmal Bhandari v Deputy Commercial Tax Officer, Kurnool*, AIR 1976 SC 656 : [1976] 3 SCR 355 : (1976) 3 SCC 1749.

2345. *Suba Bibi v Balgobind*, (1886) ILR 8 All 178 citing *Wood v Dixit*, [1845] 7 QB 892.

2346. *Saroj Ammal v Sri Venkateswara Finance Corporation, Vellore*, AIR 1989 Mad 4 (NOC).

section 53 must be distinguished from a fraudulent preference under insolvency laws. A sale effected to discharge other debts payable by the debtor-transferor is not necessarily fraudulent. Ordinarily, in the race between the creditors, he who lags behind could not complain against him who proceeded fast and succeeded in getting at the property of the debtor. Even the fact that the transferee was not a creditor would make no difference.[2347]

If the debtor sells property to another creditor to discharge the debt due to him and the price realised is considerably in excess of the debt discharged;[2348] or if a fictitious debt is included in the consideration;[2349] this would be evidence of an intent to defraud creditors generally. In the case of a fictitious debt, the money is retained by the transferee for the benefit of the debtor. Again, if more property is sold than is necessary, the conversion of land into cash enables the debtor to keep property out of the reach of the creditors.[2350] Mere inadequacy of the consideration may not by itself be sufficient to make the transaction voidable.[2351]

ILLUSTRATION

A, a trader at Jubbulpore, was in embarrassed circumstances. He purchased a stamp paper at Agra and secretly executed a usufructuary mortgage of all his property to his uncle *B*, the consideration being a fictitious book debt. One of the terms of the mortgage was that *B* should out of the usufruct pay allowances to the wife and children of *A*. The mortgage was voidable under section 53, for it put all of *A*'s property out of the reach of his creditors and reserved a benefit for *A*. Moreover, the secrecy with which the transaction was effected was evidence of fraudulent intention.[2352]

The question whether a transfer was made with intent to defeat or delay creditors is a mixed question of law and fact, and an erroneous view of the law will vitiate a finding of fact.[2353] In a Madras case,[2354] the lower court had found that the husband had sold property in order to defeat his wife's claim for arrears of maintenance. On appeal, it was urged that there was other property sufficient to satisfy the wife's claim. The high court said that in view of the finding of the lower court, it was unnecessary to consider this contention. It is submitted that this is incorrect, and that the high court should have considered all the facts and decided the issue as one of law. In another case,[2355] it was said that the court should consider whether the other property of the debtor was of sufficient amount and easily available. The Supreme Court has held that where a transfer is effected to defeat or delay creditors, the fact that only a portion of the transferor's property is transferred is immaterial, "unless there is cogent proof that there is other property left sufficient in value and of easy availability to render the alienation in question immaterial for the creditors".[2356]

2347. *Rajeswari & Co v UOI*, AIR 1973 Mad 222 : (1973) 1 Mad LJ 116.
2348. *Hanifa Bibi v Punnamma*, (1907) 17 Mad LJ 11; *Visvananda v Aiyar Venkata*, (1927) Mad WN 1 : 99 IC 709 : AIR 1927 Mad 278; *Chidambaram v Sami Aiyar*, (1907) ILR 30 Mad 6, on app *Chidambaram v Srinivasa*, (1914) ILR 37 Mad 227 : 23 IC 714 (PC); *Saroj Ammal v Sri Venkateswara Finance Corpn*, (1988) 101 Mad LW 441 : AIR 1989 Mad 4 (NOC).
2349. *Narayana v Viraraghavan*, (1900) ILR 23 Mad 184; *Hanifa Bibi v Punnamma*, (1907) 17 Mad LJ 11; *Nainsukhdas v Goverdhandas*, (1947) ILR Nag 510 : AIR 1948 Nag 110.
2350. *Alagappa v Dasappa*, (1913) 24 Mad LJ 293 : 18 IC 332; *Palamalai v South Indian Export Co*, (1910) ILR 33 Mad 334 : 5 IC 33; *Gani v Sitaram*, 79 IC 625 : AIR 1924 Nag 318.
2351. *Kedarwati v Radhey Lal*, 170 IC 353 : AIR 1937 Pat 609.
2352. *Ghansam Das v Uma Pershad*, (1919) 21 Bom LR 472 : 50 IC 264 (PC).
2353. *Ishan Chunder v Bishu*, (1897) ILR 24 Cal 825; *Amina Bibi v Mohammad Ibrahim*, (1928) 5 Oudh WN 1077 : 114 IC 501.
2354. *Meenakshi Ammal v Ammani Ammal*, 101 IC 610 : AIR 1927 Mad 657.
2355. *Gopichand v Jodhraj*, 116 IC 815 : AIR 1929 All 458.
2356. *Abdul Shukoor v Arji Papa Rao*, [1963] 2 SCR 55 (Supp) : [1964] 1 SCJ 168 : AIR 1963 SC 1150, p 1156; *Haque Brothers v Mahendra Nath*, AIR 1966 Ass & N 36; *Basavegowda v S Narayana Swamy*, AIR 1986 Kant 225, p 229.

If there is no question of preference, an intention to defeat creditors generally may be inferred from an intention to defeat a particular creditor.[2357]

(12) Title Disputed

In an Allahabad case, an objection under O 21, rule 58, Code of Civil Procedure 1908 (as it stood before 1976) was raised by the judgment-debtor's wife, on the ground that her husband had gifted the disputed property in her favour and that, therefore, the property was not the husband's property. On the objection being accepted, the creditor brought a suit to set aside the order. A defence was raised that under section 53, the suit was not maintainable, as it had not been filed on behalf of all the creditors. The plea was rejected; the suit was maintainable, since the wife's case was that the property no longer belonged to the husband. There was no allegation about an intention to defeat creditors and hence, section 53 did not come into play.[2358]

(13) No Presumption of Fraud

Under the general law, if creditors sue to avoid a transfer the burden of proving that it is a fraud on the creditors rests on them.[2359] As pointed out by the Privy Council in *Mina Kumari v Bijoy Singh,*[2360] however, suspicious a transaction may be, the court's decision must rest not upon suspicion, but on legal grounds established by legal testimony.[2361] The burden initially lies on the creditors to make out a case under this section. However, when they have proved facts which are sufficient to show prima facie that the intention of the debtor was to defeat or delay the creditors, it is for the debtor to meet the case, and to explain the facts.[2362]

The present section leaves the question of intention to be determined according to the general law of evidence. However, according to that law, a man is presumed to intend the natural consequences of his acts, and fraud must necessarily be proved by circumstantial evidence.[2363] Therefore, even under the new section, it would be evidence of a fraudulent intention if a debtor made a voluntary settlement, or a transfer for a grossly inadequate consideration without reserving sufficient property for the payment of his debts; so also, if he put all his property out of the reach of those who might become his creditors before embarking on a hazardous enterprise. However, every such case would depend upon its own circumstances, and in all cases it is a question of fact whether the transaction is bona fide or a contrivance to defraud creditors.[2364] The mere fact that a transfer is made without

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2357. See for instance *Fakira v Majho,* (1917) 2 Pat LJ 546 : 40 IC 865; *Mula Ram v Jiwanda,* (1923) ILR 4 Lah 211 : 72 IC 452 : AIR 1923 Lah 423; *Akrammun-nissa Bibi v Mustafa-un-nissa Bibi,* (1929) ILR 51 All 595 : 116 IC 445 : AIR 1929 All 238; *RROO Chettyar Firm v Ma Sein Yin,* (1927) ILR 5 Rang 588 : 105 IC 582 : AIR 1928 Rang 1; *Bhaskara v Creditors of Piler K Saheb,* (1965) ILR AP 68; *Kanchanbai v Motichand,* AIR 1967 MP 145.

2358. *Phoolan Devi v Surendra Prakash,* AIR 1983 All 440.

2359. *Sharfumiya v Pacha Saheb,* 112 IC 228 : AIR 1928 Mad 793.

2360. *Mina Kumari v Bijoy Singh,* (1916) ILR 44 Cal 662 : 44 IA 72 : 40 IC 242 : AIR 1916 PC 238; *Sreemanchunder Dey v Gopalchunder,* (1866) 11 MIA 28, p 43; *Maniklal v Bijoy Singh,* (1921) 25 Cal WN 409 : 62 IC356 : AIR 1921 PC 69.

2361. *Rambilas v Ganpatrao,* (1953) ILR Nag 937 : AIR 1954 Nag 129.

2362. *Abdul Shukoor v Arji Papa Rao,* [1963] 2 SCR 55 (Supp) : [1964] 1 SCJ 168 : AIR 1963 SC 1150; *Narendrabhai Chhaganbhai Bharatia v Gandevi Peoples Cooperative Bank Ltd,* AIR 2002 Guj 209; *Har Prasad v Mahomed Usman,* (1942) All LJ 645 : 205 IC 30 : AIR 1943 All 2; *Narasimhamurti v Maharajah of Pittapur,* AIR 1941 Mad 690; *Ponnuswami Goundar v S R Ramaswami Chettiar,* AIR 1984 Mad 198 (NOC).

2363. *Mothoora Pandey v Ram Ruchya,* (1869) 11 WR 482; *Syed Md Haidar v Prince Safdar Jah,* AIR 1938 Oudh 230.

2364. *Chidambaram v Sami Aiyar,* (1907) ILR 30 Mad 6 on app; *Chidambaram v Srinivasa,* (1914) ILR 37 Mad 227 : 23 IC 714 PC citing *Corlett v Rudcliffe,* (1862) 14 Moo PC 121.

consideration, as in the case of a gift, will not necessarily lead to an inference that the transfer was made with the intention of defrauding creditors.[2365]

The facts which militate against the bona fides of a transaction and whose cumulative effect is proof of fraud are many and various. Secrecy is a badge of fraud,[2366] while notoriety rebuts a presumption of fraud.[2367] A gift by a Hindu father of ancestral property to his grandchildren, with the assent of the son who had received consideration by payment of his debts, though made to screen the property from subsequent creditors, is not fraudulent. The Privy Council said:

> That it was intended to save the ancestral property from being wasted by the vices and extravagance of Udey Narain (the son) is openly avowed on the face of the deed. But such an intention is not fraudulent. It may be carried into effect by honest means. And people who mean to effect such a design by fraud are not likely to put it in the forefront of an instrument which must be registered, which may easily be discovered by persons interested to inquire about the property, and to which attention is, likely to be drawn by the consequent mutation of names after public notice and a change of management.[2368]

It is some evidence of fraud that a time-barred debt is set up as part of the consideration for the transfer; but though this is an element to be taken into consideration, it is not so strongly suggestive of fraud as the fact that the debt never existed.[2369] It is evidence of a fraudulent intention that the transferor is in embarrassed circumstances, and the transaction is between relations,[2370] or members of a small community,[2371] or that the transfer was a mere cloak for retaining a benefit for the transferor.[2372] A transaction which is a cloak under which the transferor retains a benefit for himself is assailable,[2373] unless it is found on consideration of all the surrounding circumstances that such benefit is small.[2374] However, these are all facts to be considered along with other circumstances of the case.[2375] The mere fact that debts are due from the transferor is not also sufficient to establish a fraudulent intention.[2376] In *Muthiah Chetti v Palaniappa Chetti,*[2377] the Privy Council held that a mortgage executed by a debtor to a relation in discharge of bona fide debts was a piece of family policy not contrary to law, although it was effected during the pendency of a suit by another creditor. Where

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2365. *Phooni v Radhe-Shyam,* AIR 1950 Ajm 41.
2366. *Twyne's* case, (1601) 3 Co Rep 80.
2367. *Leonard v Baker,* (1813) 1 M & W Sel 251 ("the transaction as to the assignment was perfectly notorious").
2368. *Rai Bishen Chand v Asmaida Koer,* (1884) ILR 6 All 560 : 11 IA 164, p 174.
2369. *Hanifa Bibi v Punnamma,* (1907) 17 Mad LJ 11; *Motumal v Manghomal,* 127 IC 701 : AIR 1930 Sau 284.
2370. *Ghansam Das v Uma Pershad,* (1919) 21 Bom LR 472 : 50 IC 264 (PC); *Bhagwant v Kedari,* (1901) ILR 25 Bom 202; *Natha v Dhumbaiji,* (1899) ILR 23 Bom 1; *Nandaramdas v Zuleka Bibi,* AIR 1943 Mad 531 : (1943) 2 Mad LJ 1 : 56 Mad LW 583 *Umrao Begum v Rahmat Ilahi,* AIR 1939 Lah 439; *Shantilal v Champalal,* AIR 1962 MP 363.
2371. *Abdul Shukoor v Arji Papa Rao,* [1963] 2 SCR 55 (Supp) : [1964] 1 SCJ 168 : AIR 1963 SC 1150.
2372. *Natha v Maganchand,* (1903) ILR 27 Bom 322; *Ramasamia v Adinarayana,* (1879) ILR 20 Mad 465; *Subraya v Perumal,* 43 IC 956; *AltonvBarrington,* [1869] 4 Ch App 622; *Exparte: Games,* Re *Bamford* (1879) 12 Ch D 314 (CA); Re *Fasey Ex parte Trustees* [1923] 2 Ch 1; *Muniyammal v Thyagaraja,* AIR 1958 Mad 580.
2373. *Bai Hakimba v Dayabhai Raghunath,* (1939) 41 Bom LR 1104 : 185 IC 655 : AIR 1939 Bom 508; *Abdul Majid v Paputhi Ammal,* (1961) 1 Mad LJ 235 : AIR 1961 Mad 235.
2374. See *Errachi Reddiar v Velayya Reddiar,* AIR 1968 Mad 256; *Chettiar (NLN) v J Chettiar,* (1971) 2 Mad LJ 292 : AIR 1972 Mad 34.
2375. *Jagat Kishore v Kulakamini Dasya,* AIR 1941 Cal 233 : 72 Cal LJ 420 : 197 IC 50.
2376. *Ratan Chand v Kishen Chand,* AIR 1938 Lah 136.
2377. *Muthiah Chetti v Palaniappa Chetti,* (1928) ILR 51 Mad 349 : 55 IA 256 : 109 IC 626 : AIR 1928 PC 139.

there were no present debts, a sale to a daughter was upheld against subsequent creditors, and payment of consideration was presumed.[2378]

ILLUSTRATIONS

(1) Where there was a sale of a partnership which was in embarrassed circumstances, the Supreme Court held that section 53 applied because the firm was financially embarrassed, and because the transferee belonged to the same small community as the vendor, and must have known the circumstances of the vendors, because the transfer was registered at Madras, though the property was situated at Vizianagaram, and because no evidence was led to the purpose of the transfer.[2379]

(2) *A* sued *B* for debt. *B* obtained an adjournment and during the adjournment sold her land to her sister *C*. *B* allowed the suit to be decreed ex-parte and when *A* attached the land *C* objected that it was hers. *B* professed to have sold the land to raise money to pay a debt but no demand had been made for payment of the debt and *B* was not solely liable for its payment. The sale was held to be voidable as in fraud of creditors.[2380]

(3) A creditor had obtained a decree against a widow who has a life-interest in property left to her by her husband. The widow in order to put the property out of the reach of the creditor surrendered her interest to her son. The surrender was voidable under this section.[2381]

(4) *A* being in embarrassed circumstances wished to convert his property into cash so as to conceal it from his creditors. *B* being aware of *A*'s object assisted him by purchasing the property. The sale was voidable under this section.[2382]

(14) Transferee in Good Faith and for Consideration

The meaning of the second para of sub-section (1) is that if a person acquires property for value and in good faith, that is without being a party to any design on the part of the transferor to defeat or delay creditors, his rights will not be affected by the section, although the transferor's intention may have been fraudulent.[2383] In a judgment approved by the Privy Council,[2384] the Madras High Court said that under section 5 of the TP Act, good faith as well as consideration is made, in terms, as an essential condition for the validity of the transfer. The judgment quotes a passage from *Twyne's* case,[2385] where Lord Coke said "a good consideration doth not suffice if it be not also bona fide." There are many Indian decisions to the same effect.[2386] If the transferee is aware of the fraudulent intention of the transferor and aids and abets it, the transfer is voidable.[2387] The knowledge and intention of the transferee are the determining factors.[2388] If the vendor's intention was to convert his immovable property into cash so as to put it out of the reach of his creditors, and the vendee was aware

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2378. *Maung Din v Ma Hnin Me*, (1925) ILR 3 Rang 71 : 89 IC 436 : AIR 1925 Rang 227.
2379. *Abdul Shukoor v Arji Papa Rao*, (1963) 2 SCR 55 (Supp) : (1964) 1 SCJ 168 : AIR 1963 SC 1150; see *Bachan Singh v Banarsi Das*, AIR 1961 Punj 361.
2380. *RROO Chettyar Firm v Ma Sein Yin*, (1927) ILR 5 Rang 588 : 105 IC 582 : AIR 1928 Rang 1.
2381. *Natha v Dhimbaiji*, (1899) ILR 23 Bom 1.
2382. *Palamalai v South Indian Export Co*, (1910) ILR 33 Mad 334 : 5 IC 33.
2383. *Ishan Chunder v Bishu*, (1897) ILR 24 Cal 825 citing *Food v Dixie*, [1845] 7 QB 892. See also *Amarnath v Dwarka Das*, AIR 1945 ILR All 42 : (1944) ILR All 737 : 219 IC 27.
2384. *Chidambaram Chettiar v Srinivasa Sastrial*, (1914) ILR 37 Mad 227 : 23 IC 714 (PC), on appeal from *Chidambaram v Sami Aiyar*, (1907) ILR 30 Mad 6, p 10.
2385. (1601) 3 Co Rep 80, p 82.
2386. *Bhagwant v Kedari*, (1901) ILR 25 Bom 202, pp 226-227; *Palamalai v South Indian Export Co*, (1910) ILR 33 Mad 34 : 5 IC 33; *Fakira v Majho*, (1917) 2 Pat LJ 546 : 40 IC 685; *Aftabuddin v Basanta*, (1918) 22 Cal WN 427 : 45 IC 441; *Kamini v Hira Lal*, (1919) 23 Cal WN 769 : 51 IC 736; *Bhikabhai v Panachand*, (1919) ILR 43 Bom 707 : 52 IC 682.
2387. *Mula Ram v Jiwanda*, (1923) ILR 4 Lah 211 : 72 IC 452 : AIR 1923 Lah 423.
2388. *Ibrahim v Jiwandas*, 75 IC 1043 : AIR 1924 Lah 707; *Daulat Ram v Ghulam Fatima*, 89 IC 953 : AIR 1926 Lah 25.

of that intention, the sale would be voidable although the consideration was paid.[2389] However, if the vendee was not a party to the fraud the sale would be valid,[2390] even if the vendee were aware of an impending execution.[2391] A debtor created a charge on two houses for the maintenance of his son's wife in pursuance of an ante-nuptial agreement. But although the evidence showed that his intention was to defraud his creditors, the charge was not set aside as there was no proof that his daughter-in-law was a party to the fraud.[2392] However, in a case where the wife was a party to the fraud and the celebration of the marriage was part of a scheme to protect the property against creditors, the consideration of marriage was held to be insufficient to support the settlement.[2393] In a case from Allahabad,[2394] the first wife of a Mahomedan filed a suit for dower. Five days later, the husband transferred his property to his second wife for her dower. The court said that the transfer was voidable if the second wife combined with her husband with the improper object of defeating the first wife's claim. It is submitted, however, that the second wife was a creditor for her dower, and that her primary object must have been to secure her own dower, and the case was merely one of preference.

A preference of one creditor to another, even though fraudulent in the law of bankruptcy, is not fraudulent under this section. A creditor is a transferee in good faith if the transfer is made in satisfaction of his debt even though he is aware that proceedings have been taken by another creditor for the recovery of his debt, for his primary object is to protect himself, and not to defeat other creditors.[2395] Therefore, if a transfer is to a creditor in satisfaction of a pre-existing debt, no question of good faith arises.[2396] Good faith is not defined in the TP Act; and the definition in section 3(22) of the General Clauses Act, 1897, does not apply as the TP Act was enacted in 1882. That definition provides that a thing shall be deemed to be done in good faith where it is in fact done honestly, irrespective of whether it is done negligently. An honest blunderer or stupid man who fails to make the usual inquiries is still acting in good faith, unless it is found that the failure to make inquiries was deliberately done to avoid discovering circumstances indicating fraud which are suspected to exist.[2397]

A transferee who has constructive notice of a fraud is not a transferee in good faith. In a suit for recovery of the property held Benami, a notice under certificate of posting was send as soon as the real owner came to know of the clandestine sale and after five days of sending of this notice, the sale deed was executed, the court held that in the circumstances it would be presumed that he executed such sale after the notice was duly served on him. Consequently he was not a bona fide purchaser for value without notice and the suit was decreed in favour of the real owner.[2398] In a Madras case;[2399] the creditor *A* had obtained a decree against his debtor *B*, and attached *B*'s property. *B* had previously sold the property to *C*, who preferred an objection to the attachment which was allowed. *C* then sold it to *D* who

2389. *Alagappa v Dasappa*, (1913) 24 Mad LJ 293 : 18 IC 332.
2390. *Natha v Maganchand*, (1903) ILR 27 Bom 322; *Ramasamia v Adinarayana Pillai*, (1897) ILR 20 Mad 465; *Vinayak v Kaniram*, 92 IC 810 : AIR 1926 Nag 293.
2391. *Ishan Chunder v Bishu*, (1897) ILR 24 Cal 825; *Muhammad-un-nissa v Bachelor*, (1905) ILR 29 Bom 428, p 434; *Ah Foon v Hoc Lai Pat*, (1932) ILR 9 Rang 614 : 135 IC 641 : AIR 1932 Rang 13.
2392. *Hassan Abbas v Razia Begum*, 12 IC 401; Re *Reis, Ex parte Clough*, [1902] 2 KB 769.
2393. *Bulmer v Hunter*, (1869) LR 8 Bq 46.
2394. *Hamidunnisa v Nazirunnissa*, (1909) ILR 31 All 170 : 1 IC 883.
2395. *Marwadi Samnaji v Sripathi*, 101 IC 568 : AIR 1927 Mad 1144; *Musahar Sahu v Hakim Lal*, (1915) ILR 43 Cal 521 : 43 IA 104 : 32 IC 343; *Natha v Maganchand*, (1903) ILR 27 Bom 322.
2396. *Gobind Ram v Chhogmal*, 152 IC 472 : AIR 1934 Lah 161.
2397. See *Jones v Gordon*, (1877) 2 App Cas 616, p 629.
2398. *Samittri Devi v Sampuran Singh*, AIR 2011 SC 773 : (2011) 3 SCC 556 : [2011] 2 SCR 196.
2399. *Kunhu Pothanassiar v Ram Nair*, (1923) ILR 46 Mad 478 : 72 IC 727 : AIR 1923 Mad 558.

purchased on the faith of the order allowing *C*'s objection. *A* filed a suit and obtained a declaration that the sale to *C* was in fraud of creditors. The court also held that *D* was not a transferee in good faith. He had seen the order of *C*'s objection which showed that title would be decided in the suit which *A* was to file; and yet he made no inquiry of *A*.

It appears from the case last cited that the protection extends to an innocent purchaser from a transferee who was a party to a fraud on creditors. Where a man in debt executed a deed of gift of his furniture in favour of his wife, who a fortnight after a creditor's decree, granted a bill of sale of the furniture in favour of a person who took for value and without notice, the court held that though the wife's title was subject to defeasance on a creditor's suit under Statute of Elizabeth, 13 Eliz, c 5 as being a fraud on creditors, yet the title of the bona fide purchaser for value under the bill of sale was a valid one.[2400] There is an apparently contrary decision in Allahabad;[2401] but in that case the original transfer was collusive and fictitious so that there was no title to convey to the second transferee. In a subsequent Allahabad case,[2402] the creditor was held to be estopped, as his omission to impeach the first transfer enabled the transferee to make a second transfer.

(15) Onus

The onus of proving want of good faith in the transferee is on the creditor who impugns the transaction.[2403] But if fraud is established, the onus of proving his good faith is shifted to the transferee.[2404] The issues in a suit to set aside a sale under section 53 are, therefore,—

(1) was the transfer made with intent to defeat and delay creditors;

(2) if so, was the purchaser a transferee in good faith and for consideration.

The onus of proving the first issue lies on the creditors; and if that be established the onus of proving the second issue will be on the transferee.[2405]

Under section 53, the burden of proof is on the person who alleges fraud, and mere suspicion is not sufficient to set aside the deed.[2406] In order to challenge the transfer of property on the ground of fraud in transfer of property, it is pertinent that the petitioner to explain under what circumstances he was concerned with the property and how he could get possession of the property.[2407]

If the transferee proves that he paid the fair value of the property, the court will lean towards holding that he acted bona fide.[2408]

2400. *Harrods Ltd v Stanton,* [1923] 1 KB 516 : [1923] All ER Rep 592; *Halifax Joint Stock Banking Co v Gledhill,* (1891) 1 Ch 31; *Frin Man Singh v B N Sinha,* AIR 1940 Lah 198 : 191 IC 639.
2401. *Basit Begam v Banarsi Prasad,* (1907) ILR 30 All 297.
2402. *Phagoo v Tulshi,* 125 IC 506 : AIR 1930 All 438.
2403. *Daulat Ram v Ghulam Fatima,* 89 IC 953 : AIR 1926 Lah 25; *Ram Ditta v Official Receiver,* 147 IC 1026 : AIR 1934 Lah 365; *Chana Madhu v Mankubai,* AIR 1950 Kutch 57.
2404. *Narendrabhai Chhaganbhai Bharatia v Gandevi Peoples Cooperative Bank Ltd,* AIR 2002 Guj 209 : (2002) 22 GLH 588 : (2002) 3 GLR 218; *Woomesh Chunder v Gooroodoss Roy,* (1872) 17 WR 9 (PC); *Amarchand v Gokul,* (1903) 5 Bom LR 142; *Mohideen v Muhammad Mustappah,* 126 IC 604 : AIR 1930 Mad 665; *NSPRMSP Firm v Allaudin,* 148 IC 539 : AIR 1933 Rang 191.
2405. *Abdul Shukoor v Arji Papa Rao,* [1963] 2 SCR 55 (Supp) : [1964] 1 SCJ 168 : AIR 1963 SC 1150; *Amarchand v Gokul,* (1903) 5 Bom LR 142; *Karuppa Thevar v Ganapathi Gounder,* (1976) 1 Mad LJ 268; *Basavegowda v S Narayana Swamy,* AIR 1986 Kant 225, p 229.
2406. *Chandradip Singh v Addl Member, Board of Revenue,* AIR 1978 Pat 148.
2407. *Nirmal Jeet Singh Hoon v Irtiza Hussain,* (2010) 14 SCC 564 : LNIND 2010 SC 1039 : 2010 (11) SCALE 302.
2408. *Amarchand v Gokul,* (1903) 5 Bom LR 142; *Ah Foon v Hoe Lai Pat,* (1932) ILR 9 Rang 614 : AIR 1932 Rang 13.

(16) Consideration

This word is used in the same sense as in the Indian Contract Act, 1872 and, therefore, excludes natural love and affection. Transfers for natural love and affection are dealt with as transfers without consideration.[2409] A time-barred debt is consideration under this section, but the inclusion of a time-barred debt in the consideration might be treated as some evidence of a fraudulent intention.[2410] A dower debt is a valid consideration under this section.[2411] In a curious case from Madras, a man who was heavily indebted transferred all his property to the children of his first wife in consideration of her relations allowing him to marry a second wife, and it was held that this was valid consideration, and that the transfer was not a fraud on creditors.[2412]

If the debtor sells or mortgages his property, and the consideration stated is in excess of what is paid, or if the vendee or mortgagee is a creditor and the consideration stated is in excess of the debt, with an understanding that the excess is to be retained for the benefit of the debtor, and that the transaction is to be a shield against creditors, the sale or mortgage is voidable under this section.

A transfer by a Mahomedan husband in favour of his wife in payment of a deferred dower is a transfer for good consideration, and is not void.[2413]

(17) Insolvency

The provisions of sub-section (1) saving the law of insolvency were inserted by the amending Act of 1929.

The object of the law of insolvency is to provide for an equal distribution of assets amongst the creditors, and its provisions are, therefore, more stringent. A preference to one creditor which would be valid under section 53 of the TP Act would, if the debtor were adjudged insolvent within three months, be deemed fraudulent under section 56 of the Presidency Towns Insolvency Act, 1909, or section 54 of the Provincial Insolvency Act, 1920. Similarly, a voluntary transfer may be set aside under those Acts if the transferor is adjudged insolvent within two years, although it may not offend against section 53 of the TP Act. Again, a transfer by a debtor of all his property to a particular creditor is not necessarily voidable under this section;[2414] but under the Insolvency Acts it may operate as a fraudulent transfer or a fraudulent preference. The cases of fraudulent preference falling under the Insolvency Acts must be distinguished from those falling under this section.[2415]

ILLUSTRATION

A debtor owed money to a relation *A*, who, knowing that the debtor was insolvent and that another creditor *B* was pressing for payment required the debtor to secure his debt by a mortgage. This he was perfectly entitled to do for a preference to one creditor is not voidable under section 53 of the TP Act even though no assests are left for other creditors. But if the

2409. *Mohammad Ishaq v Mohammad Yusuf*, (1927) ILR 8 Lah 544 : 101 IC 172 : AIR 1927 Lah 420; *Sukhpal Kuar v Dasu*, 58 IC 165.
2410. *Motuamal v Manghomal*, 127 IC 701 : AIR 1930 Sau 284; *Hanifa Bibi v Punnamma*, (1907) 17 Mad LJ 11.
2411. *Khodija Bibi v Shah Muhammad Zahir*, (1901) All WN 64; *Amina Bibi v Shah Muhammad Ibrahim*, (1929) ILR 4 Luck 343 : 114 IC 504 : AIR 1929 Oudh 520; *Bibi Saira v Bibi Suliman*, 63 IC 111 : AIR 1921 Pat 395.
2412. *Kapini Goundan v Saranganapani*, (1916) Mad WN 288 : 34 IC 744.
2413. *Mathura v Hoya Umrao*, (1949) ILR 28 Pat 97.
2414. *Venkanna v Official Receiver, Rajmahundry*, (1935) 68 Mad LJ 57 : 157 IC 559 : AIR 1935 Mad 250; *Alton v Harrison*, (1869) LR 4 Ch 622.
2415. *Narasinhamurti v Maharaja of Pittapur*, (1941) 2 Mad LJ 99 : 54 Mad LW 76 : (1941) Mad WN 513 : AIR 1941 Mad 690.

debtor had been adjudged insolvent within three months of the mortgage, the mortgage would have been voidable as against the Official Receiver.[2416]

An assignment of all his property to trustees for the benefit of his creditors is an act of insolvency on the part of the assignor.[2417]

Insolvency courts have jurisdiction to decide questions of title both under section 7 of the Presidency-Towns Insolvency Act, 1909, and under section 4 of the Provincial Insolvency Act,1920. Hence, these courts have jurisdiction to decide whether a transaction is voidable under section 53 of the TP Act on an application made by the Official Assignee,[2418] or the Official Receiver,[2419] as the case may be. This jurisdiction is not exclusive, and in some cases the court of insolvency would decline to exercise jurisdiction, and leave the matter to be determined in a regular suit.[2420] It has also been held that the insolvency courts are the only courts having jurisdiction to avoid a transfer in preference of a creditor or as not being a transfer in good faith and for value and executed within two years of the date of adjudication, and that no such question can be raised in a court of ordinary civil jurisdiction.[2421] This, however, does not accord with English Law, and the correctness of these decisions is very doubtful.

(18) Creditor's Suit

A creditor's suit to avoid a transfer must be a suit on behalf of not only himself, but the whole body of creditors.[2422] When a creditor seeks a declaration of conveyance by transferor as fraudulent transfer a suit filed by him under section 53 should be representative in nature. Where the suit filed is neither in representative capacity nor on behalf of some other persons or creditors, non complain of requirement would enable the other creditors to join as party to the suit and the suit would not be maintainable.[2423] This is because the debtor might otherwise be exposed to a multiplicity of suits by each and every creditor. It has, however, been held that it is enough if the suit is in substance on behalf of all creditors even though it is not a representative suit as such.[2424] A single creditor can, of course, file a suit if he is the

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2416. *Rash Mohan v Krisiodas*, (1918) 22 Cal WN 982 : 47 IC 412.
2417. *Karsandas v Maganlal*, (1902) ILR 26 Bom 476, p 484; *Lalchand v Husainio*, 97 IC 257 : AIR 1927 Sau 78; *Dutton v Morrison*, (1810) 17 Ves 193.
2418. *Jnanendra Bala Debi v Official Assignee of Calcutta*, (1925) 30 Cal WN 346 : 93 IC 834 : AIR 1926 Cal 597; *Ex parte Butters* (1880) 14 Ch D 265.
2419. *Anwar Khan v Muhammad Khan*, (1929) ILR 51 All 550 : 113 IC 819 : AIR 1929 All 105; *Shikri Prasad v Aziz Ali*, (1922) ILR 44 All 71 : 63 IC 601 : AIR 1922 All 196; *Hari Chand Rai v Moti Ram*, (1926) ILR 48 All 414 : 94 IC 429 : AIR 1926 All 470; *Chittammal v Ponnuswami Naicker*, (1926) ILR 49 Mad 762 : 92 IC 573 : AIR 1923 Mad 363; *Fool Kumari Dasi v Khirod Chandra DasGupta*, (1927) 31 Cal WN 502 : 102 IC 115 : AIR 1927 Cal 474; *Radha Krishna v Official Receiver*, (1932) ILR 59 Cal 1135 : 56 Cal LJ 446 : (1932) 36 Cal WN 492 : 139 IC 323 : AIR 1932 Cal 642; *Official Receiver v Subbayya*, (1933) 64 Mad LJ 397 : 146 IC 530 : AIR 1933 Mad 527; *Ram Ditto v Official Receiver*, 147 IC 1026 : AIR 1934 Lah 365.
2420. *Ex parte Price*, (1882) 21 Ch D 553; *Radha Krishna v Official Receiver*, (1932) ILR 59 Cal 1135.
2421. *Official Assignee of Bombay v Sundarachari*, (1927) ILR 50 Mad 776 : 102 IC 702 : AIR 1927 Mad 684 (case under Presidency-towns Insolvency Act); *Official Receiver v Palaniswami Chetti*, (1925) ILR 48 Mad 750 : 88 IC 934 : AIR 1924 Mad 1051; *Shahzada Begum v Gokul Chand*, (1927) ILR 2 Luck, 651 : 105 IC 50 : AIR 1927 Oudh 357; *Kaniz Fatima v Narain Singh*, (1927) ILR 49 All 71 : 98 IC 1001 : AIR 1927 All 66; *Mariappa Pillai v Roman Chettiyar*, (1919) ILR 42 Mad 32 : 52 IC 519; *Hiralal v Fatehchand* 152 IC 1026, AIR 1934 Nag 271. See also *Shikri Prasad v Aziz Ali*, (1922) ILR 44 All 71 : 63 IC 601 : AIR 1922 All 196.
2422. *Burjorji v Dhunbai*, (1892) ILR 16 Bom 1; *Ishwar v Devar*, (1903) ILR 27 Bom 146; *Hakim Lal v Mooshahar Sahu*, (1907) ILR 34 Cal 999; *Ekkari Ghose v Sideshwar Ghose*, AIR 1936 Cal 783; *Ayyamperumal v Palaniadi*, (1958) 2 Mad LJ 540; *Harekrishna v Banamali*, AIR 1971 Ori 1561.
2423. *Laila v Soosamma Chacko*, AIR 2018 (NOC) 272 (Kerela): LNIND 2017 KER 4957.
2424. *Kishan Dass v Adeshwar Lal*, AIR 1972 Del 122.

only creditor.[2425] A creditor may not approbate and reprobate, for if he has sought to make the transferee liable as a universal donee under section 128 of this TP Act, he may not afterwards impugn the gift as a gratuitous transfer with intent to defeat and delay creditors.[2426] The fact that the creditors have been paid off since the date of the transfer is immaterial.[2427]

English law allows a creditor if he can prove that he is a creditor to sue on his own behalf alone, and he may obtain an order declaring the deed void against creditors. However, the court will not give consequential directions for the satisfaction of his debt, unless he is in a position to levy execution against the property.[2428] This exception has been followed in some Indian cases where an attachment of property has been discharged at the instance of a fraudulent transferee, and the decree-holder has been allowed to sue on his own account alone under O 21, rule 63 of Code of Civil Procedure 1908 to establish his right to enforce his decree against the property.[2429] The express direction in the fourth paragraph of the section has the effect of overruling these cases;[2430] but this has been overlooked in some subsequent decisions.[2431]

The representative suit would be under O 1, rule 8 of the Code of Civil Procedure, and the title of the suit would be—

AB on behalf of himself, and all other creditors of *CDPlaintiff*

v

CD.....*Defendant*

The decree would be in the form of the Code of Civil Procedure 1908, sch I, appendix D(13), declaring the transfer void as against the plaintiff and all other creditors, if any, of the defendant. The Privy Council have observed that an issue under section 53 cannot be raised and no decree for setting aside transfers under that section can be passed except in a suit property constituted for that purpose.[2432] Although a creditor cannot sue on behalf of himself alone, yet, he is not obliged to defend a suit on behalf of the whole body of creditors.[2433] The Madras High Court at one time took a different view.[2434] The defendant creditor had attached property in execution of a decree for debt, but it had been fraudulently sold by the

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2425. *State Bank of Travancore v A K Narayan,* AIR 1967 Ker 171; *N Rajyalakshmamma v K Rajamma,* AIR 1973 AP 53; *UOI v Ram Peary Debi,* AIR 1984 Cal 215 : ITR (1984) 150 Cal 719.
2426. *Sachitanand v Radhapat,* (1928) 26 All LJ 524 : 116 IC 86 : AIR 1928 All 234; *Sarju Singh v Shiam Sunder* 153 IC 674 : AIR 1934 All 948.
2427. *Deokali v Ramdevi,* AIR 1941 Rang 76.
2428. *Reese River Silver Mining Co v Atwell,* (1869) LR 7 Eq 347.
2429. *Pokker v Kunhamad,* (1919) ILR 42 Mad 143 : 51 IC 714; *Sri Thakurji v Narsingh Narain,* (1921) 6 Pat LJ 48 : 63 IC 788 : AIR 1921 Rang 53; *China Mal v Gul Ahmad,* (1923) 5 Lah LJ 435 : 73 IC 719 : AIR 1923 Lah 478; *Loknath v Thakur Das,* 71 IC 20; *RROO Chettyar Firm v Ma Sein Yin,* (1927) ILR 5 Rang 588 : 105 IC 582 : AIR 1928 Rang 1.
2430. *Rahimtulla v Rasulkhan,* 145 IC 357 : AIR 1933 Nag 169.
2431. *Radhika Mohan Gope v Hari Bashi Saha,* (1933) 37 Cal WN 1141 : 57 Cal LJ 399 : 146 IC 1010 : AIR 1933 Cal 812; *U Maung Nge v PLSP Chettyar Firm,* 152 IC 506 : AIR 1934 Rang 200.
2432. *Chutterpat Singh v Maharaj Bahadoor,* (1905) ILR 32 Cal 198 : 32 IA 1, p 15; *Maung Tun Thein v Maung Sin,* (1934) ILR 12 Rang 670 : 153 IC 942 : AIR 1934 Rang 332; *AKACTV Chidambarm v RMARS Firm,* (1934) ILR 12 Rang 666 : 152 IC 555 : AIR 1934 Rang 302; *Median Bibi v Ismail Durga Association,* AIR 1940 Mad 789 : (1940) ILR Mad 808 : (1940) 1 Mad LJ 873 : 51 Mad LW 608 : (1940) Mad WN 481; *Girraj v Sauktha Prasad,* AIR 1938 Oudh 33.
2433. *Bai Hakimbu v Dayabhai Ragnath,* AIR 1939 Rang 508 : 41 Bom LR 1104 : 185 IC 655; *Kosuru Ademma v Chevuru Subbamma,* AIR 1942 Mad 714; *Ramanatha v Alagappa,* (1956) 2 Mad LJ 157 : AIR 1956 Mad 682.
2434. *Palaniandi v Appavu,* (1916) 30 Mad LJ 565 : 34 IC 778; *Subramania v Muthia Chettiar,* (1918) ILR 41 Mad 612; 48 IC 651.

judgment-debtor to the plaintiff. The plaintiff's objection to the attachment was dismissed, and he then sued for a declaration of his title. The court held that the defendant could not resist the claim as he had failed to have the sale (which was voidable at his option) declared to be void. These cases were, however, overruled by a Full Bench of the same High Court in *Ramaswami Chettiar v Malappa Reddiar,*[2435] where CJ Wallis explained that a transaction voidable at the option of a creditor may be avoided by an unequivocal declaration of an intention to avoid it, and that an attachment by a creditor was an exercise by him of his option to avoid the transfer; the learned judge held that section 53 may be pleaded as a personal defence by an attaching creditor, although he has not himself filed a representative suit to avoid the transfer, and this decision has been affirmed by the Supreme Court.[2436] The amended section 53(1) does not refer to a defence to a suit and if a defence under section 53(1) could be raised by an attaching creditor defeated under the section, such a defence need not be in a representative capacity. There was nothing in section 53(1), as it originally stood, which precluded a defence by an attaching creditor to a suit to set aside a summary order under O 21, rule 63 of the Code of Civil Procedure 1908 that the sale in favour of the plaintiff is vitiated by fraud, and the amendment made no change in this matter.[2437] Other high courts have also decided the point in the same way.[2438]

ILLUSTRATION

A sells property to *B* in a fraud of creditors. Creditor *C* attaches the property in execution of a decree against *A*. *B* objects to the attachment and *C* maintains his right to attach and *B*'s objection is dismissed. *B* then sues for a declaration of his right to the property. *C* may plead in defence that the transfer to *B* was in fraud of creditors.[2439]

(19) Limitation

A creditor's suit to avoid the transaction does not affect the validity of the transaction as between the parties to it and so, Artcile 91 of the Limitation Act, 1908, which corresponds to Article 59 of the Act of 1963 was held not applicable.[2440] It has been held that the suit was governed by Article 120 of the Act of 1908 which provided for a period of six years from the time when the right to sue accrued.[2441] The article of the 1963 Act corresponding to Article 120 is Article 113 which, however, prescribes a limitation period of only three years. In a Madras case,[2442] the judges differed as to whether the right to sue accrues when the creditor exercises the option to avoid the transaction, or when he becomes aware of the facts which entitle him to the relief. In *Abdulla Khan v Purshottam,*[2443] the Bombay High Court held that

2435. *Ramaswami Chettiar v Malappa Reddiar,* (1920) ILR 43 Mad 760 : 59 IC 947.
2436. *Abdul Shukoor v Arji Papa Rao,* [1963] 2 SCR 55 (Supp) : [1964] 1 SCJ 168 : AIR 1963 SC 1150.
2437. *Abdul Shukoor v Arji Papa Rao,* AIR 1963 SC 1150; *Alamelu Ammal v Chinnaswamy Reddiar,* AIR1989 Mad 311, p 313 holding that the decision in *Rukkumani Ammal v Kamachi Ammal* was no longer good law.
2438. *Abdul Kader v Ali Mia,* (1912) 16 Cal WN 717 : 14 IC 715; *Ram Chand v Mathura Chand,* (1921) 19 All LJ 299 : 60 IC 896 : AIR 1921 All 298; *Thansukhdas v Jhango,* 54 IC 798; *Lallu Singh v Chandra Sen,* (1934) ILR 56 All 624 : AIR 1934 All 155. See also *Bai Hakimbu v Dayabhai Rugnath,* AIR 1939 Rang 508; *Ramaswami v Lakshmana,* AIR 1936 Mad 408, (1936) Mad WN 361 : 161 IC 1003.
2439. *Ramaswami Chettiar v Mallappa Reddiar,* (1920) ILR 43 Mad 760 : 59 IC 947.
2440. *Pachamuthu v Chinnappan,* (1887) ILR 10 Mad 213; *Abdulla Khan v Purshottam,* (1947) ILR Bom 807 : 49 Bom LR 876 : AIR 1948 Bom 265.
2441. *Narasimhan v Narayana Rao,* 92 IC 405 : AIR 1926 Mad 66; *Venkateswara Aiyar v Somasundaram,* (1918) Mad WN 244 : 44 IC 551; *Lal Singh v Jai Chand,* (1931) ILR 12 Lah 262 : 130 IC 778 : AIR 1931 Lal 70*Parkash Narain v Raja Birendra,* (1931) ILR 7 Luck 131 : 133 IC 51 : AIR 1931 Oudh 333; *State Bank of Travancore v A K Naran,* AIR 1967 Ker 171.
2442. *Narshimhan v Narayana Rao,* AIR 1926 Mad 66; *Marthandrao v Nawal Kishore,* AIR 1954 Mad 388.
2443. *Abdulla Khan v Purshottam,* AIR 1944 Bom 267.

the right to sue accrues to the plaintiff only when he decides to exercise the option given to him by section 53 to challenge the transfer, and to seek to recover his dues out of the property transferred.

The effect of the declaration under this section is that the transaction does not affect the creditor's right to recover their claims from the property transferred. The declaration still leaves the deed operative as between the parties, and does not amount to cancelling or setting aside the deed, because the creditors have no title or interest in the property to set aside the deed as between the parties thereto. Article 120 of the Limitation Act, 1908, corresponding to Article 113 of the Act of 1963, governs such a suit, and the time begins to run from the date on which the court makes the declaration.[2444]

(20) Sub-section (2)—Subsequent Transferees

The second sub-section refers to the case when a subsequent transfer is in competition with a prior transfer without consideration. A bona fide transferee even from a fraudulent transferee is protected.[2445] The voluntary transfer is not displaced unless it is fraudulent, and whether it is fraudulent is purely a question of fact. The subsequent transfer for consideration does not of itself create a presumption that the voluntary transfer which preceded it was fraudulent.

An auction purchaser at a court sale is a person who steps in by operation of law, and is not a subsequent transferee within the meaning of this section.[2446]

(21) *Benami* Transactions

The provisions of section 53 are not affected by any of the provisions of the Benami Transactions (Prohibition) Act, 1988.[2447]

[2448][53A. **Part performance.**—Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that [2449][***] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

2444. *Rambilas v Ganpatrao*, (1953) ILR Nag 937 : AIR 1954 Nag 129; *Nanjamma v Rangappa*, AIR 1954 Mad 173 : (1953) 2 Mad LJ 737.
2445. *Frin Man Singh v BN Sinha*, AIR 1940 Lah 198 : 191 IC 639.
2446. *Vasudeo v Janardhan*, (1915) ILR 39 Bom 507 : 29 IC 497; *Awadhat v Punjaji*, 53 IC 205.
2447. Benami Transactions (Prohibition) Act, 1988, section 6.
2448. Ins. by Act 20 of 1929, sec. 16.
2449. The words "the contract, though required to be registered, has not been registered, or" have been omitted by the Registration and Other Related Laws Amendment Act, 2001 (48 of 2001) section 10 (w.e.f. 24 September 2001).

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

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(1) History of the Section

This section was first enacted in 1929 by the Transfer of Property (Amendment) Act, 1929, and imports into India a modified form of the equity of part-performance as developed in England in *Maddison v Alderson.*[2450] The enactment of the section sets at rest the considerable uncertainty prevailing in Indian law, as can be seen by three decisions of the Privy Council.[2451]

Recently, para 4 of section 53A has been amended by section 10 of the Registration and Other Related Laws (Amendment) Act, 2001 (Act 48 of 2001) whereby the words "the contract, though required to be registered, has not been registered, or" has been omitted.

(2) Scope

So far applicability of section 53A of the TP Act is concerned, what is to be seen is that the section provides for a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell to the transferee, if the proposed transferee satisfies other conditions of section 53A. That protection is available as a shield,

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2450. *Maddison v Alderson,*(1883) 8 App Cas 467.
2451. *Mahomed Musa v Aghore Kumar Ganguli,* (1914) ILR 42 Cal 801 : 42 IA 1 : 28 IC 930; *Ariff v Jadunath* 58 IA 91 : 131 IC 762 : AIR 1931 PC 79; *Mian Pir Bux v Sardar Mahomed Tahar* 61 IA 388 : 60 Cal LJ 370 : 60 Mad LJ 865 : 36 Bom LR 1195 : (1934) All LJ 912 : 151 IC 326 : AIR 1934 PC 235.

only against the transferor, the proposed vendor would disentitle him from disturbing the possession of the proposed transferees who are put in possession pursuant to such an agreement. However, that has nothing to do with the ownership of the proposed transferor who remains full owner of the lands till they are legally conveyed by a sale deed to the proposed transferees. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party like the state when it seeks to enforce the provisions of the Act against the tenure-holder.[2452] The equitable right of section 53A of the TP Act cannot be claimed for restraining sale of the suit property, but can be sought for seeking protection against dispossession.[2453]

The following postulates are sine qua non for basing a claim on section 53A of the TP Act:

(i) There must be a contract to transfer for consideration any immovable property.

(ii) The contract must be in writing, signed by the transferor, or by someone on his behalf.

(iii) The writing must be in such words from which the terms necessary to construe the transfer can be ascertained.

(iv) The transferee must in part performance of the contract take possession of the property, or of any part thereof.

(v) The transferee must have done some act in furtherance of the contract.

(vi) The transferee must have performed or be willing to perform his part of the contract.[2454]

In view of the amendment by the Amending Act of 2001, another requirement would be that the document containing contract for transfer of immovable property, if executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001, ie, 24 September 2001, has been registered.

A proposed vendee cannot protect his possession of the immovable property on the basis of an oral agreement. Written agreement is sine qua non for applicability of the equitable doctrine of part performance enshrined under section 53A.[2455] In the absence of the pleadings and evidence of all the essential conditions, making out a defence of part performance to protect possession claimed by the plaintiff, would not be attracted.[2456] The plea under section 53A of the TP Act raises a mixed question of law and fact and, therefore, cannot be permitted to be urged for the first time at the stage of second appeal.[2457]

Doctrine of part performance is not applicable to the State of J&K.[2458]

2452. *State of Uttar Pradesh v District Judge,* AIR 1997 SC 53 : (1997) 1 SCC 496.
2453. *Vasundara Bhalla v Haridas Bhagat & Company Pvt Ltd,* AIR 1995 Mad 172; *Nigamananda Patra v Sarat Chandra Patra,* AIR 1998 Ori 19.
2454. *Arun Kumar Gupta v Santosh Kumar,* AIR 2018 All 11 : 2017 (11) ADJ 424 : 2018 1 AWC 845 All; *Nathulal v Phool Chand,* (1969) 3 SCC 120 : AIR 1970 SC 546; *Shrimant Shamrao Suryavanshi v Pralhad Bhairoba Suryavanshi,* (2002) 3 SCC 676 : AIR 2002 SC 960; *Rambhau Namdeo Gajre v Narayan Bapuji Dhotra,* (2004) 8 SCC 614; *Ram Kumar Agarwal v Thawar Das,* (1999) 7 SCC 303, p 309; *Jacobs Private Limited v Thomas Jacob,* AIR 1995 Ker 249. See also *Damodaran v Shekharan,* AIR 1993 Ker 242; *M Mariappa v AK Sathyanarayan Shetty,* AIR 1984 Kant 58.
2455. *Shivram Kisan Gunjal v Ramesh Vishwanath Gunjal,* (2010) 5 Mah LJ 623 : 2011 Supp Bom CR 616 : (2011) 3 AIR Bom R 653 : 2011 AIR CC 1819; *Nathulal v Phool Chand,* (1969) 3 SCC 120; *Sardar Govind Rao v Devi Sahai,* (1982) 1 SCC 237; *Mool Chand v Bakhra Rohan,* (2002) 2 SCC 612 : AIR 2002 SC 812; *see also Nigamananda Patra v Sarat Chandra Patra,* AIR 1998 Ori 19.
2456. *Hazilal v Jugal Kishore,* AIR 1999 MP 104 : (1998) 2 JLJ 177 : (1998) 2 MPJR 60 : (1998) 2 MPLJ 266.
2457. *Ram Kumar Agarwal v Thawar Das,* (1999) 7 SCC 303, p 309 : [1999] 4 LRI 687; *Sham Lal v Mathi,* AIR 2002 HP 66, para 18.
2458. *Swaran Kumar Jain v Dev Dutt Mahajan,* AIR 1994 J& K 33, p 37.

(3) Amendment of Registration and Specific Relief Act

Amendment Act of 1929

The amending Act of 1929 did not merely partially introduce the equity of part-performance into Indian law by enacting section 53A, but also reinforced the position by amending the Registration Act, 1908 and Specific Relief Act, 1877.

Section 49 of the Registration Act, 1908 which enacts that a document required to be registered, but not registered, shall not affect the immovable property comprised therein, or be received as evidence of any transaction affecting such property, is amended, and a proviso is inserted to permit such a document being received in evidence in a suit for specific performance, or as evidence of part-performance of a contract for the purposes of section 53A of the TP Act.

This proviso made it clear that section 49 does not prevent an unregistered agreement or deed to be admitted in evidence as a contract.[2459] It gave statutory recognition to *Puchha Lal v Kunj Behari Lal,*[2460] and supersedes the decision in *Sanjib Chandra v Santosh Kumar.*[2461]

Under the proviso, the unregistered document may be referred to as evidence that certain acts are done in performance of the agreement, for instance when a building has been erected in the terms of an unregistered lease.[2462] However, a document which must be regarded as unregistered for fraud on registration cannot be referred to for invoking this section.[2463]

Amending Act of 2001

The amendments made the amending Act of 1929, both under the TP Act as well as the Registration Act, 1908, to even unregistered documents for the purpose of section 53A has now been withdrawn by the amendments made by the Registration and Other Related Laws (Amendment) Act, 2001, which has come into force with effect from 24 September 2001. By this amending Act, as already noticed above, the words "the contract, though required to be registered, has not been registered, or," as appearing in para 4 of section 53A has been omitted. Simultaneously, sections 17 and 49 of the Registration Act, 1908 have been amended making it clear that unless the documents containing contract to transfer for consideration any immovable property for the purpose of section 53A is registered, it shall not have effect for the purposes of section 53A.[2464]

The amendment made in 2001requiring the documents to be stamped and registered so as to create right in terms of doctrine of part performance is prospective in nature and would not apply to a sale agreement executed in 1995.[2465] In *Awadhesh Kumar Singh v Shyam Narayan Jha,*[2466] the parties had entered into an agreement in 1995, before the amendment came in force. Moreover, the possession was not given to the vendee, of the disputed land, and it was held that the registration Act was not applicable and the document was not required to be compulsorily registered. Similarly, in *Rajender Singh v Nanga,*[2467] the vendee had already paid full consideration and was put in possession of the land under an unregistered sale agreement prior to the amendment in 2001 coming into effect, the court

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2459. *Girja v Girdhari,* (1950) ILR 29 Pat 628 : AIR 1951 Pat 277; *Rajendra N Sarkar v Gour C Ghosh,* (1970) 75 Cal WN 106.
2460. *Puchha Lal v Kunj Behari Lal,* (1913) 18 Cal WN 445 : 20 IC 803.
2461. *Sanjib Chandra v Santosh Kumar,* (1922) ILR 49 Cal 507 : 69 IC 877 : AIR 1922 Cal 436, foll in *Ramjoo Mahomed v Haridas Mullick,* (1925) ILR 52 Cal 695 : 91 IC 320 : AIR 1925 Cal 1087.
2462. Cf *Lester v Foxcroft,* (1701) Colles PC 108 : W & TLC, vol II, 9th Edn, p 410.
2463. *Anand Narain v Lala Murli Manohar,* AIR 1945 Oudh 120.
2464. *See* Appendix V.
2465. *Gurmeet Kaur v Harbhajan Singh,* AIR 2017 Del 164 : 241 (2017) DLT 339.
2466. *Awadhesh Kumar Singh v Shyam Narayan Jha,* AIR 2018 Pat 24.
2467. *Rajender Singh v Nanga,* AIR 2018 P&H 29

held that the agreement to sell does not require compulsory registration and the defendant claimed to be a bonafide purchaser without notice of the claim of vendee but failed to prove that he ever made any enquiry from the vendee about his possession. he cannot be allowed to take the label of a bonafide purchaser without notice of the claim of the vendee and would not be entitled to take the benefit of section 53 A. The vendee would not be entitled to the relief of injunction and cannot be non suited.

An agreement of sale coupled with delivery of possession in part performance of conveyance rights created under this document now requires compulsory registration of this agreement of sale as it partakes the character of a conveyance and would require payment of stamp duty.[2468] An unregistered agreement to sell will not entitle the prospective transferee to file a suit for specific performance as an agreement to sell does not create by itself any right or title in property hence an agreement to sell is not required to be registered and is admissible in evidence.[2469] In *A N Nagarajaiah v B Arvind,*[2470] the Karnataka High court observed,

> The amendment of Registration Act, 1908 by the Amendment Act, 2001 and of section 53A Transfer of Property Act, makes it clear that if the benefit of section 53A of the Act is to be made available than the contract for sale shall be registered and if not registered then they shall have no effect for the purpose of section 53A. The amendment came into effect on 24 September 2001 and the benefit of doctrine of part performance after the coming into force of the Registration Act, 1908, (Amendment by Act of 2001) can be given only if alleged agreement to sell satisfies the provisions of section 17 (1A) of the Registration Act, 1908. Thus the document relied upon must be a registered document bearing stamp duty and unstamped agreement to sell cannot also have been looked into by the court for any purpose contrary to mandate of statute as given in section 35 of the Stamp Duty Act.

It is therefore absolutely clear that in order to give benefits of section 53A of Transfer of Property Act, the document relied upon must be a registered document. Any unregistered document cannot be looked into by the court and cannot be relied upon or taken into evidence and therefore, an agreement of sale executed in 2005, but unregistered, shall have no effect for the purposes of section 53A.[2471] A suit for possession cannot be decreed on the basis of unregistered, undated and photocopies of the documents. In *Udai Sapkota v Laxmi Prasad Sapkota,*[2472] in a sale for land, the consideration was paid to the transferor and he in turn in part possession of the contract handed over the possession to the transferee. The instrument though required to be registered was not registered, but it was held that the rule that the sale deed must necessarily be registered is not applicable as it would be relevant only for the purposes of its admissibility in evidence in a pending suit in the court. Further, as the transferor himself neither executed nor got the sale deed registered, the court held that he be estopped to claim for recovery of possession of the property and would not be allowed to take advantage of his own wrong or fault to deny execution of sale deed. Where an unregistered and uncorroborated document was produced to protect possession of the property that was inherited by several heirs but only some of them had entered into an agreement to sell the entire property, it was held that the transferee have no right to claim protection of possession by invoking the doctrine of part performance.[2473]

2468. *Ningappa Bharamappa Sogi v Govt of Karnataka,* AIR 2011 Kar 115 : (2012) 1 ICC 621; *Manglu Mool Singh v Kunjlal,* AIR 2014 Chh 31.
2469. *Sukhwinder Kaur v Amarjit Singh,* AIR 2012 P&H 97: LNIND 2012 PNH 607 : (2012) 166 PLR 241.
2470. *A N Nagarajaiah v B Arvind,* AIR 2014 Kant 140.
2471. *Sita Ram v Asha Devi,* RSA No. 223/2003, decided on 4 January 2017. High Court of Himachal Pradesh; *Pappi v Ramesh Kumar,* 239 (2017) DLT 221; *Kashi Nath Sah v Shri Nath,* 2017 III AD (Delhi) 311 : 238 (2017) DLT 392; *Arun Kumar Tandon v Akash Telecom Pvt Ltd,* AIR 2010 (NOC) 744 (Del).
2472. *Udai Sapkota v Laxmi Prasad Sapkota,* AIR 2013 Sik 21.
2473. *Venetta Kharsyntiew v Tushar Nath Bhattacharjee,* AIR 2014 (NOC) 590 (Meg).

Amendment in the Specific Relief Act

The amending Act also inserted a new section, section 27A, in the Specific Relief Act, 1877, providing that a party may sue for the specific performance of a contract in writing to lease immovable property, even though it is not registered, if he has acted in part-performance of the agreement. This amendment was wider than section 53A, for the section enacts an equity which is only available as a defence. Section 27A of the Specific Relief Act, however, enacted an active equity, as in English law, sufficient to support an independent action by a plaintiff.[2474] If a plaintiff was in possession under a lease (which would otherwise be inadmissible for want of registration), he could put the lease in evidence, and sue upon it for specific performance treating it as a contract, or to show the character and nature of the possession of the defendant.[2475] Whether a contract could be specifically enforced was not a relevant factor in granting relief under this section.[2476] Section 27A is not re-enacted in the Specific Relief Act, 1963. Protection of section 53A would be available to the vendee till his suit for specific performance of contract is disposed off finally.[2477] The amending Act of 2001 has not made any amendments in the Specific Relief Act, 1963.

(4) Section 53A

The section has been described by the Privy Council,[2478] and the Supreme Court,[2479] as a partial importation of the English equitable doctrine of part performance. By virtue of this section, part performance does not give rise to an equity, as in England, but to a statutory right.[2480] This right is more restricted than the English equity in two respects: (1) there must be a written contract;[2481] and (2) it is only available as a defence.[2482]

2474. *Hari Prasad v Hanmantrao,* (1936) ILR Nag 115 : 170 IC 554 : AIR 1937 Nag 74.
2475. *Murlidhar v Tara,* AIR 1953 Cal 349.
2476. *Sakharam v Sitaram,* AIR 1952 Nag 244.
2477. *Anjali Das v Bidyut Sarkar,* AIR 1992 Cal 47, p 57.
2478. *Mian Pir Bux v Sardar Mahomed Tahar,* 61 IA 388 : 60 Cal LJ 370 : 67 Mad LJ 865 : 36 BomLR 1195 : (1934) All LJ 912 : 151 IC 326 : AIR 1934 PC 235; *A M A Sultan v Seydu Zohra Beevi,* AIR 1990 Ker 186, p 187.
2479. *Maneklal Mansukhbhai v Honnusji Jamshedji,*[1950] SCR 75, p 83 : AIR 1950 SC 1 : [1950] SCJ 317; *Chaliagulla Ramachandrayya v Boppana Satyanarayana,* AIR 1964 SC 877 : [1964] 1 SCJ 109. See also *Nathulal v Phoolchand,* [1970] 2 SCR 854, p 858 : AIR 1970 SC 546, p 548; and *Sardar Govindrao Mahadiku Devi Sahai,* AIR 1982 SC 989, p 994 analysing this section; *Sardar Govindrao Mahadik v Devi Sahai,*(1982) 1 SCC 237, p 257.
2480. *Amrao v Baburao,* (1950) ILR Nag 25. See *Hamida v Smt Humer,* AIR 1992 All 346, p 350; *Kashinath Mehrotra v Roop Narayan Choudhary,* AIR 2008 (NOC) 301 (All); *Basanti Bai v Fulchand Mondal,* AIR 2007 Cal 8; *Bhajan Lal v Bal Govind,* AIR 2007 All 19; *Raj Sing Hurji Bhil v Vani Ken Manjubhai,* AIR 2007 Guj 69; *Magna v Amar Chand,* AIR 2007 (NOC) 1435 (Raj); *Ganga Ram v Kamal Chand,* AIR 2006 Raj 17; *Thota Rambabau v Cherujuri Venkteshwara Rao,* AIR 2006 AP 114 : (2005) 4 ALD 450 : (2005) 5 ALT 278; *H C Nagappa v Thairnnisa,* AIR 2006 Kant 112; *K Balaraman v Pattamal,* AIR 2006 Mad 260 : (2006) 4 CTC 326; *N G Vigneshwara Bhat v P Srikrishna Bhat,* AIR 2006 Kant 322; *Parasa Ranga Rao v Mathe Sanjeeva Rao,* AIR 2006 AP 366 : (2006) 5 ALD 237 : (2006) 5 ALT 205.
2481. *Parini Vishnumurthy v Vindavalli Durayya,* AIR 2009 AP 187 : (2009) 6 ALD 123 : (2009) 6 ALT 716; *Kashinath Mehrotra v Roop Narayan Choudhary,* AIR 2008 (NOC) 301 (All); *Basanti Bai v Fulchand Mondal,* AIR 2007 Cal 8; *Bhajan Lal v Bal Govind,* AIR 2007 All 19; *Raj Sing Hurji Bhil v Vani Ken Manjubhai,* AIR 2007 Guj 69; *Magna v Amar Chand,* AIR 2007 (NOC) 1435 (Raj); *Ganga Ram v Kamal Chand,* AIR 2006 Raj 17; *Thota Rambabau v Cherujuri Venkteshwara Rao,* AIR 2006 AP 114 : (2005) 4 ALD 450 : (2005) 5 ALT 278; *H C Nagappa v Thairnnisa,* AIR 2006 Kant 112; *K Balaraman v Pattamal,* AIR 2006 Mad 260 : (2006) 4 CTC 326; *N G Vigneshwara Bhat v P Srikrishna Bhat,* AIR 2006 Kant 322; *Parasa Ranga Rao v Mathe Sanjeeva Rao,* AIR 2006 AP 366 : (2006) 5 ALD 237 : (2006) 5 ALT 2005.
2482. See note (20) below. This passage was cited with approval in *U N Sharma v Puttegowda,* AIR 1986 Kant 99, p 102.

So far as India is concerned, the section creates rights which were not in existence before the enactment was passed.[2483] These rights to retain possession rest on the express provisions of the statute. Section 53A of the TP Act insists upon proof of some acts having been done in furtherance of the contract. The acts claimed to be in part performance must be unequivocally referrable to the pre-existing contract, and point in the direction of the existence of contract. When a series of acts are done in performance, one such may be payment of consideration. Any one act by itself may or may not be of such a conclusive nature. The correct approach would be to look at the writing that is offered as a contract for transfer for consideration of any immovable property, and then examine the acts said to have been done in furtherance of the contract, and find out whether there is a real nexus between the contract and the acts pleaded as in part performance, to enable refusal of relief to be perpetuating the fraud of the party, who after having taken advantage or benefit of the contract, backs out and pleads non-registration as defence, a defence analogous to section 4 of the Statute of Frauds.[2484]

(5) Applicability of Limitation Act

A perusal of section 53A shows that it does not forbid a defendant-transferee from taking a plea in his defence to protect his possession over the suit property obtained in part performance of a contract, even though the period of limitation for bringing a suit for specific performance has expired.[2485]

If the six conditions enumerated in section 53A are complied with, the law of limitation cannot come in the way of the defendant taking a plea under section 53 A of the TP Act to protect his possession of the suit property even though a suit for specific performance of a contract was barred by limitation. The reason is that the Law of Limitation is not applicable to a plea taken in defence unless a provision is expressly made in the statute. It is also trite law that law of limitation applies to the suits and applications and not to a defence taken by a defendant in a suit.[2486]

The Supreme Court has held that since the period of limitation bars a suit for specific performance of a contract, if brought after the period of limitation, it is open to a defendant in a suit for recovery of possession brought by a transferor to take a plea in defence of part performance of the contract to protect his possession, though he may not be able to enforce that right through a suit or action.[2487]

(6) Contracts to Transfer for Consideration

These words exclude gifts. A gift does not involve a contract, and even before the enactment of the section, it was held that the doctrine of part performance did not apply to

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2483. *Kripa RamvBishen Das,* AIR 1944 Lah 179.

2484. *Sardar Govindrao Mahadik v Devi Sahai,* (1982) 1 SCC 237, p 257 relying on *Steadman v Steadman,* [1974] 2 All ER 977 (HL) and holding that the statement of law in *Maddison v Alderson,* (1882-1883) 8 AC 467 : 31 WR 820 (HL) that it may be taken well settled that payment of part of purchase money or even the whole consideration is not sufficient act of part performance, can be taken to have been shaken considerably from its foundation and that English Law took a sharp u-turn in *Steadman's* case.

2485. *Balasaheb Manikrao Deshmukh v Rans Lingoji Warthi,* AIR 2000 Bom 337, para 12.

2486. *Antoney v Joseph,* 2014 (1) KHC 500 : 2014 (1) KLT 598.

2487. *Shrimant Shamrao Suryavanshi v Prahad Bhairoba Suryavanshi,* (2002) 3 SCC 676 : AIR 2002 SC 960; *Ramesh Chand Ardawatiya v Anil Panjwani,* (2003) 7 SCC 350, *Mahadeva v Tanabai,* (2004) 5 SCC 88 : AIR 2004 SC 3854; *Mahadeo Nathuji Patel v Surajbai,* 1994 Mah LJ 1145; *Narsinmha Setty v Padma Setty,* AIR 1998 Kar 389; *see also Nanasaheb Gujaba v Appa Ganu,* (1957) 59 Bom LR 303 : AIR 1957 Bom 138; Cf *Venkatasubbayya v Rosayya,* AIR 1957 AP 58. See *Parnam Balajiv Bathina Venkatramayya,* AIR 1988 AP 250, p 254.

gifts.[2488] Moreover, a gift is complete on acceptance, subject to registration.[2489] In a Calcutta case,[2490] the doctrine was applied to an antenuptial gift; but the case was regarded as one of contract, the court treating the antenuptial promise of the bride's father as becoming a binding contract when the marriage followed.

The section applies to a contract of dower governed by Mahomedan law, where the bride is in possession and has married in performance of the contract.[2491]

(7) Transfers and Agreements Covered by the Section

Transfer in relation of a capital asset would include any transaction involving allowing of the possession of an immovable property to be taken or retaining in part performance of contract of the nature referred to in section 53A.[2492] Similarly, a transfer under the Income Tax Act means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such property to be taken or retained in part performance of a contract of the nature referred to in section 53A.[2493]

The section applies to leases and agreement to lease.[2494] Where an agreement to lease is evidenced by correspondence, the lessee is put in possession, and there has been the acceptance of rent by the lessor for several years, the Supreme Court held that the section was applicable, and the lessee could defend the suit for ejectment.[2495]

However, in a case from Delhi for the renewal of lease, oral negotiations were carried out between the parties. The draft lease was prepared, but was not signed by either of the parties. It was held that no concluded contract came into existence, and the suit for specific performance is not maintainable.[2496] Section 53A applies to usufructuary mortgages, and mortgages with possession.[2497] It does not, however, apply to a family arrangement, which does not involve a transfer of property,[2498] or to a partition, which is not a transfer at all.[2499] It

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2488. *Maung Hla Maung v Maung Po Htai,* 123 IC 142 : AIR 1929 Rang 316; *Hiralal v Gaurishankar,* (1928) 30 Bom LR 451 : 109 IC 149 : AIR 1928 Bom 250; *Hari Pada v Elokeshi Devi,* (1940) 44 Cal WN 357 : 71 Cal LJ 144 : 189 IC 249 : AIR 1940 Cal 254.
2489. *Katyanasundaram v Karuppa,* (1927) ILR 50 Mad 193 : 54 IA 89 : 100 IC 105 : AIR 1927 PC 42.
2490. *Pran Mohan Das v Hari Mohan Das,*(1928) ILR 52 Cal 425 : 85 IC 799 : AIR 1928 Cal 856.
2491. *Haji Mokshed v Del Rouson Bibi,* (1971) 75 Cal WN 277 : AIR 1971 Cal 162.
2492. *Director of Income Tax (Exemptions) v Maharaja Agrasen Technical Education Society,* [2010] 328 ITR 551 (Delhi) : [2011] 196 TAXMAN 528 (Delhi).
2493. *Nahalchand Laloochand Pvt Ltd v Assistant CIT* 2014 SCC OnLine SC 1107 : (2015) 274 CTR (SC) 246 : [2015] 228 TAXMAN 1 (SC).
2494. *Maneklal Mansukhbhai v Hormusji Jamshedji,* [1950] SCR 75 : AIR 1950 SC 1 : [1950] SCJ 317; *Benarsi Das v Ali Mahomed,* AIR 1936 Lah 5; *Shyam Sunder Lal v Dur Shah,* AIR 1937 All 10; *Jonnada Sayi v Jonnada Subbanna,* AIR 1946 Mad 310; *Ramchandra v Subraya,* (1951) ILR Bom 692 : 53 Bom LR 363 : AIR 1951 Bom 127; *Deochand v Parwatibai,* AIR 1952 Nag 115; *Karthikeya Mudaliar v Singaram Pillai,* (1956) 2 Mad LJ 515; *Vidya Bhushan Singh v Rati Ram,* AIR 1963 HP 49; *Sinha BP v Somnath,* AIR 1971 All 297; *C A Fernandes v A L P Furtado,* AIR 1975 Goa 27; *P C Thomas v Laila Beevi,* AIR 1993 Ker 335, p 339, but not to a mere agreement to sell without any condition for delivery of possession.
2495. *Maneklal Mansukhbhai v Hormusji Jamshedji,* AIR 1950 SC 1.
2496. *Somani Marketing Pvt Ltd v Subash C Raswant,* (1998) 47 DRJ 427. See however, *Ved Prakash v Genelec Ltd,* (1993) 25 DRJ 92 and *Shukla Malhotra v Vyasa Bank Ltd,*(1998) 45 DRJ 504 wherein it was held that section 53A was not applicable to a lease agreement.
2497. *Ayyan Kunhi v Krishna,* AIR 1950 Tr & Coch 81; *Ram Reddi v Venkat Reddi,* AIR 1963 AP 489 reversing AIR 1963 AP 239; *P C Thomas v Laila Beevi,* AIR 1993 Ker 335, p 339: but not to a mere agreement to sell without any condition for delivery of possession.
2498. *Jileba v Marmesra,* (1950) All LJ 477 : AIR 1950 All 700.
2499. *Rashakrestayya v Sarasamma,* (1951) ILR Mad 607 : (1950) 2 Mad LJ 338 : AIR 1951 Mad 213.

is doubtful whether the section applies to an agreement to transfer a partial interest in property, such as a right to win minerals, or to cut timber.[2500]

The mortgagee cannot claim a right higher than what is provided in the ultimate document agreed to be executed, by invoking section 53A. In the case of an agreement to execute a mortgage for a definite period under which possession was handed over to the defendant, if the conditions of section 53A are satisfied, he will be entitled to get all the rights under the mortgage which are agreed to be executed, but cannot claim to continue in possession after the expiry of that period relying on section 53A. The general law of mortgages or the rights and liabilities of the mortgagor and mortgagee are not modified by section 53A.[2501]

(8) By Writing

As has been noted, the section only applies to a case where there is a written agreement. An oral agreement will not be sufficient.[2502] Similarly, the section would have no application if there is no written contract at all.[2503] To claim part performance, the contract of sale must be in writing,[2504] and on the basis of oral agreement of sale that were never attempted to get recognised or enforced through judicial proceedings a person cannot claim protection of possession.[2505] In Dhannalal Ahirwar v Satyanarayan,[2506] the parties did enter into an oral contract but no effort was ever made to get the sale deed executed, the court held that an inference can be drawn, that the requisite conditions for part performance were not fulfilled and therefore no benefit under this section can be given. In case of a complete failure to prove execution of a contract for sale, the benefit of section 53A cannot be pleaded by a person despite the fact that he might have been given the possession of the property.[2507] There seem to be two reasons for this limitation: (1) The occasion for the doctrine arises in India with reference to documents inadmissible in evidence for want of registration; and (2) The risk of perjuries, if an oral contract could be set up as a defence after limitation for a suit for specific performance had expired. Mere oral agreement does not create any interest or charge.

Though the contract must be in writing, its existence and its terms may, in appropriate cases, be proved by secondary evidence, as when the original is in the possession or power of

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2500. *S N Banerji v Kuchwar Lime & Stone Co Ltd,* (1941) ILR 21 Pat 243 : (1942) All LJ 149 : 44 Bom LR 324 : (1942) 46 Cal WN 374 : (1942) 1 Mad LJ : 197 IC 399 : AIR 1941 PC 128; *Traders Miners Ltd v Dhirendranath Ltd,* AIR 1944 Pat 261.

2501. *Damodaran v Shekharan,* AIR 1993 Ker 242, p 245.

2502. *U Pu Le v Oo Kim Seng,* 144 IC 825 : AIR Rang 136; *Ma Mya v VPR VSA Annamdai Chettiyar,* 151 IC 227 : AIR 1934 Rang 127; *Dhanrajmal v Hazarmal* 200 IC 326 : AIR 1943 Sau 81; *Bechardas v Ahmedabad Municipality,* AIR 1941 Bom 346; *Shravan Jayram v Garbad Ukha,* AIR 1943 Bom 406; *Balkrishna v Ranganath,* (1950) ILR Nag 613 : AIR 1951 Nag 171; *Narayan v Guruprasad,* (1951) ILR Nag 334 : AIR 1952 Nag 246; *Narasayya v Ramachandrayya,* AIR 1956 AP 209; *Sundararaja Iyer v Kanakaraj,* (1958) ILR Mad 69 : (1958) 2 Mad LJ 374 : AIR 1958 Mad 576; *Murid Khan v Usman Khan,* AIR 1962 Punj 475; *Ude Ram v State of Haryana,* AIR 1994 P&H 175, p 178 : (1994) 108 PLR 186; *Rambhau Namdeo Gaire v Narayan Bapuji Dhotra,*(2004) 8 SCC 614 : AIR 2004 SC 4342; *Mahadeva v Tanabai,* AIR 2004 Bom 378 : (2004) 4 Bom CR 564 : (2004) 4 CTC 465.

2503. *Chintalapati Purushottama Sastry v Yarlagadda Nagarja Rao,* (2011) 4 ICC 103 : (2011) 3 ALD 599; *N Kamalamma v H S Subbanarasimha Sastry,* AIR 2010 (NOC) 883 (Kant) :2010 (1) KCCR 290 : 2010 (1) RCR (Rent) 568.

2504. *Thomas Mathew @ Thampikunju v Vachi Yesudasan,* 2014 (2) KLJ 79 : LNIND 2014 KER 53.

2505. *Brijgopal Lumani v Mothey Anja Ratna Rajkumar,* AIR 2010 (NOC) 570 (AP) : 2010 (3) ALT 785 : 2010 (2) ALD 355.

2506. *Dhannalal Ahirwar v Satyanarayan,* AIR 2014 (NOC) 497 (MP).

2507. *Md Makbul Hussain v Kasim Uddin,* AIR 2012 Gau 190.

the transferor.[2508] It cannot, however, be proved from what purports to be its quotation in another document.[2509] A writing which may refer to some part or parts of a contract which is oral, is not sufficient.[2510] So also, a writing which referred by mistake to a different piece of land was held as not entitling a person to claim part performance.[2511] It is, however, not necessary that there should be a formal agreement.[2512] But when the terms of the agreement are reduced to a form of document, such document serves the purpose of this section.[2513] An operative document incorporating a previous oral agreement is sufficient, even if it comes into existence later;[2514] but a mere memorandum recording that possession was taken earlier under an oral agreement, is not.[2515] A written agreement cannot, however, be relied upon if its material terms have been subsequently orally varied.[2516] Where the recital indicating passing of possession was found to have been subsequently interpolated in the deed of agreement, it was held that the interpolation by which the plaintiff could claim part performance under section 53A of the TP Act was a material alteration, and the plaintiff could not, therefore, enforce his right under that agreement.[2517] Where the instrument of transfer is not brought on record in accordance with law, no benefit of protection can be availed of despite acquiring the possession of the property.[2518]

(9) Signed by him or on his Behalf

The contract must be signed by or on behalf of the person sought to be charged under this section.[2519] It follows, therefore, that a *kabuliyat,* signed only by the lessee, does not entitle him to relief under this section.[2520] Where the lease deed, though registered, is not signed by the lessee, but possession had been delivered to the lessee, the lessee can claim the benefit of section 53A,[2521] It had been held by the Madras,[2522] and Andhra[2523] High Courts that where such a contract was signed by another person as agent or *karta* of a joint family, a plea of part performance could not be taken against the members of the joint family, unless it was expressly stated to be on behalf of the joint family. Both the decisions have been

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2508. *Maneklal Mansukhbhai v Hormusji Jamshedji,* [1950] SCR 75 : AIR 1950 SC 1 : [1950] SCJ 317; *Karthikeya v Singaram,* (1956) 2 Mad LJ 515 : AIR 1956 Mad 693; *Bobba Suramma v P Chandramma,* AIR 1959 AP 568.
2509. *Hari Prasad v Hanmantrao,* (1936) ILR Nag 115 : 170 IC 554 : AIR 1937 Nag 74; *Kashi Prasad v Bed Prasad,* 189 IC 111 : AIR 1940 Nag 113; *Firdos Jehan v Mohammed Yunus,* (1939) ILR 15 Luck 43 : 184 IC 401 : AIR 1940 Oudh 1; *Ramjiwan v Hanuman Prasad,*190 IC 163 : AIR 1940 Oudh 409; *Nasibanv Md Sayed,* AIR 1936 Nag 174; *Qamar Jahan Begum v Bansidhar,* (1947) ILR 17 Luck 530 : 199 IC 35 : AIR 1942 Oudh 23; *Subhodchandra v Bhagwandas,* (1946) 50 Cal WN 851 : AIR 1947 Cal 353; *Parasram v Deoram* AIR 1947 Nag 188; *Kathiar Jute Mills Ltd v Calcutta Match Works,* AIR 1958 Pat 133.
2510. *Maung Ohu v Maung Po Kwe,* 177 IC 977 : AIR 1938 Rang 356.
2511. *Ajjab Singh v Jhabbu Lal,* (1949) ILR Nag 449 : AIR 1948 Nag 67.
2512. *Firdos Jehan v Mahommed Yunus,* AIR 1940 Oudh 1; *Maung Po Kwe v Maung Po Sein,* 174 IC 169 : AIR 1938 Rang 49; *Shira Khatoon v Paung Po,* 182 IC 523 : AIR 1939 Rang 206.
2513. *Radhabai v Nayudu,* (1950) ILR Nag 799 : AIR 1951 Nag 285.
2514. *Allam Gangadhara Rao v G Gangarao,* AIR 1968 AP 291.
2515. *Krishna Sardar v Sindhu Bala,* (1970) 74 Cal WN 622 : AIR 1970 Cal 444.
2516. *Yasodammal v Janki Ammal,* (1968) ILR 2 Mad 382 : (1968) 1 Mad LJ 249 : AIR 1968 Mad 294.
2517. *Janab MHM Yakoob v M Krishnan,* AIR 1992 Mad 80, p 89.
2518. *Johnson Koshy v Madhu Mohanan,* AIR 2012 (NOC) 240 (Cal).
2519. *Berendra Huttaya v Gauri Channaya,* AIR 1948 Mad 546.
2520. *Ram Abtar v Shanta Bala,* AIR 1954 Cal 207; *Ramnarain v Sukhi,* AIR 1957 Pat 24; *Chandra Nath v Chulai Pasha,* AIR 1960 Cal 40; *Lal Behari Sasmal v Kanak Kanti Roy,* AIR 1962 Cal 502.
2521. *Raghavendra v Motilal,* AIR 1982 All 304, p 307.
2522. *Subramanyam v Subba Rao,* (1944) ILR Mad 749 : AIR 1944 Mad 337 foll in *Rattayya v Chandrayya,* (1948) 1 Mad LJ 392 : AIR 1948 Mad 526.
2523. *Satyanarayanamurty v Subrahmanyam,* AIR 1959 AP 534.

expressly overruled, the former by the Privy Council,[2524] and the latter by a Full Bench of the Andhra High Court.[2525] Where a contract is signed by a person, whose act would be binding on the real owner, the section applies.[2526] It has also been held that these words must be liberally construed,[2527] and such liberal construction is in accord with the English Law.[2528] The position is, of course different, where *A*, who was part-owner of a property which had been leased by him to a firm of which he was a member, signed the contract not as part-owner but, as a member of the firm; the section could not be invoked against the other owner.[2529]

In granting relief under section 53A, the question whether the contract is specifically enforceable has no bearing at all, and the doctrine of part performance applies even if specific performance is not otherwise permissible.[2530]

(10) Any Movable Property

The doctrine as enacted in this section cannot apply to movable property.[2531]

(11) Ascertained with Reasonable Certainty

A contract the terms of which cannot be ascertained with reasonable certainty, cannot be enforced.[2532] It is one of the necessary ingredients of section 53A that the terms of the written contract must be ascertainable with reasonable certainty. The emphasis on the word "reasonable certainty" pre-supposes that the court should be in a position to judge the exact nature of the transaction, ie, the subject matter of the document. This is the foundational basis for section 53A, and in the absence of a document or secondary evidence from which the court can ascertain the terms of that document with reasonable certainty, the defendants are not entitled to the benefit of the doctrine of part performance.[2533]

(12) Taken or Continues in Possession

Section 53A applies to a person who contracts to transfer immovable property in writing. If the proposed transferee in the agreement has taken possession of the property or he continues in possession thereof being already in possession, part performance of the contract and has done some act in furtherance of the contract, and transferee has performed or is willing to perform his part of the contract, the transferor shall be debarred from enforcing any right in respect of the property.[2534] Where the purchaser is given the possession of the suit shop in view of the agreement on payment of balance sale consideration of the total amount and he is ready and willing to perform his part of the contract, such purchaser is entitled to protect his possession under this section.[2535]

2524. *Srikakulam Subrahmanyam v Kurra Subba Rao,* AIR 1948 PC 95 : 75 IA 115.
2525. *Padmanbharaju v Lakshmi Kumara,* AIR 1967 AP 267.
2526. *Srikakulam Subrahmanyam v Kurra Subba Rao,* 75 IA 115 : (1949) ILR Mad 141 : 50 Bom LR 646 : (1948) All LJ 226 : 52 Cal WN 706 : (1948) 2 Mad LJ 22 : AIR 1948 PC 95 reversing *Subrahmanyam v Subba Rao,* AIR 1948 PC 95; *Labhchand Shankarlal v Sharifabi,* (1961) 63 Bom LR 602 : AIR 1961 Bom 215; *Paryarikkal Mohammedunni Hajis v Ramchandran,* AIR 1990 Ker 119 (NOC).
2527. *Labhchand Shankarlal v Sharifabi,* AIR 1961 Bom 215; *Debi Singh v Bhim Singh,* AIR 1971 Del 316.
2528. See Meggary & Wade, *The Law of Real Property,* 2nd Edn, pp 551-4.
2529. *Steuart & Co Ltd v Mackertich,* AIR 1963 Cal 198.
2530. *Durga Prasad v Kanhaiyalal,* AIR 1979 Raj 200.
2531. *Bhabhi Dutt v Ramlalbyamal,* 152 IC 431 : AIR 1934 Rang 303.
2532. *Bobba Suramma v P Chandramma,* AIR 1959 AP 568.
2533. *Kamalabai Laxman Pathak v Onkar Parsharam Patil,* AIR 1995 Bom 113 : (1994) 96 Bom LR 641.
2534. *Shashi Kapila v R P Ashwin,* (2002) 1 SCC 583 : AIR 2002 SC 101; *Reserve Bank of India, Mumbai v Krishi Export Comm Corporation Ltd, Varanasi,* AIR 2012 (NOC) 151 (All).
2535. *Rajpal v Harswaroop,* AIR 2011 Del 203.

The section only applies to cases where the transferee is in possession under a contract to transfer immovable property. Sine qua non for taking shelter under section 53A is proof of possession.[2536] If the transferee has not taken possession, the section does not apply.[2537] In a case where a person claims benefit of part performance, evidence that he was inducted into possession for the first time subsequent to the contract, would be a strong piece of evidence regarding the contract, and of possession changing hands pursuant to the contract. Continuous possession of a tenant in the suit property even after entering into the sale agreements would not by itself amount to a part-performance, putting the tenant in possession of the suit properties pursuant to the sale agreements.[2538]

It is not necessary that the delivery of the possession must be at the instance of the vendor. The words used in the section are "and the transferee has... taken possession".[2539]

It is not necessary, that the contract must contain a direct covenant regarding transfer of possession. It is only necessary that possession should have been taken in part performance of the contract,[2540] but where only temporary possession was given to the defendant for carrying out construction, it was held that the exclusive possession in the legal sense remained with the plaintiff, and the defendants were not entitled to protect their possession under section 53A of the TP Act.[2541]

It is not necessary that the transferee must be in possession of the entire property agreed to be sold. It is enough if the transferee continues in possession or takes possession even of a part of the property.[2542] Where the transferee was already in possession of immovable property under an agreement of sale, and the transferor accepted delayed payment of installment under the agreement by the transferee, and the transferee was willing to perform his part of contract, the benefit under section 53A cannot be denied to the transferee.[2543]

(13) Possession, Change of Character

The Supreme Court has held that there is an understandable and noteworthy difference in the probative value of entering into possession for the first time, and continuing in possession with claim of change in character. Where person claiming benefit of part performance of a contract was already in possession prior to the contract, the court would expect something independent of the mere retention of the possession to evidence part performance and unless there is in addition something done in furtherance of this contract, he is not entitled to take the benefit of section 53A.[2544] It has been held that mere retention of possession, quite legal and valid, if mortgage with possession is not discharged, could hardly be said to be an act in part performance unequivocally referrable to the contract of sale.[2545] When a person already in possession of the property in some other capacity enters into a contract to purchase the property, to confer the benefit of protecting possession under the plea of part performance,

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2536. *S Parmuthai v P Muthusamy,* AIR 2004 Mad 450, para 19; *Sardar Kamaljit Singh v Suresh Chand,* AIR 2010 Raj 152.
2537. *Sardar Kamaljit Singh v Suresh Chand,* AIR 2010 Raj 152; *Thota Chima Subba Rao v Malapalli Raju,*(1949) FCR 484; *Sanyasi Raju v Kamappadu,* AIR 1960 AP 83; *Nila Padhan v Gokulananda Padhi,* AIR 1950 Ori 118.
2538. *Chinnaraj v Sheik Davood Nachair,* AIR 2003 Mad 89, para 15 : (2002) 3 MLJ 784.
2539. *Nagar Khan v Gopi Ram,* AIR 1976 Pat 2.
2540. *Balkrishna v Ranganath,* (1950) ILR Nag 613 : AIR 1951 Nag 171; *Bobba SurammavP Chandramma,* AIR 1959 AP 568. See further note (15) below.
2541. *R K Apartments P Ltd v Arun Bahree,* (1999) 77 DLT 193.
2542. *Durga Prasad v Kanhaiyalal,* AIR 1979 Raj 200.
2543. *Teja Singh v Ram Prakash Talwar,* AIR 1984 P & H 95.
2544. *Nanjegowda v Gangamma,* AIR 2011 SC 3774.
2545. *Sardar Govindrao Mahadiu v Devi Sahai,* AIR 1982 SC 989 : (1982) 1 SCC 237.

his act effective from that day must be consistent with the contract alleged, and also such as cannot be referred to the preceding title.[2546]

Where a person is already in possession as a tenant at the commencement of an unregistered lease, he would continue to be a tenant from month to month, and section 53A would not apply where the person remains in occupation of the premises sold to him after the termination of the period of lease.[2547] Merely because the landlord accepts rent after termination of notice under protest, such conduct would not amount to signifying "assent" to continuance of lease in absence of any evidence even to prove oral lease and hence such a tenant cannot take the benefit of section 53 A.[2548] Similarly, a tenant who continued to be in possession as tenant, cannot take benefit of section 53A though subsequently an agreement to sale is entered between the parties.[2549] In a Calcutta case,[2550] on the expiry of the original lease, the lessee continued in possession under the renewal clause. Rent was paid for such period, but it was not shown to be independent of contract. It was held that the lessee was protected only under section 53A, and became a trespasser on the expiry of the renewed period. He did not become a monthly tenant. The court distinguished the decisions in *Biswabani Pvt Ltd v Santhosh K Dutta*[2551] and *Technical Studios v Lila Ghosh.*[2552]

The plea of retention of possession as a tenant is again contrary to the spirit of section 53A and a tenant claiming the benefit of part performance of the contract to protect his possession but failing to prove that he was given possession of the property in furtherance of the contract, cannot avail the benefit of section 53A.[2553] The benefit of section 53A was not extended to the tenant, as the condition in the agreement to sell was that the possession as owner purchaser will be given to tenant at the time of the sale deed. Nothing was done on the part of the tenant in furtherance of the said agreement, and nothing was on the record to show that he ceased to be a tenant. It was held the tenant cannot take advantage of the doctrine of part performance, and the order of eviction against him meanwhile, is not illegal.[2554]

A person who is put in possession in pursuance of part performance of unregistered sale deed, is entitled to protect his possession through an order of interim injunction obtained in a suit for permanent injunction.[2555]

The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected; for instance, in the case of waste lands, or where nothing is known about possession one way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party.[2556]

2546. *D S Parvathamma v A Srinivasan,* (2003) 4 SCC 705 : AIR 2003 SC 3542; (Approving *Bhagwandas Parsadilal v Surajmal,* AIR 1961 MP 237 and impliedly approving *Dakshinamurthi Mudaliar v Dhanakoti Ammal,* AIR 1925 Mad 965 and *AMA Sultan v Seydu Zohra Beevi,* AIR 1990 Ker 186.
2547. *Biswabani Pvt Ltd v Santosh Kumar Dutta,* AIR 1980 SC 226 : (1980) 1 SCC 185.
2548. *K Sajjan Raj v Gopi Setty Chandra Mouli,* AIR 2011 (NOC) 411 AP.
2549. *Inder Kumar Johar v Kailash Devi,* AIR 1999 P&H 65 : (1998) 119 PLR 795.
2550. *Goswami Maltivahuji MaharajvPurushottam,* AIR 1984 Cal 297; *S K Kapoor v Sanjay,* AIR 2010 All 56; *St Mary Educational Society v Qutubuddin Ahmed,* AIR 2007 AP 156 : (2007) 2 ALD 412 : (2007) 3 ALT 214.
2551. *Biswabani Pvt Ltd v Santhosh K Dutta,* AIR 1980 SC 226 : (1980) 1 SCC 185.
2552. *Technical Studios v Lila Ghosh,* AIR 1977 SC 2425 : (1977) 4 SCC 324.
2553. *Girija Shankar v Sheela Devi,* AIR 2013 Chh 30 : 2012 (2) CGLRW 385.
2554. *Inder Kumar Johar v Kailash Devi,* AIR 1999 P&H 65 : (1998) 119 PLR 795.
2555. *Lakshmi alias Bhagyalakshmi v E Jayaram (D) by LRs,* AIR 2013 SC 2939 : 2013 (2) SCALE 277 : (2013) 9 SCC 311 : 2013 (2) WLN 49 : JT 2013 (2) SC 466.
2556. *State of AP v Star Bone Mill and Fertiliser Co,* 2013 (9) SCC 319 : JT 2013 (3) SC 401 : 2013 (2) SCALE 728 : (2014) 1 WBLR (SC) 422 : 2013 (3) WLN 68.

(14) Adverse Possession

Setting up of a title by adverse possession and readiness and willingness to perform his part of the contract are contradictory to each other, which a party cannot be permitted to take.[2557] Where a person bases his case on section 53A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement, and continued to remain in possession till date of suit; thereby, the plea of adverse possession is not available to appellant.[2558] Plea of adverse possession and retaining the possession by operation of section 53A, are inconsistent with each other.[2559] The defense of part performance cannot go with the plea of adverse possession.[2560] Thus where a person admits permissive possession to manage property by virtue of an agreement to sell, his attempts to perfect his title by raising the plea of adverse possession would not be accepted.[2561] Similarly, where a person who obtains the possession of the property under executory terms of contract of sale and who fails to file any suit for specific performance of contract within the prescribed limitation period cannot ask for declaration of his title on the ground that he remained in possession for more than 12 years period and contending that his possession is adverse to the real owner. Such a possession can only be protected under section 53A.[2562]

(15) Act of Part Performance

Repairs and improvements effected under a mortgage cannot be an act of part performance under a subsequent sale, as it is an act preliminary to a sale.[2563] The mere retention by a tenant,[2564] or a mortgagee in possession,[2565] of possession after the expiry of the original lease or mortgage, or advancement of money for the purchase of stamps,[2566] is not an act of part performance. Similarly, possession obtained subsequent to the agreement, and not referrable to it, is not an act of part performance.[2567] Where, however, the tenant remains in possession after the expiry of an old lease, and pays reduced rent, it is an act of part performance of the renewal of the lease at a reduced rent.[2568] So also, where the person puts up a house soon after being put in possession under an unregistered contract of sale,[2569] or takes electricity connection and makes improvements.[2570]

The section does not apply when a mortgagee in possession continues in possession under an oral sale;[2571] the position would, of course, be different when the mortgagee retains possession under an unregistered deed of sale.[2572]

2557. *M Jaya Rao v M Krishna Rao,* AIR 2012 AP 34; *Sardar Kamaljit Singh v Suresh Chand,* AIR 2010 Raj 152; *Gurcharan Kaur v Sukhwant Singh,* AIR 2013 P&H 42.
2558. *Mohan Lal v Mira Abdul Gaffar,* AIR 1996 SC 910 : (1996) 1 SCC 639.
2559. *Roop Singh v Ram Singh,* (2000) 3 SCC 708 : AIR 2000 SC 1485.
2560. *Thomas Mathew @ Thampikunju v Vachi Yesudasan,* 2014 (2) KLJ 79.
2561. *Lakshmi v Karuppathal alias Sadayammal,* AIR 2011 Mad 192.
2562. *M Gopal v K Jangareddy,* AIR 2011 AP 185.
2563. *Kukaji v Basantilal,* AIR 1955 Madh Bh 93.
2564. *Dakshinamurthi v Dhanakoti,* (1925) 48 Mad LJ 661 : 87 IC 552 : AIR 1925 Mad 965; *Bhagwandas v Surajmal,* AIR 1961 MP 237.
2565. *Pannalal v Labhchand,* AIR 1955 Madh Bh 49.
2566. *Govindrao Mahadik v Devi Sahay,* AIR 1982 SC 989 : (1982) 1 SCC 237.
2567. *Manjural Hoque v Mewajan Bibi,* (1956) 60 Cal WN 714 : 97 Cal LJ 257 : AIR 1956 Cal 350.
2568. *Satyaniranjan Chakravarty v Habibur Sobhan,*144 IC 598 : AIR 1933 Cal 393.
2569. *Naicker P v S Pillai,* AIR 1971 Mad 466.
2570. *RajPal Singh v Harbans Kaur,* AIR 2010 (NOC) 1021 (P&H).
2571. *Ma Shwe Kin v Ka Hee,* (1924) 3 Bur LJ 211 : 84 IC 514 : AIR 1924 Rang 381 (the court also held that the possession was not referrable only to the contract).
2572. *Chikkannaswamy v Hayat Khan,* (1955) ILR Mys 234 : AIR 1955 Mys 38; *Baba Murlidhar v Soudagar,* AIR 1970 Mys 202.

So, also, where a lessee retained possession after the expiry of the lease, under a written agreement to purchase the property, for which he had paid the consideration.[2573] For a tenant continuing in possession of an immovable property after a contract to transfer, written and signed by the landlord, to get the protection under section 53A, it is necessary to show that he continues in possession in pursuance of the contract as mere continuance in possession does not satisfy the requirement of section 53A.[2574]

The act in question must be referrable to the contract alleged to have been partly performed.[2575]

In the proceedings instituted by the landlord under the Rent Control Act for eviction, the tenant is entitled to set up the agreement of sale in his favour as a shield in defence to the action. After the date of such contract, and after it was performed in part by the payment of consideration towards the contract, if the landlord allows the tenant to remain in possession by reason of the new status created under the contract, the landlord cannot contend that the possession is still referrable to the earlier contract. Under section 53A, it is not necessary that the deed of transfer must have been obtained before the section can be invoked.[2576]

In two cases,[2577] however, the doctrine was wrongly applied to oral sales to persons in possession, though there was no act done in furtherance of the contract for sale.

(16) Has Performed or is Willing to Perform

The section confers no rights on a party who was not willing to perform his part of the contract.[2578] A transferee has to prove that he was honestly ready, and willing to perform his part under the contract.[2579] A prospective vendee who had taken possession could not resist dispossession, if he fails to discharge his obligations under an agreement to sell,[2580] or were not willing to pay the price agreed upon.[2581] Where the agreement was executed for Rs 17,750 but the buyer paid only 5500 as earnest money and was in possession of the property under the orders of the court but failed to prove his readiness and willingness to make the payment or the balance amount on the date agreed for execution of the deed or till the filing

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2573. *Annamalai Goundan v Venkataswami Naidu,* (1959) ILR Mad 796 : (1959) 1 Mad LJ 301 : AIR 1959 Mad 354. See, however, *Mallappa Bhimanna v Land Tribunal,* (1979) 2 Kant LJ 218 and *Mallanna v Abdul Nabi,* AIR 1986 Kant 221, p 223.

2574. *Sunil Kumar Sarkar v Aghor Kumar Basu,* AIR 1989 Gau 39.

2575. *Fgp Ltd v Saleh Hooseini Doctor,* (2009) 10 SCC 223 : 2009 (12) SCALE 516 : [2009] 14 SCR 995; *Chandramathy C S v Devakey Amma,* 2011 AIR CC 15 : (2010) 4 KLT 465 (Kerala): 2010 (4) KHC 383 : 2010 (3) KLJ 344; *Ranchhoddas Chhaganlal v Devaji Supdu,* AIR 1977 SC 1517 : [1977] 2 SCR 621 : (1977) 3 SCC 584.

2576. *Chinna Thevar v Gnanaprakasi Ammal,* (1978) 2 Mad LJ 533. Relying on *Munuswami Gounder v Eruse Gounder,* AIR 1975 Mad 25; *Wilfed Lovette v Ganesh,* AIR 1988 Bom 142, p 147.

2577. *Naganna v Appalaraju,* 129 IC 59 : AIR 1930 Mad 1021; *Husaini Begum v Sultani Begum,*105 IC 479 : AIR 1927 Oudh 485.

2578. *Chinnaraj v Sheik Davood Nachair,* AIR 2003 Mad 89; *A Lewis v M T Ramamurthy,* AIR 2008 SC 493 : (2007) 12 SCALE 50; *Brijgopal Lumani v Mothey Anja Ratna Rajkumar,* AIR 2010 (NOC) 570 (AP); *Seshamma v N M Haneef,* AIR 2010 (NOC) 653 (Mad).

2579. *Awadhesh Kumar Singh v Shyam Narayan Jha,* AIR 2018 Pat 24; *Sunder Bai v Naint Ram,* AIR 2003 MP 268, para 9; *Bhajan Lal v Bal Govind,* AIR 2007 All 19; *M Ponnuswamy v M Thamaraikannan,* AIR 2008 (NOC) 506 (Kant); *Lakshmi v Karuppathathaal,* AIR 2011 Mad 192.

2580. *Andhra Graphite (P) Ltd v Ms Jobing Syndicate, a registered Partnership Firm,* AIR 2011 (NOC) 245 (AP).

2581. *Bechardas v Ahmedabad Municipality,* AIR 1941 Bom 346; *Sulleman v Patel,* (1933) 35 Bom LR 722 : 145 IC 557 : AIR 1933 Bom 381 not followed *Bhagwati Lal v Shri Krishan Chandra,* AIR 1994 Raj 331 (NOC).

of the suit, it was held that he was not entitled to protection under section 53A.[2582] The High Court of Karnataka has pointed out that in order to substantiate the plea of part performance, the defendant who takes this plea must assert that he had demanded specific performance within the stipulated time. Plea of part-performance is not available in case one fails to plead in his written statement his willingness to perform his part of contract.[2583] Failure to take this plea would mean that he did not show readiness and willingness to perform his part of the contract.[2584]

The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always abides by the terms of the agreement, and is willing to perform his part of the contract.[2585] Part performance, as a statutory right, is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms covenanted there under.[2586]

Willingness to perform the roles ascribed to a party in a contract is primarily a mental disposition. However, such willingness in the context of section 53A of the TP Act must be absolute and unconditional.[2587] If willingness is studded with a condition, it is in fact no more than an offer, and cannot be termed as willingness. Where the vendee company expresses its willingness to pay the amount, provided the plaintiff clears his income tax arrears, there is no complete willingness, but a conditional willingness or partial willingness which is not sufficient to arm the company with the shield provided under section 53A of the TP Act.[2588]

In case a substantial part of sale consideration is paid, and the transferee, being sufficiently possessed of more amount than contemplated in agreement, the transferor, cannot fall back on frivolous plea of not having received amount of registration charges, and the purchaser would be entitled to protection of section 53A.[2589] Where on receipt of the balance consideration, the purchaser was given possession of property and with another agreement he was allowed to use premises as an absolute owner, was permitted to get electricity connection make improvements and take other necessary steps, this would show his willingness to perform his part of the contract.[2590] Where the transferee is not willing to fulfil his part of the contract, section 53A will not be attracted.[2591] Where the possession of the property was handed over in furtherance of an agreement to sell but the transferee was not ready and willing to fulfil his specific obligations under the agreement and part of the bargain, the benefit of section 53A would not be available to him.[2592] Where the transferee failed to discharge his obligations under agreement to sell and failed to establish his willingness and readiness to fulfil his part of the contract,[2593] nor paid balance amount, and did not even filed

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2582. *Ajabrao Marotrao Radake v Bhalchandra Vitthalrao Deshpande,* AIR 2018 (NOC) 46 (Bom) : 2017 (6) ABR 137 : 2017 (5) Bom CR 340 : 2017 (3) MhLJ 850.
2583. *Hukma v Manga,* AIR 2003 P&H 287 : (2003) 135 PLR 753.
2584. *M Mariyappa v A K Satyanarayana,* AIR 1984 Kant 50.
2585. *Thota Rambabau v Cherujuri Venkteshwara Rao,* AIR 2006 AP 114 : (2005) 4 ALD 450 : (2005) 5 ALT 278; *H C Nagappa v Thairnnisa,* AIR 2006 Kant 112; *K Balaraman v Pattamal,* AIR 2006 Mad 260 : (2006) 4 CTC 326; *N G Vigneshwara Bhat v P Srikrishna Bhat,* AIR 2006 Kant 322; *Parasa Ranga Rao v Mathe Sanjeeva Rao,* AIR 2006 AP 366 : (2006) 5 ALD 237 : (2006) 5 ALT 205; *Ganga Ram v Kamal Chand,* AIR 2006 Raj 17.
2586. *Mohan Lal v Mira Abdul Gaffar,* AIR 1996 SC 910 : (1996) 1 SCC 639.
2587. *Chinnaraj v Sheik Davood Nachair,* AIR 2003 Mad 89, para 16e : (2002) 3 MLJ 784.
2588. *Jacobs Private Limited v Thomas Jacob,* AIR 1995 Ker 249 : (1994) 2 KLJ 738.
2589. *Seshamma v N M Haneef,* AIR 2010 (NOC) 653 (Mad) : 2010 (1) CTC 641 : 2010 1 LW 687.
2590. *Raj Pal Singh v Harbans Kaur,* AIR 2010 (NOC) 1021 (P&H).
2591. *Parmanand v Kailash Chand,* AIR 2012 Chh 64; *M Jaya Rao v M Krishna Rao,* AIR 2012 AP 34: LNIND 2011 AP 1300 : 2012 (1) Andh LD 136 : 2012 (1) ALT 240.
2592. *Andhra Graphite (P) Ltd v Jobing Syndicate, a registered Partnership Firm,* AIR 2011 (NOC) 245 (AP) : 2011 (2) ALD 16.
2593. *Bhauvti v Alam,* AIR 2014 MP14 : LNIND 2013 MP 133 : 2013 (4) MPLJ 39.

a suit for specific performance of contract despite expiry of period of limitation he cannot resist a suit for recovery of possession,[2594] nor claim that the transferor should have instead filed a suit for specific performance or recovery of the balance amount.2595 On the other hand when the right of the true owner is challenged by the proposed vendee, he must establish that he has performed his part of the contract as performance of his part of contract and readiness and willingness to perform if neither pleaded nor proved by the vendee he would not be entitled to seek the benefit of section 53A.[2596] In certain circumstances, once a party to a contract has repudiated a contract, it is not necessary for the other party to tender the amount payable under the contract in the manner provided in the contract, in order to successfully claim the specific performance of the contract. Non payment of registration charges after payment of substantial sale consideration would not be[2597] sufficient to dispossess the transferee. This does not, however, mean that where one party to a contract repudiates the contract, the other party to the contract, who claims specific performance of the contract, is absolved from his obligation to show that he was ready and willing to perform the contract.[2598] In the instant case, the transferee was in possession of the premises and claimed protection under section 53A. Under the agreement of sale, he was required to pay regular installments of a monthly sum to the transferor. After paying some installments, he stopped payments, alleging that the transferor had repudiated the agreement. The arbitrator held that since the transferee stopped payment of the monthly sum, he could not be said to have performed or was willing to perform his part of the contract and, therefore, was not entitled to retain possession under the protection afforded by section 53A. It was held that the award of the arbitrator could not be set aside on the ground of error of law apparent on face of the award. It could not also be said that the arbitrator was guilty of misconduct.

So also, a person who falsely pleads that he has paid the full consideration for the transfer, and is found not to have paid a part of the consideration is not entitled to the benefit of the section.[2599] It is, however, not necessary that the willingness to perform the terms must be expressly pleaded in the pleadings.[2600]

In judging willingness to perform, the court must consider the obligations of the parties, and the sequence in which they were to be performed. So a buyer could not be said to be not willing if he was to pay the balance of the purchase money after the revenue records were rectified, and did not do so because they were not rectified.[2601]

This is also the position in English Law, based on the maxim, "he who seeks equity must do equity." So, where a person in possession under an agreement to lease, has failed to perform a condition precedent to the agreement, he was not allowed to raise the equity of *Walsh v Lonsdale.*[2602] With reference to section 53A, the High Court of Punjab and Haryana has held that the tenants who claim to have agreed to purchase the property must take the

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2594. *Tongani Tea Company Limited v Rossell India Limited,* AIR 2014 Gau 41 : 2013 (4) GLT 767.
2595. *Lakshmi v Karuppathal,* AIR 2011 Mad 192 : LNIND 2011 BMM 8.
2596. *Hardei v Amin Chand,* AIR 2011 HP 103 : LNIND 2011 HP 255.
2597. *K K Adalakha v Amrish Sehgal,* AIR 2010 (NOC) 1118 (P&H).
2598. *Jawahar Lal WadhwavHaripada Chakroberty,* AIR 1989 SC 606.
2599. *Ranchod v Manubai Zipru,* (1954) ILR Bom 194 : 55 Bom LR 890 : AIR 1954 Bom 153; *Shobharam v Totaram* (1949) ILR Nag 959.
2600. *Karthikeya Mudaliar v Singaram Pillai,* (1956) 2 Mad LJ 515; *Sohan Singh v Gulzari* AIR 1997 HP 12.
2601. *Nathulal v Phoolchand,* [1970] 2 SCR 854 : AIR 1970 SC 546 : (1969) 3 SCC 120; *Sardar Govindrao Mahadik vDevi Sahai,* (1982) 1 SCC 237, p 257.
2602. *Walsh v Lonsdale,* [1982] 21 Ch D 9. See also *Cornish v Brook Green Laundry Ltd,* [1959] 1 QB 394 : [1959] 1 All ER 373 (CA); *Kamalabai Laxman Pathak v Onkar Parsharam Patil,* AIR 1995 Bom 113.

plea that he has performed, or is willing to perform, his part of the contract.[2603] Similarly, where a person after taking possession, instead of filing a suit for specific performance took steps to transfer possession to a third party, the possession of such a person would not be protected.[2604]

(17) Then

Section 53A makes it clear by employing the word "then" after laying down the pre-requisites that a transferee can seek refuge under it only after satisfying the other pre-requisites.[2605]

(18) Though the Contract is Not Registered

These words expressly supersede the provisions of the Registration Act, 1908. Under the proviso added to section 49 of the Registration Act, 1908, unregistered documents are admissible as evidence of part performance. However, by the amendments made by the Registration and Other Related Laws (Amendment) Act, 2001, which has come into force with effect from 24 September 2001, as already noticed above, the words "the contract, though required to be registered, has not been registered, or," as appearing in para 4 of section 53A has been omitted. Simultaneously, sections 17 and 49 of the Registration Act, 1908 has been amended making it clear that unless the documents containing contract to transfer for consideration any immovable property for the purpose of section 53A is registered, it shall not have effect for the purposes of section 53A. Presently the protection of possession can be availed of only under a registered agreement.[2606] However, there is a contrary ruling from the Punjab and Haryana High court.[2607] The court has held that as an agreement to sell does not create any right or title to the property and it is a sale deed which when executed will create a right, title or interest in the property, hence an agreement to sell is not required to be registered and the same is admissible in evidence in a suit for specific performance of the contract. This ruling stands in sharp contrast to the amendment of 2001.

(19) Where there is an Instrument of Transfer

The case of an instrument of transfer is put in the alternative. The amendment to section 49 of the Registration Act, 1908 shows that the section applies although there is not a distinct and separate contract in writing. The instrument itself is treated as the contract in writing, as was done by CJ Jenkins in *Puchha Lal v Kunj Behari Lal.*[2608]

In order that the doctrine of part performance may be invoked, it is necessary that the acts of part performance must be such as not only to be referrable to the contract of which the part performance is alleged, but to be referrable to no other title.[2609]

The section would not apply if the instrument is unsigned, or if it cannot be proved for some other reason, eg, if the original is unstamped and lost so that secondary evidence, is inadmissible, as in *Hiralal v Shankar.*[2610] The doctrine does not extend to gifts.[2611]

2603. *Kuldip Singh v Prakash Chand,* AIR 1985 P&H 222.
2604. *Shivayya v Praveena,* AIR 2008 Kant 157 : (2008) 3 KCCR 1342.
2605. *Jacobs Private Limited v Thomas Jacob,* AIR 1995 Ker 249 : (1994) 2 KLJ 738.
2606. *Arun Kumar Tandon v Akash Telecom Pvt Ltd,* AIR 2010 (NOC) 744 (Del); *Nagna v Amarchand,* AIR 2007 (NOC) 1425 (Raj); *Amar Singh v Laxman,* AIR 2007 (NOC) 320 (Raj).
2607. *Sukhwinder Kaur v Amarjeet Singh,* AIR 2012 P&H 97 : (2012) 166 PLR 241.
2608. *Puchha Lal v Kunj Behari Lal,* (1913) 18 Cal WN 445 : 20 IC 868.
2609. *Thakamma Mathew v M Azamathulla Khan,* (1993) 49 DLT 249.
2610. *HiralalvShankar,* (1921) ILR 45 Bom 1170 : 62 IC 637 : AIR 1921 Bom 401.
2611. *Piru Charan Pal v Sumtmony Nema,* AIR 1973 Cal 1; *SDP Sabha Baijnath Co-op Multipurpose Society Ltd v State of Himachal Pradesh,* AIR 1984 HP 67 (NOC).

(20) Nature of Right: Available Only as a Defence

The Privy Council in *Probodh Kumar Das v Dantmara Tea Co*[2612] has held that the right conferred by section 53A is a right available only to the defendant to protect his possession. The section is so framed as to impose statutory bar on the transfer; it confers no active title on the transferee.[2613] Indeed any other reading of it would make serious inroad on the whole scheme of the TP Act. The above law laid down has been followed with approval by Supreme Court in *Technicians Studio Pvt Ltd v Leela Ghosh.*[2614]

It has been held that part-performance in India does not give rise to equity as in England, but to a statutory right which is a comparatively restricted right. In that, it is available only as a defence. It is only a partial importation in the statute law of India of the English doctrine of part-performance. Thus, a person who is lead into possession on the strength of a void lease does not acquire any interest in the property, but gets under section 53A only a right to defend his possession.[2615] Following *Probodh Kumar,* the Supreme Court again in *Delhi Motor Company v UA Basrurkar*[2616] has held that section 53A is only available as defence to the lessee, and not as conferring a right on the basis of which the lessee can claim rights against the lessor.

This section does not create a title in the defendant;[2617] and he cannot maintain a suit on title.[2618] It only imposes a statutory ban on transfer. The Supreme Court has approved this principle.[2619]

It merely operates as a bar to the plaintiff asserting his title. It is limited to cases where the transferee had taken possession, and against whom the transferor is debarred from enforcing any right, other than that expressly provided by the contract. When the conditions mentioned in the section are fulfilled, it debars him from enforcing against the transferee any right or interest not expressly provided by the contract. So far as the transferee is concerned, the section confers a right on him to the extent it imposes a bar on the transferor. However, that is only a right to protect his possession against any challenge to it by the latter contrary to the terms of the contract.[2620] Where the transferee who gets a document of a

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2612. *Probodh Kumar Das v Dantmara Tea Co,* 66 IA 293 : (1940) ILR 1 Cal 250 : (1940) All LJ 226 : 42 Bom LR 199 : 44 Cal WN 145 : (1940) 1 Mad LJ 75 : 185 IC 217 : AIR 1940 PC 1; *Ramrao v Purmanand,* AIR 1940 Bom 281; *Kashinath v Makchhed,* AIR 1939 All 504; *Peary Lal v Pirthu Singh,* AIR 1945 All 422; *Raghav Rao v Gopalrao,* AIR 1942 Mad 125; *Bholai Phukan v Lakhi Kanta,* AIR 1949 Assam 8; *Bajrang Gopi v Rup Narayan,* AIR 1949 Pat 464; *Hari Prasad v Abdul Haq,* AIR 1951 Pat 160; *Sardarilal v Shakuntla Devi,* (1960) 63 Punj LR 363, AIR 1961 Punj 378; *Motilal v Jaswant Singh,* (1963) ILR 13 Raj 832 : AIR 1964 Raj 11; *Dammulal v Mahomedbhai,* (1956) ILR Nag 10 : AIR 1955 Nag 306; *Kanhaiyalal v Jerome D'Costa,* (1955) ILR Nag 833 : AIR 1955 Nag 302; *Vora Mull v Manoranjan,* (1969) ILR Guj 266 : 10 Guj LR 950 : AIR 1970 Guj 22; *Stoneware Pipe & SFM Co v State,* AIR 1972 Raj 83.

2613. *Rajpal v Harswaroop,* AIR 2011 Del 203 : LNIND 2011 DEL 663.

2614. *Technicians Studio Pvt Ltd v Leela Ghosh,*(1977) 4 SCC 324, para 5; AIR 1977 SC 2425.

2615. *Ram Gopal Reddy v Additional Custodian, Evacuee Property,* [1960] 3 SCR 214 : AIR 1966 SC 1438 : [1966] 2 SCJ 782.

2616. *Delhi Motor Company v UA Basrurkar,* AIR 1968 SC 794, para 6 : [1968] 2 SCR 720 : [1968] 2 SCJ 614 : [1968] 2 SCA 22.

2617. *Rajpal v Harswaroop,* AIR 2011 Del 203; *Kuchwar Lime Stone Co v Secretary of State,* (1936) ILR 15 Pat 460 : 163 IC 507 : AIR 1936 Pat 372; *Garaj Narain v Babulal,* AIR 1975 Pat 58; *B Sitarama Rao v Bibhisana Pradhan,* AIR 1978 Ori 222.

2618. *S N Banerji v Kuchwar Lime & Stone Co Ltd,* (1941) ILR 21 Pat 24 : (1942) All LJ 149 : 44 Bom LR 324 : 46 Cal WN 374 : (1942) 1 Mad LJ 1 : 197 IC 399 : AIR 1941 PC 128; *Maung Ba v Maung Kywe,* (1928) ILR 6 Rang 125 : 110 IC 735 : AIR 1928 Rang 124; *Osman Gazi v Hemanta Kumar,* (1969) 74 Cal WN 355.

2619. *Ram Gopal v Custodian,* [1966] 2 SCR 214 : AIR 1966 SC 1438 : [1966] 2 SCJ 782.

2620. *M Sankar Nadar v Deva Krishnan,* 2017 (1) CTC 561 : 2017-2-LW 434 : (2017) 3 MLJ 778; *Rampratap Kayan v Natural Petroleum Co Ltd,* (1950) ILR 2 Cal 443 : 54 Cal WN 58 : AIR 1950 Cal 23.

contract of sale in his favour coupled with the actual delivery of possession of the suit property can use it as a protective shield against the transferor or any person claiming under him.[2621]

Where suit for possession by the owner was resisted by proposed vendor claiming benefit under section 53A and he neither pleaded nor proved performance of his part of the contract or readiness and willingness to perform, it was held that non mentioning of agreement of sale in plaint would not disentitle the owner to claim possession because burden lay on proposed vendee to plead and prove ingredients of section 53A and hence owner would be entitled to possession.[2622] In a Supreme Court case, the appellant company was the sub-lessee of the disputed premises. A suit for eviction was decreed against it, but ultimately, in revision before the high court, there was a compromise under which the appellant company became a direct tenant (instead of being a sub-lessee) for 16 years, the rent being paid on a monthly basis. No deed was executed, nor was the compromise registered. On the expiry of the period of lease, the landlord issued a notice to quit, and a suit for eviction was filed. It was held that the compromise required registration and this having not been done, it created no interest in favour of the appellant, though he could protect his eviction for 16 years, by reason of part performance. On the expiry of the said period, he had no protection at all. The subsequent possession after the passing of the compromise decree conferred no active title on the transferee, but only imposed a statutory bar on the transferor.[2623] The plaintiff brought a suit for specific performance on the footing that the unregistered document in the suit was an agreement to sell land. The plaintiff's main plea was founded on part performance. However, in the documents itself, it was stated that full consideration for the land was also delivered to the plaintiff-vendee. Thus, the passing of consideration and passing of title—the two essential incidents to constitute a sale deed—being present in the document, it was held that the document was nothing but a sale deed, but as it was unregistered, the sale failed. However, the plaintiff had been given possession of the suit land simultaneously with the execution of the sale deed, and was continuously in possession, thus the court held, that he could not be non-suited and would be entitled to a decree for permanent injunction to protect his title.[2624]

In *Kulwant Singh v Prasada Ram*,[2625] *A* in lieu of a loan of Rs 6000 from *B*, put *B* in the possession of the property, who made various developments on the property. *A* later sold the property to *C*. The attempt of dispossessing *B* by *C* led to an action by the former by way of permanent injunction. The issue was whether protection of section 53A, is available to him as this plea is available only in defence and not to base his claim in the suit on this plea. The court held that protection under section 53A can be used not for an attack but only in defence.

It is only in the case of a suit for specific performance that part performance assists a plaintiff. A transferee who has come into possession of the property in part performance of a written agreement can continue in possession, if he is ready and willing to perform his part of the agreement. In such a case, it is not necessary that the transferee should have filed a suit for specific performance within the period of limitation prescribed for a suit for specific

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2621. *Rehmat Bee v Noor Mohd*, (2010) 120 DRJ 85 (Delhi); *Sunil Kapoor v Himmat Singh*, (2010) 167 DLT 806 : (2010) 115 DRJ 229; *Dharamwati v Satbir*, (2010) 118 DRJ 352A (Delhi); *Raj pal v Harswaroop*, AIR 2011 Del 203.
2622. *Hardei v Amin Chand*, AIR 2011 HP 103 : (2011) 2 Shim LC 426.
2623. *Technicians Studio Pvt Ltd v Lila Ghosh*, AIR 1979 SC 2425 : (1979) 4 SCC 324 : [1978] 1 SCR 516.
2624. *Madan Mohan v Gawri Shankar*, AIR 1988 MP 152.
2625. *Kulwant Singh v Prasada Ram*, Regular Second Appeal No. 3892 of 2006 (O&M), decided on 15 January 2015, High Court of Punjab & Haryana, Chandigarh.

performance.[2626] According to the Bombay High Court, an application for temporary injunction in a suit seeking specific performance of agreement of sale of land cannot be treated as an application for the relief of injunction under section 53A. The high court dissented from a Madras case holding to the contrary.[2627] According to the Allahabad High Court, section 53A applies to the transferee, even if he is a plaintiff. Further, it applies not only where the transferee is physically in possession on the date of suit, but also where he has been illegally dispossessed by some person claiming under the transferor. A contrary interpretation would reduce the utility of the section to a naught, because a powerful transferor would then, defeat the section by forcibly dispossessing the transferee and compelling him to sue as a plaintiff.[2628] It is, of course, not available under the section.[2629]

A transferee in possession under section 53A of the TP Act can ask for an injunction for the protection of his rights. He can claim injunction against the transferor restraining him from interfering with his possession.[2630] The Madhya Pradesh High Court has held that a transferee-in-possession satisfying all conditions of the section must be protected by the court, whether he comes as a plaintiff or as a defendant. The court cannot tell the transferee-in-possession if he comes as a plaintiff - "go back, use your physical strength and muscle power to resist and repel the attack of the transferor and drive him to come to the court as a plaintiff and then if you are arrayed as a defendant, the court will protect you."[2631]

A person who is allowed to take or retain possession of any building or part thereof in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), shall be deemed to be the owner of that building for taxation purposes.[2632]

(21) Part Performance Not a Sword

Some Indian decisions betray a misconception of the limited scope of the section. In a Bombay case,[2633] a defendant who had taken possession under an unregistered lease, was held liable for the rent, and damages were awarded to the plaintiff. In this case, the section was used as a ground of attack, and the cardinal principle was overlooked, ie, part performance must be the act of the person seeking to avail himself of the equity, and that acts of the person sought to be charged are of no avail. In a Rangoon case,[2634] the court granted a declaration of right to the person claiming under the transferee. A Lahore case,[2635] where the

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2626. *Chaman Lal v Surinder Kumari,* AIR 1983 P&H pp 323, 324, 325, paras 8 and 9.
2627. *Venkat Dhannaji v Vishwanath,* AIR 1983 Bom 413, p 415, para 9 (dissenting from *Krishnamoorthy v Paramsiva,* AIR 1981 Mad 310, p 311, para 3).
2628. *Babu Ram v Basdeo,* AIR 1982 All 414, p 424, para 33 (following *Pandit Ram Chander v Pandit Maharaj Kunwar,* AIR 1939 All 611).
2629. *Ajab Singh v Jhabbulal,* (1949) ILR Nag 449 : AIR 1948 Nag 67.
2630. *SE Munnuswami Gounder v Erusa Gounder,* AIR 1975 Mad 25; *Bhulkoo Ghaslya v Hiriyabai,* AIR 1949 Nag 410; *Sitaram v Tularam,* AIR 1989 MP 128, p 132 holding that the decision in *Krishnamoorthy v Paramsiva,* AIR 1981 Mad 310 is a judgment per incuriam inasmuch as it does not take into account the earlier Division Bench decision in *SE Munnuswami Gounder's* case; *Krishnamoorthy's* case was followed in *UV Sharma v Puttegowd,* AIR 1986 Kant 99, p 102. See also *T Parameshwari v S S Investments Pvt Ltd,* (1993) 1 Mad LW 109 affirmed by the Supreme Court in SLP nos 17926 and 17927 of 1991 and cited in *Vasundara Bhalla v Haridas Bhagat & Co Pvt Ltd,* AIR 1995 Mad 172, p 178; *Sadashiv Chander Bhamgare v Eknath Pandharinath Nangude,* AIR 2004 Bom 378.
2631. *Chetak Construction Ltd v Om Prakash,* AIR 2003 MP 145, para 13.
2632. *CIT-1 v Goel Builders,* 2010 SCC OnLine All 1080 : 2010 Supp All LJ 245 : (2011) 331 ITR 344.
2633. *Sulleman v Patel,* (1933) 35 Bom LR 722 : 145 IC 557 : AIR 1933 Bom 381.
2634. *Mastram v Ma Ohn,* 154 IC 769 : AIR 1934 Rang 284.
2635. *Kaur Ram v Chaman Lal,* 154 IC 1088 : AIR 1934 Lah 751; *Ramchander v Maharaj Kunwar,* AIR 1939 All 611; *Etah Municipality v Moradhuj,*189 IC 819 : AIR 1940 All 340.

transferee who was in possession was said to have a right under the section, can perhaps be explained as meaning that he had a right to resist dispossession.

In this regard, the Supreme Court has laid to rest all doubts, and held that the benefit of section 53A cannot be taken aid of by the transferee-plaintiff to establish his right as owner of the property,[2636] nor can he maintain a suit against a third party to the contract for enforcement of a bar as against the transferor.[2637] It has further been held that section 53A can be used as a shield, but not as an independent claim either as plaintiff, or as a defendant.[2638] It is a "weapon of defence and not attack".[2639] In a matter with regard to an unregistered lease deed, the Supreme Court held that section 53A is meant only to bring out a bar against the enforcement of a right by a lessor in respect of the property of which the lessee had already taken possession, but does not give any right to the lessee to claim possession, or to claim any other rights on the basis of an unregistered lease.[2640] Right under this section cannot be pressed into service against a third party like state purporting to enforce the provisions of Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 against the proposed transferor of lands.[2641]

No doubt section 53A creates a right in favour of transferee to defend his possession. But if he is forcibly ejected by the transferor, he can file a suit for recovery of possession not pursuant to section 53A, but under section 6 of the Specific Relief Act, 1963.[2642] A Full Bench of Bombay High Court has held that when it is said that proposed transferee-in-possession can use section 53A as a shield, but not as a sword, it means that he can use section 53A either as a plaintiff or as a defendant to protect his possession, but he cannot use section 53A either for getting title or for getting possession if he is not actually in possession. In other words, when the transferee-in-possession comes to the court as a plaintiff seeking a decree of perpetual injunction against the transferor, he is using section 53A as a shield to protect his possession.[2643] Where the party acquired the premises in part performance of the contract, a sale of the same property in favour of third party who never had possession of the property, would not result in dispossession of the party who had entered in possession of the property in part performance of the contract. Thus a plea seeking their eviction would not be granted and they are entitled to protection under section53A.[2644]

With reference to section 53A, the High Court of Punjab and Haryana has held that the section applies only when the defendant transferee seeks to debar the transferor from enforcing his right of transfer of property. In other words, section 53A can be used only as a defence. The high court dissented from the views taken to the contrary in *Ram Chander v Maharaj Kanwar*,[2645] *Achayya v Venkata Subba Rao*[2646] and *Amrao Singh v Sanathan Dharma*

2636. *Ram Gopal Reddy v Additional Custodian Evacuee Property, Hyderabad,* AIR 1966 SC 1438.
2637. *Ambaben Waghubhai Haribhai Desai v Baldevbhai Becharsinh Vaghela,* AIR 2010 Guj 17 : (2009) 3 GLH 768 : (2010) 1 GLR 565.
2638. *Patel Natwarlal Rupji v Kondh Group Kheti Vishayak,* (1996) 7 SCC 690 : AIR 1996 SC 1088; *SP Munnuswami Gounder v Ersu Gounder,* AIR 1975 Mad 25 : (1974) 1 Mad LJ 499; *N P Tripathi v Damayanti Devi,* AIR 1988 Pat 123, p 125.
2639. *Chetak Construction Ltd v Om Prakash,* AIR 2003 MP 145, p 150 : (2003) 2 MPJR 95.
2640. *Delhi Motor Company v UA Basrurkar,* AIR 1968 SC 794 : [1968] 2 SCR 720.
2641. *State of Uttar Pradesh v District Judge,* (1997) 1 SCC 496 : AIR 1997 SC 53.
2642. *Bhalkoo Ghaslya v Hiryabai,* AIR 1949 Nag 410.
2643. *Sadashiv Chander Bhamgare v Eknath Pandharinath Nangude,* AIR 2004 Bom 378, p 384.
2644. *Gita Devi v Sobha Agarwalla,* AIR 2017 Jhar 24.
2645. *Ram Chander v Maharaj Kanwar,* AIR 1939 All 611.
2646. *Achayya v Venkata Subba Rao,* AIR 1957 AP 854.

Sabha[2647] The high court agreed with the view taken to the same effect in *Padmanabh v Appalanarasamma*[2648] and *Motilal v Jaswant Singh.*[2649]

It was clearly stipulated in an agreement to sell in favour of the objection in respect of the attached property, that possession would be delivered to the objector after the execution of the sale deed. It was not in dispute that the judgment-debtor was in actual possession of the property at the time of execution of the agreement, and continued to be in possession thereafter. It was held that in view of the provisions of sections 53A and 54 of the TP Act and O 21, rule 59 of the Code of Civil Procedure 1908, the objector could not maintain an objection petition on the basis of the rent note allegedly executed on the same date on which the agreement to sell was executed.[2650]

In *Ghanshyambhai Dhirubhai Barvaliya v Rasikbhai Dhirubhai Ambaliya,*[2651] the Gujarat High court observed

> to hold that the transferee can use the .....deed as shield only as a defendant and not as a plaintiff would defeat the very spirit of section 53A for it will be possible for an over-powering transferor to forcibly dispossess the transferee even against the covenants in the contract and compel him to go to the court as a plaintiff. If the right as a shield is available to the transferee as a defendant, there is no justification that it would be denied to the transferee even if by force of circumstances, he is compelled to approach the Court as a plaintiff to use that shield.

(22) Payment Remaining Due

A person cannot be debarred from taking advantage of section 53A, merely because he has not paid the amount in full, particularly when, by filing a suit for specific performance, he has evinced his readiness and willingness to perform the contract.[2652] A society was in possession of land leased out to it by a municipality. The society apprehended eviction by the municipality, and filed a suit seeking protection to its possession under section 53A. It was held that the society must be protected from unjust invasion by the municipality over its legitimate rights. It was seeking protection as a shield, and not as a sword.[2653]

(23) Who is Entitled to the Benefit of Part Performance

The words of the section do not warrant a conclusion that the plaintiff as such is necessarily debarred from the benefit of the section.[2654] The true position, as explained by CJ Subba Rao as he then was, in a case decided by High Court of Andhra Pradesh is:

> Whether the transferee occupies the position of a plaintiff or a defendant, he can resist the transferor's claim against the property. Conversely, whether the transferor is the plaintiff or the defendant, he cannot enforce his rights in respect of the property against the transferee. The utility of the section or the rights conferred thereunder should not be made to depend on the manoeuvring for positions in a court of law, otherwise a powerful transferor can always defeat the salutary, provisions of the section by dispossessing the transferee by force and compelling him to go to a court as plaintiff. Doubtless, the right conveyed under the section can be relied

2647. *Amrao Singh v Sanathan Dharma Sabha,* AIR 1985 P&H 195.
2648. *Padmanabh v Appalanarasamma,* AIR 1952 Ori 143.
2649. *Motilal v Jaswant Singh,* AIR 1964 Raj 11.
2650. *Juhar Mal v Kapur Chand,* AIR 1983 Raj 139.
2651. *Ghanshyambhai Dhirubhai Barvaliya v Rasikbhai Dhirubhai Ambaliya,* AIR 2017 Guj 164.
2652. *Ekudashi v Ganga,* AIR 1981 All 373.
2653. *Savarkundla Nagarpalika v Maninagar Nivas Nirmal Sahakari Mandhi Ltd,* AIR 1981 Guj 243.
2654. *Ewaz Ali v Firdous Jehan,* AIR 1944 Oudh 212; *Radhanath Swain v Madhusudan,* (1956) ILR Cut 42 : AIR 1956 Ori 58.

upon only as a shield and not as a sword but the protection is available to the transferee both as a plaintiff and as a defendant so long as he uses it as a shield.[2655]

Whether the above statement was a correct statement of the law, was kept open by the Supreme Court.[2656]

So, since the object of a suit under O 21, rule 103 of the Civil Procedure Code 1908 is to protect possession, and the capacity in which the plaintiff comes to the court is, in reality, of defence, the plaintiff can take advantage of section 53A.[2657]

An equitable right of protection of possession of the transferee in pursuance of agreement to sale cannot be availed of by third party who had no agreement with the owner. Where the transferee had already sold the land to the third party, whatever may be the nature of possession of the third party, she cannot protect the possession under this section.[2658] This section imposes a statutory bar on the transferor to seek possession of immovable property from transferee in possession and said bar cannot be imposed on the third parties who is not a party to contract/agreement to sell and consequently a suit by proposed transferee against third party to contract for enforcement of bar created by section 53 A would not be maintainable.[2659] Where the property was purchased by the bonafide transferee who had no knowledge of the agreement at the time of the execution of the sale agreement and they were bonafide purchasers for value, a person who was put in possession on the strength of the partly performed contract, but was not willing to fulfil his part of the contract would not be entitled to protect his possession as against the bonafide purchasers.[2660] Where under an agreement to sell, a bonafide transferee in good faith and for value had been put in possession of the property for sale of which permission from company law board was granted, the transferee will be entitled to protect the possession under section 53A irrespective of the fact that sale agreement was executed in his favour after the winding up proceedings.[2661]

Section 53A cannot be enforced against non-alienating coparceners who are not parties to an agreement of sale.[2662]

Section 53A operates only against a transferor, but not against a co-sharer who was not a party to the transfer, nor does it have any effect of superseding section 44 of the TP Act, and frustrate the right of the co-sharer in a family dwelling house as contemplated in section 44.[2663]

The effect of a conjoint reading of section 53A of Transfer of Property Act and section 202 of the Contract Act is that transferor who executed an agreement to sell and a power of attorney, though continued to be the legal owner of the property as per title deed yet all his powers were taken away and were vested in the person in whose favour the agreement to sell and power of attorney was executed,[2664] but, where a person claims to have been put in possession of property on the basis of power of attorney and agreement of sale alleged to be

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2655. *Achayya v Venkata Subba Rao,* AIR 1957 AP 854; *Akram MeavSecunderabad Municipal Corp,* AIR 1957 AP 859; *Maruti v Krishna,*(1966) ILR Bom 291 : 67 Bom LR 761 : AIR 1967 Bom 34.
2656. *Delhi Motor Co v Basurkar,* [1968] 2 SCR 720 : AIR 1968 SC 794 : [1968] 2 SCJ 614.
2657. *Maruti v Krishna,* AIR 1967 Bom 34. But see *Padmalabha v Appalanarasamma,* AIR 1952 Ori 143.
2658. *Mahadeva Mandi Madashetty v Rangamma,* AIR 2013 Kant 56.
2659. *Ambaben Waghubhai Haribhai Desai v Baldevbhai Becharsinh Vaghela,* AIR 2010 Guj 17 : 2009 GLH (3) 768 : (2010) 1 GLR 565.
2660. *Parmanand v Kailash Chand,* AIR 2012 Chh 64.
2661. *Reserve Bank of India, Mumbai v Krishi Export Company Corporation Ltd, Varanasi,* AIR 2012 (NOC) 151 (All).
2662. *V KrishnaiahvN Narasimhareddy,* AIR 1976 AP 395.
2663. *Salim v First Addl Civil Judge, Saharanpur,* AIR 1996 All 342 : 1997 Civil CC 118.
2664. *Surjeet Singh v Paramjeet Singh,* (2010) 120 DRJ 602 (Delhi); *Johnson Koshy v Madhu Mohan,* AIR 2012 (NOC) 240 (Cal).

executed in his favour but fails to bring in both the documents on record, he is not entitled to protection under section 53 A.[2665]

(24) Transferor, or Person Claiming under him

The person claiming under a transferor, referred to in the section, is a person who claims under a title derived subsequently to the transfer, and not anterior to it.[2666] The test for determining whether these words in section 53A apply to a Hindu reversioner is, whether the acts of the deceased widow affecting the property bind the reversioner. If her acts bind the property, they must bind the reversioner in the same manner, and to the same extent as the acts of an absolute owner would bind his heir. The reversioner may not be her heir, but is certainly her successor, and is bound by her acts which lawfully affect the property, and to the extent he is so bound, he becomes a person claiming under her.[2667]

A reversioner comes within the expression "person claiming under him" in the context of Hindu law. Though reversioners do not claim through the widow, they are the successors-in-title of the estate after the widow's death, in the sense that the extent of the estate which would devolve on him would depend on the exercise by the widow of her right of disposal for legal necessity.[2668]

Where an agreement is entered into by a guardian, which he was competent to enter into so as to bind the minor, and is for the minor's benefit, the minor is the transferor within the meaning of the section, and is debarred from obtaining possession from the transferee.[2669] A judgment creditor who has attached the property of a judgment debtor in possession of an intended purchaser is a person claiming under the transferor.[2670] A person who holds in adverse possession to the transferor is, of course, not a person claiming under him.[2671] Similarly, where a Hindu father executed a document of transfer of joint family property, the sons who were entitled to two-thirds of the property were not affected, by this section, as they do not claim under the father.[2672]

The successor in interest of a lessor is not a person "claiming" under the lessee within the meaning of section 53A.[2673]

(25) Right Expressly Provided by the Contract

The transferor may, of course, enforce a right which is expressly provided by the terms of the contract. So, if the contract were an agreement of lease not provable for want of registration, the lessee could not resist a demand for rent. If he did so, he would be disentitled to the benefit of the section as not being willing to perform his part of the contract. So also where a lessee is already put in possession of certain premises in part

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2665. *Johnson Koshy v Madhu Mohan,* AIR 2012 (NOC) 240 (Cal).
2666. *Hemraj v Rustomji,* AIR 1953 SC 503.
2667. *Balaram Jairam v Kewalram,* AIR 1940 Nag 396; *Ranchod v Zipru,* (1954) ILR Bom 194 : 55 Bom LR 890 : AIR 1954 Bom 153; *Bobba Suramma v P Chandramma,* AIR 1959 AP 568; *Karunakar Das v Mahakuren,* (1959) ILR Cut 453 : AIR 1960 Ori 170. But see *Labhu v Shiv Ram,* (1939) 41 Punj LR 56 : AIR 1939 Lah 57; *Jagad Bhusan v Panna Lal,* AIR 1941 Cal 287, on app (1943) ILR 1 Cal 56 : 206 IC 624 : AIR 1943 Cal 344.
2668. *Piru Charan Pal v Sunitnony Nemo,* AIR1973 Cal 1.
2669. *Srikakulam Subrahmanayam v Kurra Subba Rao,* 75 IA 115 : (1949) ILR Mad 141 : 50 Bom LR 646 : (1948) All LJ 226 : 52 Cal WN 706 : (1948) 2 Mad LJ 22 : AIR 1948 PC 95, reversing *Subramanayam v Subba Rao,* AIR 1944 Mad 337; *Amrao v Baburao,*(1950) ILR Nag 25 : AIR 1951 Nag 405; *Manglu Mehra v Sukru Meher,* (1950) ILR Cut 107 : AIR 1950 Ori 217.
2670. *Audinarayudu v Mangamma,* (1943) 2 Mad LJ 300 : 56 Mad LW 502 : AIR 1943 Mad 706.
2671. *Raju Roy v Kasinath Roy,* AIR 1956 Pat 308.
2672. *Nanjedevary v H V Rama Rao,* (1957) ILR Mys108 : AIR 1959 Mys 173.
2673. *Narendra Bahadur Tandon v Shankar Lal,* AIR 1980 SC 575 : (1980) 2 SCC 253.

performance of an unregistered lease, the lessor can enforce the term of the lease entitling him to re-enter, if there is default in payment of six months' rent.[2674]

Similarly, if the unregistered lease was only for a term, there would be no right to continue in possession after the expiry of the term.[2675]

(26) Proviso: Transferee for Consideration without Notice

The purpose of proviso is to defeat a claim which would otherwise, have succeeded under the main part of the section. The question of this proviso does not arise until and unless the claimant has substantiated his claim under the main part of the section. If the defendant fails to establish the requirements of section 53A, the proviso would not come into the picture at all, irrespective of whether transferee has notice of the defendant's agreement or the part performance thereof, he will be entitled to succeed.[2676]

The proviso to the section saves the right of a transferee for consideration who has no notice of the contract or its part performance.[2677] The burden of proving that he is a transferee for consideration without notice is on the transferee.[2678] This was so held prior to the enactment of section 53A. As to what constitutes notice, has been discussed in section 3 above. It has been held that possession by the earlier transferee would operate as notice; the court relied on illustration 2 to section 27(b) of the Specific Relief Act, 1877.[2679] The Specific Relief Act of 1963, re-enacts the section as section 19(b), but contains no illustrations. In a suit for declaration of title and performance, *B* was in occupation of the suit premises as a bonafide purchaser without any notice of the sale agreement with plaintiff, *A*. *A* also had no notice of the sale or fact that *B* was in occupation of the suit property by way of part performance of the contract. *B* was not shown to be ready and willing to perform his part of the contract and non readiness and willingness was pleaded in written statement. Where the sale deed in favour of *A* was valid and subsisting, *B* would not be entitled to plead the benefit of protection under the doctrine of part performance of the contract.[2680]

In a Rajasthan case, it was held that though the burden of proving that the subsequent transferee had notice of the prior contract lay on the defendant (who claimed the benefit of part performance), the subsequent transferee must be taken to have implied notice of the agreement (to sell) and of part performance, because since the defendant was admittedly in possession, the transferee would have had notice of the title of the defendant, but for wilful abstention from inquiry. In this case, the defendant was in possession as mortgagee and agreed to purchase.[2681]

(27) Agreement Otherwise Invalid

The section specifically allows the doctrine of part-performance to be applied to agreements which though required to be registered, are not registered, and to transfers not completed in the manner prescribed by any law. The section is, therefore, applicable to cases

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2674. *Muralidhar v Tara Dye*, AIR 1953 Cal 349.
2675. See *Radha Charan Das v Pranbati Dassi*, (1959)63 Cal WN 535.
2676. *S Veerabadra Naicker v S Sambanda Naicker*, AIR 2003 Mad 19, paras 29 & 31 : (2002) 3 MLJ 834; *Prova Rani v Lalit Mohini*, AIR 1960 Cal 541, para 5; *Yasodammal v Janaki Ammal*, AIR 1968 Mad 294.
2677. *Parmanand v Kailash Chand*, AIR 2012 Chh 64; *Hemraj v Rustomji*, AIR 1953 SC 503; *Dayawati v Madan Lal Verma*, AIR 2003 All 276, para 20.
2678. *Prova Rani v Lalit Mohini*, AIR 1960 Cal 541; *Mahadei Halua v Ram Krishna*, AIR 1960 Pat 354.
2679. *Mahadei Halua v Ram Krishna*, AIR 1960 Pat 354.
2680. *Vasanthi v Venugopal*, AIR 2017 SC 1569: 2017 (3) SCALE 674 : (2017) 4 SCC 723.
2681. *Asharam v Bhanwarlal*, AIR 1974 Raj 188.

where a transfer has not been completed in the manner required by law, unless such non-compliance with the procedural or formal requirements results in the transfer being void.

If the agreement is void under any other law, neither the section, nor the doctrine of equity on which it is founded will validate that which the law says is invalid. This proposition follows from the decisions of the Privy Council in *Ariff v Jadunath*[2682] and *Mian Pir Bux v Sardar Mahomed Tahar.*[2683]

The following agreements have, therefore, been held outside the scope of the doctrine: an agreement by a client to transfer land to a *mukhtiar* as remuneration for his services, which was invalid under section 28 of the Legal Practitioners Act, 1879;[2684] an agreement regarding the transfer of immovable property belonging to a company in liquidation executed by the liquidator which was not duly sanctioned by the creditors under section 212 of the Indian Companies Act, 1913;[2685] an agreement subsequent to the TP Act by a reversioner to transfer his right of succession;[2686] an agreement on behalf of a trust to which all the trustees have not joined.[2687]

The doctrine of part performance cannot be availed of in respect of a transaction which is null and void. Where possession by the transferor to the transferee was not supported by any valid transfer or by title holder, the transferee cannot claim possession of the suit property as part performance.[2688] A transfer in contravention to section 165-A of Madhya Pradesh land revenue Code being void, section 53A cannot be invoked in such a case. The purchaser may claim refund of consideration under section 65 of the Indian Contract Act, 1872.[2689] In an Andhra Pradesh case, it was held on the facts that the possession given to the petitioners in pursuance of the contract of sale without obtaining previous sanction of the *tehsildar* as required under section 471, Hyderabad Tenancy Act (the sale being by a tribal in favour of a non-tribal) was unlawful, and section 53A could not give any protection for such possession.[2690] In a case where possession was obtained under an agreement of sale in respect of service *inam* land violating section 5 of the Madras Hereditary Village Offices Act, it was held that the provisions of section 53A of the TP Act cannot be resorted to by the would-be vendee to maintain his possession.[2691] Where there was a sale of land by a member of the schedule tribe in contravention of the provisions under section 3(l)(a) of the Andhra Pradesh Scheduled Areas Land Transfer Regulation 1959, it was held that a person in possession of immovable property in contravention of section 3(l)(a) of the said Act would not be entitled to claim the benefit of section 53A of the TP Act.[2692] Similarly, where sale deeds were not valid for want of necessary permission under section 22 of the Orissa Land Reforms Act, 1960, it was held that the defendant was not entitled to ask for protection of his possession under section 53A of the TP Act, his possession being on the basis of a void transaction.[2693]

2682. *Ariff v Jadunath,* 58 IA 91 : AIR 1931 PC 79.
2683. *Mian Pir Bux v Sardar Mahomed Tahar,* 64 IA 388 : 60 Cal LJ 370 : 60 Mad LJ 865 : 36 Bom LR 1195 : (1934) All LJ 912 : 151 IC 326 : AIR 1934 PC 235.
2684. *Ranjhari v Gokul Singh,* 123 IC 408 : AIR 1930 Pat 61.
2685. *Bank of Upper India v Arif Hussain,* (1930) 28 All LJ 1157 : 128 IC 772 : AIR 1931 All 59.
2686. *Lalita Prasad v Sarnam Singh,* 149 IC 491 : AIR 1933 Pat 165.
2687. *Janakiram Ayyar v PM Nilakanta Ayyar,* (1954) 1 Mad LJ 26 : AIR 1954 Mad 537; *Karnataka Trader Hubli v Hiren Shamji Karamsey,* AIR 1987 Kant 204, p 206.
2688. *TS Bellieraj v Vinodhim Krishna Kumar,* AIR 2004 Mad 319, para 21.
2689. *Radhe Lal v Punaram,* (1974) MP LJ 761.
2690. *Meram Pocham v Agent to the State Government,* AIR 1978 AP 242; *Chetan v State of Rajasthan,* AIR 1984 Raj 295 (NOC).
2691. *Muthabathula Arjayya v Rambala Venkata Surya Gopal Krishnamurthi,* AIR 1974 AP 240.
2692. *Goddam Narsa Haddy v Collector, Adilabad,* AIR 1982 AP 1.
2693. *Sadhu Meher v Rajkumar Patel,* AIR 1994 Ori 26, p 29.

(28) Agreements Conditional on Compliance with Statute

There is, however, a distinction between an agreement void as such, and an agreement void in the absence of something which the vendor could do, and had expressly or impliedly contracted to do. Where a vendor agrees to sell his share of property including *sir* land, there is an implied term in the contract that he will apply for sanction to the revenue authorities necessary for such transfers, and the court will direct him to do so.[2694]

It cannot be said that such an agreement is void because no sanction has been obtained.[2695]

It has been held that the equity is not available in the case of agreements by a municipal body without complying with the requisite formalities prescribed by the statute incorporating such body.[2696] This appears to be correct as an agreement made without complying with such formalities is not a contract at all. In some cases, however, such an "agreement" can give rise to a promissory estoppel, or an equity similar to that in *Ramsden v Dyson*.[2697]

A defence under section 53A involves a question of fact, and its foundation ought to be laid in the pleadings as well as in the evidence. The defence cannot be raised for the first time in second appeal.[2698]

In a Calcutta case, it was held that if all the ingredient facts required to support the defence in part performance are stated in the written statement, the defendant will be entitled to raise such a defence even though the defence is not mentioned in the written statement.[2699]

(29) Plea of Part Performance

The plea under section 53A, being a mixed question of law and fact, cannot be raised for the first time in second appeal by the respondent.[2700] In absence of a contract in writing, a party cannot be allowed to raise a plea of part performance.[2701]

(30) Equity in *Walsh v Lonsdale*

The equity in *Walsh v Lonsdale*[2702] may be stated thus: Where (in a case where a lease not under seal is void at law) *A* agrees to let land to *B* on lease, and *B* goes into possession, and the agreement is one of which specific performance would be granted, *A* and *B* have the same legal rights as between themselves and are subject to the same legal liabilities, as if a lease under the seal had been granted on terms of the agreement. Hence, the landlord has the same power of distress as he would have had if a lease under seal had been granted, and the tenant can only be evicted if he has committed such a breach of covenant as would (if a lease had been granted) have entitled the landlord to re-enter. The equity depends not so much on

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2694. *Motilal v Nanhelal,* (1980) ILR 58 Cal 692 : 57 IA 333 : AIR 1930 PC 287; *Chandnee Widya Vati Madden v CL Katial,* [1964] 2 SCR 495 : AIR 1964 SC 978.
2695. *Nathulal v Phoolchand,* [1970] 2 SCR 854 : AIR 1970 SC 546 : (1969) 3 SCC 120; *Rajendra Nath v Gour Gopal,* (1971) 75 Cal WN 106 : AIR 1970 Cal 163; *Ermma v Parwatamma,* AIR 1972 Mys 121.
2696. *Akram Mea v Secundrabad Municipal Corp,* AIR 1957 AP 859; *Sitaram v Corporation of Calcutta,* AIR 1956 Cal 18; *Jitendra Nath v Baduria Municipality,* AIR 1967 Cal 423.
2697. See *Collector of Bombay v Municipal Corporation;* [1952] SCR 43 : AIR 1951 SC 469 : [1951] SCJ 752; *UOI v Indo-Afghan Agencies,* [1968] 2 SCR 366 : AIR 1968 SC 718.
2698. *St Francis Xavier's Church v Varalakshmi Ammal,* (1976) 1 Mad LJ 230.
2699. *Ambika Pada Chowdhury v Radha Rani,* 83 Cal WN 527.
2700. *Hiralal Agarwala v Bhagirathi Gore,* AIR 1975 Cal 445.
2701. *Kalawati Tripathi v Damyanti Devi,* AIR 1993 Pat 1, p 11.
2702. *Walsh v Lonsdale,* [1882] 21 Ch D 9.

part performance as on the fact that there is a valid contract between the parties still capable of specific performance, and is an instance of the rule that equity regards as done what ought to have been done.

As has been noted, the Privy Council have held that no equitable rule could override the express provisions of TP Act or the Registration Act, 1908 regarding writing or registration.[2703] The enactment of this section has only altered that position by creating the limited right conferred under the section, and it is settled law that no other equitable right can supersede the provisions referring to writing or registration.[2704] It follows, therefore, that there is no scope in India for applying the equity of *Walsh v Lonsdale,* except in the limited class of cases where an interest in land can be created without registration, eg a lease for less than one year, or a sale for less than ₹ 100. In such a case, if the defendant were in possession, he would not require protection for he would be the owner of the interest; and if he were not, his remedy would be a suit for possession.

The decisions of the Privy Council, referred to above, had the effect of overruling a number of decisions where the equity in *Walsh v Lonsdale* had been applied. In those decisions, the equity had been applied to agreement of lease,[2705] exchange,[2706] mortgage,[2707] sale,[2708] or release,[2709] where the agreements were not registered. In several of these cases it was recognised that the equity was not available after a suit for specific performance has become time-barred,[2710] or has been dismissed,[2711] or after the execution of a decree for specific performance has become time-barred.[2712] Although equity confers no title,[2713] it confers an interest which is attachable and saleable.[2714]

2703. *Ariff v Jadunath,* 58 IA 91 : 131 IC 762 : AIR 1931 PC 79; *Mian Pir Bux v Sardar Mahomed Tahar,* 61 IA 388 : 60 Cal LJ 370 : 67 Mad LJ 865 : 36 Bom LR 1195 : (1934) All LJ 912 : 151 IC 326 : AIR 1934 PC 235.
2704. *Chaliagulla Ramachandrayya v Boppana Sabyanarayana,* AIR 1964 SC 877 : [1964] 1 SCJ 109.
2705. *Jogendra Krishna v Kurpal Harsih,* (1922) ILR 49 Cal 345 : 68 IC 993 : AIR 1923 Cal 63; *GanjendravAshraff,* (1923) 27 Cal WN 159 : 69 IC 707 : AIR 1923 Cal 130; *Chan E Maung v Ah Til,* 84 IC 396 : AIR 1925 Rang 118; *Peari Dai v Naimish Chandra,* (1926) ILR 5 Pat 40 : 90 IC 822 : AIR 1926 Pat 184; *Kanti Chandraw v Brojendra Mohan,* (1929) 49 Cal LJ 12 : 116 IC 630 : AIR 1929 Cal 186; *Karamath Khan v Latchmi Atchi,* 61 IC 675; *Akbar Fakir v Initial Sayal,* 29 IC 707; *Singheeram v Bhagbat,* (1910) 11 Cal LJ 543 : 6 IC 374; *Bipin Behary v Tincowry,*(1911) 13 Cal LJ 271 : 9 IC 374; *Secretary of State v Forbes,* (1912) 16 Cal LJ 217 : 17 IC 180; *Bibi Jawahir v Chatterput Singh,* (1905) 2 Cal LJ 343.
2706. *Hari Pada v Nirod Krishna,* (1921) 33 Cal LJ 437 : 64 IC 687 : AIR 1921 Cal 383; *Meher Ali Khan v Aratunnessa,* (1921) 25 Cal WN 905 : 67 IC 167 : AIR 1921 Cal 383.
2707. *Maung Tun Ya v Maung Aung,* (1924) ILR 2 Rang 313 : 84 IC 1023 : AIR 1925 Rang 1; *Po Tok Maung v Ma Le War,* (1924) 3 Bur LJ 238 : 84 IC 468 : AIR 1925 Rang 102.
2708. *Shyam Kishore v Umesh Chandra,* (1920) 24 Cal WN 463 : 31 Cal LJ 75 : 51 IC 154; *Hemeshwar v Pal Chandra,* AIR 1928 Cal 754; *Maung Myat Tha Zan v Ma Dun,* (1924) ILR 2 Rang 285 : 81 IC 857 : AIR 1924 Rang 214; *Khankala Kunta v Mandlem Giraviah,* (1926) 50 Mad LJ 669 : 96 IC 290 : AIR 1926 Mad 757; *Akli v Daha,* (1928) ILR 7 Pat 95 : 105 IC 63 : AIR 1928 AP 44.
2709. *Khogendra v Sonaban,* (1915) 20 Cal WN 140 : 31 IC 987.
2710. See *Kalipada v Fort Gloster Jute Manufacturing Co,* (1927) 31 Cal WN 348 : 100 IC 866 : AIR 1927 Cal 365; *Mahim Chandra v Esahak,* 105 IC 860 : AIR 1927 Cal 954.
2711. *Lalchand v Lakshman,* (1904) ILR 28 Bom 466.
2712. *Pitambair Gain v Ram Charan,* (1924) 28 Cal WN 157 : 76 IC 365 : AIR 1924 Cal 483. See, however, *Mehar Ali Khan v Aratunessa,* (1921) 25 Cal WN 905 : 67 IC 167 : AIR 1921 Cal 383; *Maung Po Kywe v Maung Po Thin,* (1929) ILR 7 Rang 288 : 119 IC 744 : AIR 1929 Rang 251; *Shafikul Huq v Krishna Gobinda,* (1919) 23 Cal WN 284 : 47 IC 428; *Shyam Kishore v Umesh Chandra,* (1920) 24 Cal WN 463 : 31 Cal LJ 75 : 51 IC 154.
2713. *Kalipada v Fort Gloster Jute Manufacturing Co,* (1927) 31 Cal WN 348 : 100 IC 866 : AIR 1927 Cal 365.
2714. *Juan Chandra v Rajani Kanta Pal,* (1918) 22 Cal WN 22 : 41 IC 850.

Fiduciary capacity of vendor

In a Bombay case,[2715] CJ Scott said that if a vendor who has contracted to sell immovable property puts the prospective vendee in possession, and then seeks to eject the vendee who is willing to complete the purchase, he is repudiating his fiduciary obligation, and the court will not grant him the relief he seeks. This is not a correct statement of the law as explained in *Mian Pir Bux v Sardar Mahomed Tahar,*[2716] for it treats a contract of sale as a declaration of trust, even though under section 5 of the Indian Trusts Act, 1882, such a declaration must be registered. The same equity was, however, applied by CJ Macleod in *Venkatesh v Malappa,*[2717] and in a number of decisions of the Rangoon High Court.[2718] The true position was explained by CJ Page in *Official Assignee v ME Moola & Sons Ltd,*[2719] which was affirmed by the Privy Council,[2720] and several decisions of Rangoon High Court were expressly overruled by a Full Bench of that high court in *Ma Kyi v Ma Thon.*[2721] This position has been reaffirmed by the Supreme Court in *Chaliagulla Ramaschandrayya v Boppna Satyanarayana,*[2722] where the court held that the only equity which prevailed against the statutory provisions regarding writing, registration, etc was the right enacted in section 53A.

In some cases, however, the prospective transferee can invoke the equity of *Ramsden v Dyson,* or the doctrine of promissory estoppel even in cases where he cannot invoke section 53A.

Ground of Part Performance of Agreement to Sale

In a case where heirs inherited suit property after demise of their father but did not execute any agreement to sale in respect of their shares in the suit property, agreement executed in favour of defendant by one of the heirs which was unregistered and no witness was present to prove it has not right of possession over the suit land. Defendant would not be entitled to benefit of section 53A.[2723]

Section 53A and *res judicata*

The plea of res judicata would be available in case of an attempt to protect the possession acquired under the doctrine of part performance. Where in spite of having the right to retain the possession of the property under the benefit of section 53A, the predecessor of the

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2715. *Bapu Appaji v Kashinath Sadoba,* (1917) ILR 41 Bom 438 : 38 IC 103; *Laxaman v Raoji,* (1923) 25 Bom LR 1027 : 77 IC 305 : AIR 1924 Bom 150 doubting *Lalchand v Lakshman,* (1904) ILR 28 Bom 466; *Gangaram v Laxman,* (1916) ILR 40 Bom 498 : 37 IC 360; *Laxman v Bhagwan Singh,* (1921) ILR 45 Bom 434 : 60 IC 581 : AIR 1921 Bom 409.

2716. *Mian Pir Bux v Sardar Mahomed Tahar,*61 IA 388 : 60 Cal LJ 370 : 67 Mad LJ 865 : 36 Bom LR 1195 : (1934) All LJ 912 : 151 IC 326 : AIR 1934 PC 235; *Namtulla v Safiabu,* (1935) 37 Bom LR 82 : 156 IC 779 : AIR 1935 Bom 208; *Muthuswami v Loganatha,* AIR 1935 Mad 404.

2717. *Venkatesh v Malappa,* (1922) ILR 46 Bom 722 : 66 IC 868 : AIR 1922 Bom 9; *Dada v Bahiru,* (1927) 29 Bom LR 307 : 109 IC 533 : AIR 1928 Bom 150.

2718. *Maung Shwe Hmon v Maung Tha Byaw,* 72 IC 6 : AIR 1923 Rang 125; *Ma Pyone v Mau,* 77 IC 877 : AIR 1924 Rang 89; *Ma Myat Tha Zan v Ma Dun,*(1924) ILR 2 Rang 285 : 81 IC 857 : AIR 1924 Rang 214; *Maung Tun Ya v Maung Aung,* (1924) ILR 2 Rang 313 : 84 IC 1023 : AIR 1925 Rang 1; *Ma Ma E v Maung Tun,*(1924) ILR 2 Rang 479 : 84 IC 517 : AIR 1925 Rang 119; *Maung Ok Kyi v Ma Pu,* (1926) ILR 4 Rang 368 : 99 IC 519 : AIR 1927 Rang 33; *CAMKR Chettiar v Ma Kyaw,* (1928) ILR 6 Rang 270 : 110 IC 616 : AIR 1928 Rang 321; *Maung Po Sin v Ma Nyein,* (1928) ILR 6 Rang 276 : 110 IC 610 : AIR 1928 Rang 182.

2719. *Official Assignee v ME Moola & Sons Ltd,* (1934) ILR 12 Rang 589 : 154 IC 9 : AIR 1935 Rang 84.

2720. *Moola Sons Ltd v Official Assignee, Rangoon,* 63 IA 340 : (1936) All LJ 832 : 38 Bom LR 1011 : 40 Cal WN 1253 : 71 Mad LJ 40 : 163 IC 418 : AIR 1936 PC 230.

2721. *Ma KyivMa Thon,*(1935) ILR 13 Rang 274 : 157 IC 565 : AIR 1935 Rang 230.

2722. *Chaliagulla Ramaschandrayya v Boppna Satyanarayana,* AIR 1964 SC 877 : [1964] 1 SCJ 109 : 1964 (1) AnWR 46 : (1964) 1 MLJ 46 : [1964] 3 SCR 985.

2723. *Venetta Kharsyntiew v Tushar Nath Bhattacharjee,* AIR 2014 (NOC) 590 (Meg).

transferee did not take the plea of part performance in an earlier suit which can lead to the presumption that he was not willing to fulfil his part of the contract, and consequently a decree for recovery of possession of the property was made as against him in an earlier proceedings that became final against him as also against person claiming under such transferee, the proceedings filed by the successor of the transferee for specific performance of the contract of the same agreement would be barred by constructive res judicata.[2724]

2724. *Shantaben v Hasmukhbhai Bhailalbhai Patel,* AIR 2013 Guj 193 : LNIND 2012 GUJ 173 : 2012 (2) Guj LR 1719.

CHAPTER 3

Of Sales of Immovable Property

Sections 54–57, Transfer of Property Act, 1882

54. Sale defined.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.—[1]Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

[2]In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.—A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

Sale

The section deals with three subjects:

I. Definition of sale.

II. Mode of transfer by sale.

III. Contract for sale.

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I—Definition of Sale

(1) Definition

The definition indicates that in order to constitute a sale, there must be transfer of ownership from one person to another, i.e., all rights and interests in the properties which are possessed by that person are transferred by him with his free consent[3] to another person. The transferor cannot retain any part of his interest or right in that property, or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promise" indicate that actual payment of the whole of the price at the time of the execution of sale deed is not a sine qua non to the completion of the sale. Even if the whole price is not paid but the document is executed and thereafter registered, if the property is of the value of more than ₹ 100, the sale would be complete.[4] Therefore, a sale simpliciter is when a piece of immovable property is transferred by way of a sale with all advantages and/or disadvantages on "as is where is" basis and so any assurance of the development of the property amounts to be a "service" under the Consumer Protection Act.[5] In a lease, there is a partial transfer or demise and the rights left in the transferor are called the reversion.[6] Therefore, where a document was presented for registration and the issue was whether the document in question, was a partial transfer and accordingly, a lease, or whether it involved any outright sale therein, it was held that it was a lease deed was executed by the lessor in favour of the co-operative societies and

3. *Iqbal Singh v State of Haryana,* (2011) 3 RCR (Civil) 365. *Surinder Pal v Rainbow Promoters Pvt Ltd,* (2011) 2 RCR (Civil) 762 : (2011) 99 AIC 583; *Ratab Bai v Basanti Bai* AIR 2008 (NOC) 1172 (MP).
4. *Vidhyadhar v Manikrao,* (1999) 3 SCC 573, p 590 : AIR 1999 SC 1441
5. *Narne Construction Pvt Ltd v UOI,* (2012) 5 SCC 359 : LNIND 2012 SC 313 : AIR 2012 SC 2369.
6. See note "Demise" under section 105.

its members.[7] In a mortgage, there is a transfer of an interest to the extent stated in section 58 below. A sale is, however, distinguishable from a hire-purchase agreement. If the transferee has eventually to pay the entire purchase price, it may be a circumstance indicating that the transaction was meant to be a sale. On the other hand, if the transferee is given a right to terminate the agreement, that may be a circumstance indicating that the transaction is a hire-purchase agreement.[8] If the transfer is in the nature of a security for money then even though it is described as a sale it would not be a sale but a mortgage.[9]

An outright sale is distinguishable from a sale with an option of reconveyance, which must be evidenced by the sale deed. If the sale deed is totally silent with respect to an option/agreement of reconveyance, the transfer would be an outright sale and not a sale with an option of reconveyance.[10] Where the reconveyance clause was inserted in an unusual manner at foot of deed above signatures but interlineations were neither signed nor attested by appellant vendor at the time of execution but were made after execution and before registration. As this reconveyance clause was inserted without consent and knowledge of respondent buyer at time of registration when he put his thumb impression, it was held that such additions are not binding as such insertion had been made to convert the absolute sale deed into a conditional sale deed.[11] An agreement for sale and purchase simpliciter is a reciprocal arrangement imposing obligations and benefits on both parties, and is enforceable at the instance of either. However, when an agreement provides that the right to obtain a sale is subject to the fulfilment of certain conditions by the purchaser, the agreement would in effect be an option to purchase, as the right to purchase would only accrue upon the voluntary performance of the conditions specified by the owner. The vendor cannot compel the performance of the conditions by the purchaser, and then ask for the contract to be specifically performed.[12]

The essential elements of a sale are:

(1) the parties;

(2) the subject-matter;

(3) the transfer or conveyance (discussed under section 55);

(4) the price or consideration.

(2) Parties to Sale

The parties are the seller and the buyer.

The seller must be a person competent to transfer.[13] He must be competent to contract, and he must have title to the property or authority to transfer it, if it is not his own.

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7. As per section 54 and section 105 of the Transfer of Property Act, see *Residents Welfare Association, Noida v State of UP,* (2009) 14 SCC 716 : AIR 2009 SC (Supp) 2193 : 2009 (6)SCALE 94 : LNIND 2009 SC 858.
8. *Central Finance & Housing Co v British Transport Co,* (1953) All LJ 656 : AIR 1954 All 195.
9. *Ramlal v Phagua,* (2006) 1 SCC 168 : AIR 2006 SC 623; *Chennamal v Maniamalayalam,* AIR 2005 SC 4397 : (2005) 13 SCC 71; *Umabai v Neelakanth D Chavan,* (2005) 6 SCC 243 : (2005) 4 JT 292; *Shanti Devi v Nand Lal,* AIR 2005 Raj 218 : RLW 2005 (2) Raj 1249; *Abdul Sami Qureshi v Sardar Kuldeep Singh,* AIR 2008 (NOC) 840 (All); *Tulsi v Chandrika P Prasad,* AIR 2006 SC 3359 : (2006) 8 SCC 322; *Bhagwan Devi v Beni Bai,* AIR 2006 All 251 : (2006) 2 RD 164; *Jankiraman v State,* (2006) 1 SCC 697 : AIR 2006 SC 1106.
10. *Vitthal Maharn Patil v Fakira Bhavsing Patil* AIR 2011 (NOC) Bom 292.
11. *D R Rathna Murthy v Ramappa,* (2011) 1 SCC 158 : 2010 (10) SCALE 625 : (2011) 4 MLJ 548 (SC) : 2011 MPLJ 507 (SC).
12. *V Pechimuthu v Gowrammal,* (2001) 7 SCC 617, p 626 : AIR 2001 SC 2446.
13. *Ramdas v Sitabai,* JT 2009 (8) SC 224 : LNIND 2009 SC 1367 : 2009 (8)SCALE 654 : 2009 (5) Bom CR 290.

A purchaser purchasing the property from the seller who claimed to be the owner on the basis of the Will of the original owner claiming to be his son, has a duty to verify the documents relating to and facts of parentage of the seller. Failure to do so would disentitle him to claim the title of a bonafide purchaser without notice of the defect in title. In *Jagadambai v Suresh Kumar*,[14] one *S*, sought the property claiming that he was the son of the deceased owner, a claim that his widow successfully refuted. Thus a sale executed by this *S* of the property in favour of the purchaser came in question. The purchaser was not permitted to take the label of a bonafide purchaser to protect his possession as the law imposed a duty upon him to ascertain the competency of the seller to alienate the property that he failed to do. A sale of property in excess of the share and of a portion belonging to another co-owner on the basis of unsubstantiated and unproven claim of oral relinquishment would be invalid and illegal.[15] A sale deed executed by any other person in presence of the owner would not be valid.[16] Similarly, the guardian of the property of a minor is empowered to sell it with the permission of the court, and without such permission the sale would be invalid.[17] In *Sachida Nand Sharma v State of Bihar*,[18] the property belonged to A but was sold four years after his disappearance by his brother as the guardian of the minor son during life time of the natural guardian, i.e., the mother. The mother was of sound mind and there was no evidence that the sale was for the benefit of the minor, it was held that the sale would be void as having been executed by a person who had no right or title to the property.

In case a power of Attorney executed by the owner empowers the holder to transfer property, the term transfer would include all kinds of transfers including sale and thus the power of attorney holder would be competent and entitled to sell the property.[19] The fixing of different rates of stamp duty when a Power of Attorney is executed in favour of blood relative as against in favour of outsider as agent is not unconstitutional and is to curb tendency of transferring immovable properties through Power of Attorney and inappropriate documentation and levy of stamp duty on such ostensible documents, whose real intention is to transfer immovable property.[20]

In *Aqeel Ahmad v Mohd Moin*,[21] a Muslim lady, executed a Will of her property expressly revoking the earlier two Wills in which she had dedicated her property to Allah giving reasons for the same, and through this last Will she declared that after her death, the property would go solely to the beneficiary, and upon the death of the beneficiary, her son in the capacity of her heir would be the owner. In a challenge to the validity of the sale executed by the son, it was held that the sale executed by such son would be valid and the title in the property would be validly transferred in favour of the transferee. Similarly, in *Husna Bano v Munni Bano*,[22] it was held that when a person is the beneficiary under the Will, and he conveys property after the death of the testator, in absence of any provision in the Will that the property should be held back to pay out the debts, the conveyance of property by the

14. *Jagadambai v Suresh Kumar*, AIR 2017 Mad 224 : LNIND 2017 MAD 913.
15. *Baldev Raj Sharma v Kanta Devi*, AIR 2017 P&H 119.
16. *Anu Dutta v Lolit Kalita* AIR 2013 Gau 178.
17. See *Church of Christ Charitable Trust & Educational Charitable Trust v Ponniamman Educational Trust*, (2012) 8 SCC 706 : LNIND 2012 SC 381 : AIR 2012 SC 3912 : 2012 (6) JT 149; *Sarup Chand v Surjit Kaur*, AIR 2002 P&H 54 : LNIND 2001 PNH 122.
18. *Sachida Nand Sharma v State of Bihar*, AIR 2013 Pat 89 : LNIND 2013 PAT 595.
19. *A Bhagyamma v Bangalore Development Authority, Bangalore*, AIR 2010 Kant 63 : 2009 (4) Kant LJ 509 : LNIND 2009 KANT 90.
20. *State of MP v Rakesh Kohli*, (2012) 6 SCC 312 : AIR 2012 SC 2351 : LNIND 2012 SC 326 : 2012 (5) SCALE 467.
21. *Aqeel Ahmad v Mohd Moin* AIR 2014 (NOC) 303 (All) : 2014 (1) ALJ 719 : 2014 (1) RCR (Rent) 298.
22. *Husna Bano v Munni Bano*, AIR 2013 Cal 111 : LNIND 2013 CAL 121 : 2013 (3) ICC 510.

legatee or his constituted attorney is proper. Where a woman inherits the property of her husband the fact that she had converted to Christianity would not be material due to protection available under the Caste Disabilities Removal Act, 1850, and she would be competent to transfer the property through sale having right, and title to the property.[23] On the other hand, a person purchasing the entire property despite being fully aware that the transferor was the owner of only half portion of the property, cannot later claim to be a bonafide purchaser without notice and his claim of absolute title over the entire property would be rejected.[24] Similarly, a person who is not the sole owner of the property, cannot claim the complete sale proceeds and would be entitled to only a portion of it.[25] The change in the plaint for a relief of declaration of title must be allowed along with the original prayer of cancellation of lease deeds if it doesn't change the basic nature of the suit.[26]

The buyer may be any person who is not disqualified to be a transferee under section 6(h)(3). A duly executed transfer by way of sale to a minor who had paid the consideration is valid.[27] A sale deed executed when vendor was a minor is not per se void, but becomes voidable as soon as the option is exercised by the minor through the guardian.[28] A sale executed after getting a general power of attorney and express authorization to sell would be valid,[29] but not in absence of such permission.[30] Where a person *A* sold his property to *B*, who undertook to discharge his debts, but failed to do so, it was held that his mere failure to discharge the debts did not make the transaction a sham one. This was more so, because—

(i) possession had already been delivered to the vendee;

(ii) there was mutation of names in the municipal records;

(iii) stamp for the sale deed stood only in vendee's name; and

(iv) some amount in cash was also paid by the vendees as part of consideration making sale deed to be real as fully supported by consideration.[31]

Even if the acceptance of the papers and the possession is by a person other than the transferee mentioned in the document, though with an endorsement, the sale would not be vitiated on this account. In *Jagtar Singh v State of Punjab*,[32] the recitals in agreement and sale deed showed that the transferee was the state government. The land was recorded in favour of the ownership of state government c/o Baba Farid University of Health Sciences and acceptance of the sale deed was by the Vice Chancellor of University. The sale was held as valid and in favour of state government as a transferee.

With regard to persons under disability like *pardanashin* or illiterate lady, the court must be satisfied that the deed had been explained to and understood by the party, under disability, either before execution or after it under circumstances showing that the deed has been executed with full knowledge and comprehension. Mere execution by such a person,

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23. *K Sivanandam v Maragathammal*, AIR 2013 Mad 30 : 2012 (3) Mad LW 674 : LNIND 2012 MAD 1767.
24. *V Ethiraj v S Sridevi*, AIR 2014 Kant 58 : LNIND 2013 KANT 370 : 2014 (1) Kant LJ 273.
25. *Harminder Khullar v Swaran Kant Juneja*, AIR 2014 (NOC) 6 (Delhi) : LNIND 2013 DEL 1287 : 202 (2013) DLT 222.
26. *Abdul Rehman v Mohd Ruldu*, (2012) 11 SCC 341 : LNIND 2012 SC 597 : 2012 (9) SCALE 582.
27. *Ulfat Rai v Gauri Shankar*, (1911) ILR 33 All 657 : 11 IC 20; *Das v Dhania*, (1916) ILR 38 All 154 : 35 IC 23; *Munni Kunwar v Madan Gopal*, (1916) ILR 38 All 62 : 31 IC 792; *Munia v Perumal*, (1911) ILR 37 Mad 390 : 26 IC 195; *Subba Reddy v Guruva Reddy*, 120 IC 77 : AIR 1930 Mad 425.
28. *Dev Kishan v Ram Kishan*, AIR 2002 SC 370, para 33.
29. *A Bhagyamma v Bangalore Development Authority, Bangalore*, AIR 2010 Kant 63 : (2009) 4 Kar LJ 509.
30. *Lakhwinder Singh v Paramjit Kaur*, AIR 2004 P&H 6 : (2003) 135 PLR 837.
31. *Rajammal v Raman Kutty*, AIR 1985 Mad 222.
32. *Jagtar Singh v State of Punjab*, AIR 2012 P&H 145 : LNIND 2012 PNH 41.

although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehensions, is, in itself, no real proof of a true understanding in the mind of the executant.[33] It has to be proved that such execution is the mental act of the maker.[34]

Conveyance of property by legatee or his constituted attorney is not improper. In *Husna Bano v Munni Bano,*[35] the Calcutta High Court held that a party, as a legatee or through a power of attorney was in a position to confer an imperfect title of the property on the purchaser. The Court relied on the decision in *Hirak Roy v S K Roy* reported in 1990 (95) CWN 629, where it was held that a legatee is recognized to be having an imperfect title to an immoveable property, in the absence of an assent from the executor or executrix. Furthermore, he has the right to convey the imperfect title. If the title is imperfect, it is the problem of the taker of the property.

(3) Subject-matter of Sale

The subject-matter is transferable immovable property that is sufficiently identifiable, i.e., the identity of the property should not be subject to controversy.[36] The section is not applicable to the sale of movable property which is governed by the Indian Sale of Goods Act, 1930.[37] Immovable property has been explained in the note under that heading under section 3. Immovable property is transferable except in the cases specified in section 6.

The definition of immovable property in the General Clauses Act includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Things attached to the earth are mentioned in section 8 as incidents which pass with the land on transfer, and are defined in section 3. Land and things attached to the earth are things which can be touched and are, therefore, tangible immovable property. Thus, a field or a house is tangible immovable property. Where the owner of the land had executed a lease and the lessee had with the permission of the owner constructed a hotel on it in which ownership rights were with the lessee and not with the owner of the house, a sale deed executed by the wife of the owner after his demise would be a sale of only the land and not of the hotel. The purchaser would acquire ownership only in the land and would be entitled to lease rent as per the lease which was being realized by the predecessors.[38] A benefit to arise out of land is immovable property, and is an interest in land. However, such interests may or may not be tangible. An undivided share in land is tangible as the owner has joint physical possession.[39] However, an easement, a right of ferry, or a fishery are intangible, for these are rights exercised over the property of another, and cannot be perceived by the sense of touch. There has been a conflict of decisions as to whether an equity of redemption is tangible, or an intangible immovable property. It was held in a number of cases that the equity of redemption in a simple mortgage is tangible for the owner is in possession, but is intangible in a usufructuary mortgage because he is not in physical possession.[40] Conversely, as to the mortgagee's interest, that it was intangible in a simple

33. *Naryan Mishra v Champa Dibya,* AIR 1986 Ori 53, p 56; *Santoo v Jagannath,* AIR 2004 All 131.
34. *Labanya Singh v Tapoi Singh,* AIR 2003 Ori 155, p 156.
35. *Husna Bano v Munni Bano,* AIR 2013 Cal 111.
36. *Ram Jiwan Rai v Deoki Nandan Rai,* AIR 2005 Pat 23 : (2004) 2 BLJR 1062 : (2004) 3 PLJR 31.
37. *Sahebram Surajmal v Purushottamlal,* (1950) ILR Nag 355 : AIR 1950 Nag 89.
38. *Ashok Kumar v Chief Controller,* Revenue Authority, UP, Allahabad AIR 2011 All 142.
39. *Peare Lal v Lala,* (1911) 14 OC 161 : 11 IC 673; *Maung Hoe Kyin v Pe Hla Gyi,* 83 IC 270 : AIR 1924 Rang 267; *Nathu v Gulabchand* 144 IC 919 : AIR 1934 Nag 13.
40. *Ramasamfi v Chinnan,* (1901) ILR 24 Mad 449, p 463; *Mutsaddi Lal v Muhammad Hanif,* (1912) 10 All LJ 167 : 15 IC 853; *Rahmat Ali v Muhammad Mazhar Hussain,* (1913) 11 All LJ 407 : 19 IC 818; *Sheikh Hushmat v Sheikh Jamir,* (1919) 23 Cal WN 513 : 52 IC 558; *Ramnarain v Kula Chandra,* 49 IC 426.

mortgage, but tangible if the mortgagee is a usufructuary mortgagee.[41] That has also the opinion of CJ Sulaiman in his minority opinion in *Sohan Lal v Mohan Lal,*[42] and was described as well-founded in principle in earlier editions of this work. The judgment of the majority of the judges in *Sohan Lal v Mohan Lal* was, however, that an equity of redemption is tangible property even in the case of a usufructuary mortgage and was based, inter alia on the following passage from Salmond's *Jurisprudence*:[43]

> The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees and other encumbrances. His ownership may be reduced to a mere name rather than a reality. Yet he nonetheless remains the owner of the *thing,* for all the others own nothing more than rights over it.

The majority view has been followed by the Patna,[44] Bombay,[45] Andhra Pradesh,[46] and Rajasthan[47] High Courts.

An interest under a deed of settlement, whereby a person is granted an income in future rents and profits of certain immovable property, and also a share in the proceeds of the property in future, is "immovable property" within the meaning of the section.[48] In a case of transfer of co-operative society membership/flat, the Supreme Court, in *Prathima Chowdhury v Kalpana Mukherjee*[49] held that it is difficult to accept that parties had agreed to pass on consideration by transfer of shares, which were not even owned by transferee on date of transfer of property in question. On facts, it was held that the transfer being suspicious, is not valid. In an agreement of sale of land, the well, room, tubewell and trees standing on the land,[50] would be treated as part of it.

A statutory bar on alienation will override the provisions of the TP Act.[51]

(4) Tangible and Intangible Property

The distinction between tangible and intangible immovable property is analogous to that made in English law between a corporeal hereditament and an incorporeal hereditament. Topham explains the distinction as follows:

> A corporeal hereditament is an interest in land in possession, i.e. a present right to enjoy the possession of land. An incorporeal hereditament is a right over land in the possession of another, which may be a future right to possession, or a right to use for a special purpose land in the possession of another, e.g. a right of way.[52]

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41. *Ramasami Pattar v Chinnan Asari,* (1901) ILR 24 Mad 449; dissenting from *Subramaniam v Perumal,* (1895) ILR 18 Mad 454; *Mutsaddi Lal v Muhammad Hanif,* (1908) 10 All LR 167 : 15 IC 853.
42. *Sohan Lal v Mohan Lal,* (1928) ILR 50 All 986 : 118 IC 117 : AIR 1923 All 726.
43. See the 11th Edn, p 302.
44. *Pheku Mian v Syed Ali,* (1936) ILR 15 Pat 772 : 167 IC 890; AIR 1937 Pat 178; *Puran Mahton v Bhago Mahton,* AIR 1946 Pat 81; *Jagarnath v Chhatu Sah,* (1948) ILR 27 Pat 206 : AIR 1949 Pat 504; *Suraj Prasad v Aguta Devi,* (1958) ILR 37 Pat 1577 : AIR 1959 Pat 153.
45. *Tukaram v Atmaram,* (1939) ILR Bom 71 : 40 Bom LR 1192 : 180 IC 40 : AIR 1939 Bom 31.
46. *Venkatasubbamma v Subbayya,* AIR 1964 AP 21.
47. *Bhanwarilal v Dhulilal,* (1958) ILR 8 Raj 572 : AIR 1959 Raj 218.
48. *Moolla Sons Ltd v Official Assignee, Rangoon* 63 IA 340 : (1936) All LJ 832 : 38 Bom LR 1011 : 40 Cal WN 1253 : 71 Mad LJ 40 : 163 IC 418 : AIR 1936 PC 230.
49. *Prathima Chowdhury v Kalpana Mukherjee,* AIR 2014 SC 1304.
50. *Hakim Singh v Ram Sanehi,* AIR 2001 All 231 : (2001) 1 All CJ 653. It was also observed that the room was constructed during the pendency of the case and tubewell was fixed on a trolley, which was movable and could be removed at any time and, therefore, there was no question of mentioning these facts in agreement to sale.
51. *Ram Karan v State of Rajasthan,* (2014) 8 SCC 282 : AIR 2014 SC 3070 : 2014 (8) SCALE 233 : 2014 (7) SCJ 346.
52. Topham, *New Law of Real Property,* 4th Edn, pp 12,13.

The contrast is between the estate of one who is possessed of the land, the tangible thing, and that of a man who has the mere right, the intangible thing, without possession of anything tangible.[53]

The "other intangible thing" in section 54 is intended to embrace those imponderables related to immovable property. A *patta* right is intangible property, and the sale of such a right must be effected by a registered instrument.[54] It cannot include such things as a mere licence to sell electricity.[55] A licence to enter into land, and fish is a transaction relating to *profits a pendre*, and must be registered under this section[56] if the value exceeds ₹ 100. Hence, the sale of such a right, if not effected by a registered instrument, passes no title.[57] Growing crops are, of course, excluded from the definition of immovable property by section 3; but a contract to take *tendu* leaves, *adjat* timber etc. from land is not limited to growing crops, and must be registered.[58]

(5) Mortgage Debt

The mortgage debts can no longer be transferred as actionable claims under chapter VIII of TP Act. They can only be transferred by way of sale under section 54, or by way of exchange under section 118, or by way of gift under section 123, but in all cases as immovable property, and consequently only by registered instrument.[59] However, the Privy Council has held that an unregistered transfer of a mortgage debt may be treated as a transfer of the debt dissociated from the security.[60]

The Supreme Court, in *Vanchalabhai Raghunath Ithape (D) by Lr v Shankarrao Baburao Bhilare (D) by Lrs*,[61] held that a sale with a condition of repurchase is not a lending and borrowing arrangement. No debt subsists and no right to redeem is reserved by the debtor, but only a personal right to purchase.

In the case of *Williams v Owen*,[62] a similar question arose as to whether a conveyance by the plaintiff's father to the defendant was to be considered as having been a mortgage as contented by the plaintiff, or as having been a sale, with a right of repurchase at a given date. It was held that in a mortgage the debt subsists and a right to redeem remains with the debtor, but a sale with a condition of repurchase is not a lending and borrowing arrangement; no debt subsists and no right to redeem is reserved by the debtor, but only a

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53. William and Eastwood, *Principles of the Law of Real Property*, p 79.
54. *Anthya v Gattadu*, AIR 1950 Hyd 38.
55. *Manmohan Das v Official Liquidator*, (1940) ILR All 568 : (1940) All LJ 449 : 192 IC 367 : AIR 1940 All 458.
56. *Ananda Behera v State of Orissa*, [1955] 2 SCR 919 : AIR 1956 SC 17 : [1955] SCJ 96; *State of West Bengal v Sardiya Thakurani*, AIR 1971 SC 2097.
57. *Bihar Eastern Gangetic Fishermen Co-operative Society Ltd v Sipahi Singh*, AIR 1979 SC 2149; [1978] 1 SCR 375.
58. *Mahadeo v State of Bombay*, [1959] 2 SCR 339 (Supp) : AIR 1959 SC 735 : [1959] SCJ 1021; Cf *Manoharlal v State of Madhya Pradesh*, AIR 1959 MP 120 : ILR 1958 MP 864.
59. *Perumal v Perumal*, AIR 1921 Mad 137; *Elumalai v Balakrishna*, (1921) ILR 44 Mad 965 : 66 IC 168 : AIR 1922 Mad 344; *Bank of Upper India v Fanny Skinner*, (1929) ILR 51 All 494 : 119 IC 241 : AIR 1929 All 161 : on app 62 IA 115 : 155 IC 743 : AIR 1935 PC 108; *Banarasi Das v Ramchander*, 141 IC 421 : AIR 1933 Lah 210; *Girdhar v Motilal Champalal*, (1941) ILR Nag 615 : (1940) NLJ 151 : 192 IC 556 : AIR 1941 Nag 5.
60. *Imperial Bank of India v Bengal National Bank*, 58 IA 323 : 35 Cal WN 1034 : 54 Cal LJ 117 : (1931) All LJ 804 : 61 Mad LJ 589 : 33 Bom LR 1338 : 134 IC 651 : AIR 1931 PC 245; *Fanny Skinner v Bank of Upper India*, 62 IA 115 : 55 IC 743 : AIR 1935 PC 108. See also note "Debts" under section 8.
61. *Vanchalabhai Raghunath Ithape (D) by Lr v Shankarrao Baburao Bhilare (D) by Lrs*, AIR 2013 SC 2924.
62. *Williams v Owen*, 1840 5 My & Cr 303 : English Reports 41 (Chancery) 386.

personal right to purchase. This personal right can only be enforced strictly according to the terms of the deed and at the time agreed upon.[63]

(6) Reversion

A reversion is particularly mentioned, probably because the lessor, although out of possession, is able to give symbolical possession by his lessee attorney to the transferee. However, such symbolical possession is not equivalent to physical possession and a reversion is, therefore, intangible.[64] A transfer of a reversion is a transfer of a right to future rents which is a "benefit to arise out of land" within the meaning of the phrase used in the definition of immovable property in the Registration Act, 1908.[65] Arrears of rent already accrued due are not a benefit to arise out of land, but a mere debt or chose in action, and not immovable property at all.[66]

(7) Fruits of an Action

An assignment of the fruits of an action is not illegal,[67] but such an assignment is not a sale although the suit (action) is for the possession of immovable property,[68] because, if the defendant succeeded and the suits were dismissed, there would be no property to be sold.[69] On the other hand, if the seller has a present title, the mere fact that he is out of possession will not justify the inference that the sale is a transfer of a law suit.[70]

(8) Easements

The grant of an easement is not a transfer of ownership under this section;[71] and the provisions of the TP Act have no application to the creation of an easement.[72]

(9) Exchange and Sale

Though, under section 118 (exchange), the formalities required for sale are made applicable to an exchange, that does not mean that all the requirements of section 54 must apply to an exchange.[73] Thus, a grant of land on what is called *adhlapi* tenure, i.e., a transfer of land in return for work done in clearing land and sinking a well, is not a sale;[74] and a transfer of life interest in land in discharge of a claim for maintenance is neither a sale, nor an exchange, nor a gift.[75] A transfer of land in satisfaction of a charge for maintenance has been held to be not a sale, but an exchange.[76] A transfer of land in satisfaction of a wife's claim for

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63. *Vanchalabhai Raghunath Ithape (D) by Lr v Shankarrao Baburao Bhilare (D) by Lrs,* AIR 2013 SC 2924.
64. *Bhaskar Gopal v Padman Hira,* (1916) ILR 40 Bom 313 : 33 IC 263. But see *Sibendrapada v Secretary of State,* (1907) ILR 34 Cal 207 where this point seems to have been overlooked.
65. *Mansataswami v Subbia Pillai,* (1911) ILR 34 Mad 64 : 6 IC 504.
66. *Damodar Das v Girdhari Lal,* (1905) ILR 27 All 564; *Sharp v Key,* (1841) 8 M&W 379.
67. *Subhadrayamma v Venkatapati Raju,* (1924) 47 Mad LJ 93 : 80 IC 807 : AIR 1924 PC 162.
68. *Kalyan v Desrani,* (1927) ILR 49 All 488 : 100 IC 610 : AIR 1927 All 361.
69. *Abdul Wahid Khan v Shaluka Bibi,* (1894) ILR 21 Cal 496 : 21 IA 26.
70. *Jiyao Singh v Jageshar Singh,* (1929) ILR 4 Luck 185 : 114 IC 755 : AIR 1929 Oudh 22; *Badri Prasad Misir v Bijai Nand Tewari,* (1932) ILR 54 All 905 : 139 IC 693 : AIR 1932 All 685.
71. *Bhagwan Sahai v Narsingh Sahai,* (1907) ILR 31 All 612 : 3 IC 615; *Kondayya v Veeranna,* 92 IC 672 : AIR 1926 Mad 543; *Satyanarayana v Lakshmayya,* (1929) 57 Mad LJ 46 : 115 IC 145 : AIR 1929 Mad 79.
72. *Sital Chandra v Delanney,* (1916) 20 Cal WN 1158 : 34 IC 450.
73. *Sardara Singh v Harbhajan Singh,* AIR 1974 P&H 345.
74. *Ghulam Muhammad v Tek Chand,* (1921) ILR 2 Lah 199 : 62 IC 932 : AIR 1921 Lah 82.
75. *Madan Pillai v Badrakali,* AIR 1922 Mad 311; overruling *Ariyaputhira Muthukomaraswami,* (1914) ILR 37 Mad 423 : 15 IC 343.
76. *Rajjo v Lajjo,* (1928) 26 All LJ 169.

dower;[77] or a sale deed executed by a husband in consideration of a wife's claim for *khurach pandan* (which was a personal right) valued at ₹ 14,000,[78] or a transaction by which a person agreed to file a suit to redeem a mortgage and to bear all expenses and charges in respect of such a suit, is not a sale.[79] However, where parties were to exchange properties with one of them paying an additional sum of rupees one lakh as equalisation of value, it amounts to sale, and not exchange.[80]

However, in some cases such a transaction has been held to be a sale on the ground (submitted to be erroneous) that the extinction of the dower debt is equivalent to the payment of price.[81] If the consideration for the transfer is not money only, but also forbearance to sue or to take proceedings, the transfer is not a sale.[82] A transaction in consideration of the regard for the transferee, who also agreed to maintain the transferor,[83] or a compromise affecting immovable property as an acknowledgment of an existing right, does not operate as a sale,[84] but there would be cases in which a compromise might result in a sale.[85] A decretal amount may be the price,[86] an advance made by one brother to another is a good consideration for a sale.[87]

(10) Hire Purchase

Hire purchase transaction is not sale. Stipulation authorising the owner to seize a vehicle given out on hire purchase for non-payment of an installment, is valid.[88]

(11) Sale and a General power of Attorney

A power of attorney is not a sale.[89] A sale involves transfer of all the rights in the property in favour of the transferee but a power of attorney simply authorises the grantee to do certain acts with respect to the property including if the grantor permits an authority to sell the property. It is revocable unless made irrevocable. GPA Sales or Sale Agreement or Will transfers' cannot be used to transfer immovable property. Both the descriptions are misnomers as there cannot be a sale by execution of a power of attorney nor can there be a transfer by execution of an agreement of sale and a power of attorney and will. Immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance under section 5 and 53A of TP Act. A General power of Attorney; The general Power of Attorney, Deed of Agreement, Will receipt and Affidavit do not confer title as a sale can be effected under section 54 of the Transfer of Property Act (TPA) only by a registered

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77. *Chaudhri Talib Ali v Kaniz Fatima Begam,* AIR 1927 Oudh 204; *Bashir Ahmad v Zubaida Khatun,* AIR 1926 Oudh 186; *Mahomed Hashim v Aminabi* AIR 1952 Hyd 5; *Ghulam Abbas v Razia Begam,* (1952) ILR 1 All 477 : (1950) All LJ 917 : AIR 1951 All 86.
78. *Malik Mohammad Shujaaqt v Salim Jahan,* (1949) ILR All 400 : AIR 1949 All 204.
79. *Sahadeo Singh v Kubernath,* (1953) ILR 1 All 265 : AIR 1950 All 632.
80. *John Thomas v Joseph Thomas,* AIR 2000 Ker 408 : ILR 2000 (3) Ker 517.
81. *Saiful Bibi v Abdul Aziz Khan,* (1932) ILR 54 All 22 : 133 IC 901 : (1931) All LJ 951 : AIR 1932 All 596; *Ali Hasan v Rasidan,* 124 IC 756 : AIR 1931 All 237; *Mahomed Zaki v Mannu,* (1925) 28 OC 227 : 87 IC 176 : AIR 1925 Oudh 407; *Asalat v Sambu,* (1911) 14 OC 214 : 11 IC 928; *Abbas Ali v Karim Baksh,* (1908) 13 Cal WN 160 : 4 IC 466.
82. *Zamindar of Polavaram v Maharaja of Pittapuram,* (1931) ILR 54 Mad 163 : 135 IC 17 : AIR 1931 Mad 140; *Mahima Byasddeba v Dinabandhu,* (1959) ILR Cut 250 : AIR 1960 Ori 16.
83. *Rati Ram v Main Chand,* AIR 1959 Punj 117.
84. *Krishna Tanjahi v Aba,* (1910) ILR 34 Bom 139 : 4 IC 833.
85. *Alagappa Chettyar v Chettyar Firm,* (1936) ILR 14 Rang 766 : 170 IC 434 : AIR 1934 Rang 287.
86. *Sura Reddi v Ram Sarasa,* AIR 1937 Mad 714.
87. *Ashok Chandra v Chota Nagpur Banking Corporation,* AIR 1948 Rang 294.
88. *Hameed v Jayabharat Credit and Investment Co,* AIR 1986 Ker 206.
89. *Jayanta Ghosh v State of West Bengal,* AIR 2008 (NOC) 303 (Cal).

sale deed. Where the owner of the property first executes a power of attorney in favour of the developer but revokes it subsequently, the remedy of specific relief is not lost to the developer who can still seek specific enforcement of the development agreement.[90]

(12) Price—Meaning of

The word "price" is used in its ordinary sense as meaning money only.[91] It is used in the same sense as in section 77 of the Indian Contract Act, 1872 as enacted.[92] The Supreme Court has held that though "price" is not defined in the TP Act, it is used in the same sense as in the Sale of Goods Act, 1930, and means the money consideration for the sale of goods.[93] The Supreme Court has also held that the presence of a money consideration is an essential element in a transaction of sale; if the consideration is not money, but some other valuable consideration, it may be an exchange or barter, but not a sale.[94] However, the Andhra Pradesh High Court has held a family settlement to be a consideration for execution of an agreement of sale.[95]

(13) Price of the Essence

The price is fixed by the contract antecedent to the conveyance. Price is of the essence of a contract of sale,[96] and unless the price is fixed, there is no enforceable contract, because if no price is named the law does not imply, as in the case of a sale of goods, a contract to buy at a reasonable price. If no price is paid or promised, even a registered deed does not affect a sale.[97] However, it is sufficient if the contract specifies definite means of ascertaining the price.[98] The law is stated by *Fry on Specific Performance* as follows:

> In all sales it is evident that price is an essential ingredient, and that where it is neither ascertained nor rendered ascertainable, the contract is void for incompleteness, and incapable of enforcement. It is not however necessary that the contract should in the first instance determine the price, it may either appoint a way in which it is to be determined or it may stipulate for a fair price.

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90. *Sudhir Tyagi v Subhash Tyagi,* (2011) 179 DLT 780 (Delhi). *Ashok Kumar Jaiswal v Ashim Kumar,* AIR 2014 Cal 92 : LNIND 2014 CAL 152 : 2014 (1) Cal LT 663. See also *Suraj Lamp and Industries (P) v State of Haryana,* AIR 2009 SC 3077 : 2009 (76) ALR 792 : 2010 (6) ALT11(SC) : 2010 (3) BomCR 808 : 2011(6) Kant LJ 62 : 2009 (6) MhLJ 11(SC) : 2009 MPLJ 315 (SC) : 2009 (9) SCALE 36 : (2009) 7 SCC 363 : [2009] 10 SCR 1048.
91. *Madan Pillai v Badrakali,* (1922) ILR 45 Mad 612, p 617 : 68 IC 687 : AIR 1922 Mad 311; *Bashir Ahmad v Zubaida Khatun,* (1926) ILR 1 Luck 83 : 92 IC 265 : AIR 1926 Oudh 186; *Chaudhri Talib Ali v Kaniz,* (1927) ILR 2 Luck 575 : 102 IC 142 : AIR 1927 Oudh 204; *Rajjo v Lajjo,* (1928) 26 All LJ 169 : 114 IC 43 : AIR 1928 All 204; *Abadi Begam v Mohammad Khalil,* (1930) 7 Oudh WN 1010 : AIR 1930 Oudh 481; *Subbi Reddy v K N Srinivasa Murthy,* AIR 2006 Kant 4 : (2005) 6 Kar LJ 489; *Jagir Singh v Ranjeet Singh,* AIR 2006 Raj 105 : RLW 2005 (4) Raj 2941 : (2005) 4 WLC 447; *Inder Chand v Sethi,* AIR 2006 Raj 251 : RLW 2006 (3) Raj 2248 : (2006) 4 WLC 144; *Anjum Reddy v Arjun C Thanga,* (2006) 7 SCC 756 : (2006) 8 SCALE 477; *Ramlal v Phagua,* (2006) 1 SCC 168 : AIR 2006 SC 623.
92. *Queen Empress v Appavu,* (1886) ILR 9 Mad 141; *Volkart Bros v Vettivelu,* (1888) ILR 11 Mad 459, p 467; *Kedar Nath v Emperor,* (1903) ILR 30 Cal 921; *Samaratmal v Govind,* (1901) ILR 25 Bom 696.
93. *CIT v Motor and General Stores (P) Ltd,* [1967] 3 SCR 876 : AIR 1967 SC 200 : [1968] 1 SCJ 96.
94. *State of Madras v Gannon Dunkerley and Co (Madras) Ltd,* [1959] SCR 379, pp 397–398 : AIR 1958 SC 560 : [1958] SCJ 696; *CIT v Motor & General Stores (P) Ltd,* [1967] 3 SCR 876 : AIR 1967 SC 200.
95. *Kanigolla Lakshamana Rao v Gudimetla Ratna Manikyamba,* AIR 2003 AP 241.
96. *Surinder Pal v Rainbow Promoters Pvt Ltd,* (2011) 2 RCR (Civil) 762 : (2011) 99 AIC 583; *Milnes v Grey,* (1807) 14 Ves 400; *Bombay Tramways Co v Bombay Municipal Corporation,* (1902) 4 Bom LR 384, p 404.
97. *Maung Saing v Shwe Lon,* (1909) 4 LBR 369.
98. *Gourlay v Somerset (Duke),* (1815) 19 Ves 429; *Morgan v Milman,* (1853) 3 De GM&G 29, p 37.

A contract for sale at 33 years' purchase of the net income is valid, and capable of specific enforcement.[99] The plea of absence of any sale due to sale consideration being very low is untenable, unless there is reliable evidence on record to show as to what was the market value of the land at the time of the agreement.[100] There should be direct or indirect evidence of any contemporaneous transaction on record.[101]

(14) Price how Ascertained

A clause in an agreement that the purchaser will at his own expense and cost take proper legal steps to protect and defend the properties, was held as affording sufficient and adequate consideration. The law does not require that the consideration should be immediately ascertainable in money. It is sufficient if it is ascertainable at a time when the payment is made.[102] Where the transaction is on the face of it complete, it cannot be regarded as a mere agreement on the ground that the price is unascertained at that time.[103]

The fact that there is difference between two sale deeds of the same property executed at different times does not, in itself, prove that the subsequent sale deed showing a lower price, must be collusive, and lacking in bona fides. On the contrary, the mala fide purchaser generally inflates the price.[104]

(15) Price—Payment of

The time of payment of price is not necessarily a sine qua non to the completion of the sale.[105] If the intention is that property should pass on registration, the sale is complete as soon as the deed is registered irrespective of whether the price has been paid;[106] and the purchaser is entitled to sue for possession although he has not paid the price,[107] unless the contract provides for transfer of ownership only on the payment of the price.[108] This is clear from the words of the section, "price paid or promised or part paid or part promised." However, when although the deed recited that the price was not paid, and it was not infact paid and so also possession was not delivered, it was held that the inference was irresistible

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99. *Ram Sundar Saha v Raj Kumar Sen,* (1928) ILR 55 Cal 285 : 104 IC 527 : AIR 1927 Cal 889.
100. *Hakim Singh v Ram Sanchi,* AIR 2001 All 231, para 11 : (2001) 1 All CJ 653.
101. *Kamal Shivajirao Katkar v Gajarabi Sopanrao Algude,* AIR 2001 Bom 369 : (2001) 3 Mah LR 290.
102. *Beni Madho v John,* AIR 1947 All 110.
103. *Unnao Commercial Bank v Kailash Nath,* AIR 1955 All 393.
104. *Hiralal Agarwala v Bhagirathi Gore,* AIR 1975 Cal 445.
105. *Sankarsan Behara v Commissioner, Consolidation, Odisha, Cuttack,* AIR 2018 Orissa 41 : 124 (2017) CLT 993; *Nalamathu Venkaiya v B S Neelakanta,* AIR 2005 AP 535; *Ranjana Nagpal v Devi Ram,* AIR 2002 HP 166 : (2002) 3 Shim LC 478.
106. *Vidhyadhar v Manikrao,* (1999) 3 SCC 73, para 36 : AIR 1999 SC 1441; *Ghosh v Rohini,* (1908) 13 Cal WN 692 : 4 IC 541; *Ponnaya Goundan v Muttu,* (1894) ILR 17 Mad 146; *Kashidas v Chaithru,* (1914) 19 Cal LJ 289; 23 IC 813; *Sagaji v Namdev,* (1899) ILR 23 Bom 525; *Baijnath v Paltu,* (1908) 30 AH 125; *Subbayar v Moment,* (1913) ILR 36 Mad 8 : 10 IC 546; *Shib Lal v Bhagwan,* (1888) ILR 11 All 244; *KYKM Chetty Firm v SNVR Chetty Firm,* 34 IC 125; *Puttam Singh v Jagannath,* AIR 1947 AP 1; *Balabhadra Misra v Nirmala Sundari,* (1953) ILR Cut 531 : AIR 1954 Ori 23; *Sukaloo v Pumau,* AIR 1961 MP 176 : (1960) ILR MP 614; *Michhu Kuar v Raghu Jena,* AIR 1961 Ori 19; *Sukalop v Puanu,* AIR 1961 MP 176; *G Hampamma v Kartigi Sajjivalada Kalingappa,* AIR 1990 Kant 128, p 131; *Gayatri Prasad v Board of Revenue,* (1973) All LJ 412; *Premnarayan v Kunwarji,* AIR 1993 MP 164.
107. *Krishnamma v Mali,* (1920) ILR 43 Mad 712 : 56 IC 530; *Somasundaram v Shwe Bwa,* 57 IC 948; *Chandra Shanker v Abbhai Kumar,* AIR 1952 Bom 56; *Kutcherlakota Vijaylakshmi v Radimeti Rajuratnamba,* AIR 1991 AP 50, p 53.
108. *Kaliaperumal v Rajagopal,* AIR 2009 SC 2192.

that no title passed.[109] A condition that price shall be paid in a year provided that possession was given within that time does not invalidate the sale deed.[110] If the price is not paid the seller cannot on that account set aside the conveyance.[111] He can only sue for the price;[112] and he will have a charge on the property for the unpaid purchase-money. Even if the plaintiff had paid only part of the money to the second defendant as sale consideration and the remaining amount which was shown to have been paid before the execution of the deed was, in fact, not paid, the sale deed would not, for that reason, become invalid on account of section 54 of the TP Act.[113] This is non-possessory charge, as explained in the note under section 55(4)(b), and it will not justify the seller refusing to give possession. Similarly, where for the sale of immovable property, a sum of ₹ 1500 was paid by cheque, but the cheque was dishonoured. It was held that if the transferee commits fraud, there is no valid transfer. Once it is found that the contract is without consideration—as in this case—it is void, and title did not pass.[114] Nonpayment of sale consideration does not vitiate sale provided it is promised to be paid. However, if the assertion made in the sale deed that consideration had already been paid is found to be incorrect, the transaction does not amount to sale in eyes of law.[115]

The purchaser is free to pay the entire sale consideration to the seller in advance or at the time of taking the possession and even if there is sufficient consideration to be paid at the time of the possession without executing the sale deed to enable the purchaser to enjoy the usufruct, the transaction would be valid. In absence of specific pleading to the effect, the courts should not decide the justness or fairness of agreements entered into by the parties.[116]

Therefore, though the sale deed may recite that the consideration had been paid, the parties can adduce evidence to show that the recital was not correct.[117] Section 92 of Indian Evidence 1872 Act does not bar such evidence. In that case, the purchaser agreed to pay consideration at the time of execution and registration, but failed to do so. It was held that he could tender or pay the money within a reasonable time, but before the vendor repudiates the contract sale. However, the vendor cannot be expected to wait indefinitely to enable the vendee to perform his part, and if the vendee does not make payment within a reasonable time, the vendor is at liberty to sell the property to another person. If after such repudiation the amount is tendered by the vendee, it is of no consequence.[118]

(16) Price, Challenge to Adequacy of

In *Lal Achal Ram v Raja Kazim Hussain Khan*,[119] the Privy Council laid down the principle that a stranger to a sale deed cannot dispute payment of consideration or its

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109. *Motilal Sahu v Ughra Narain Sahu*, (1950) ILR AP 288; *Ananda Chandra v Nilakantha*, AIR 1972 Ori 99.
110. *Kauleshar Prasad v Abadi*, (1915) ILR 37 All 631 : 30 IC 512.
111. *Ponnaya Goundan v Muttu*, (1894) ILR 17 Mad 146; *Sagaji v Namdev*, (1899) ILR 23 Bom 525; *Tatia v Babaji*, (1898) ILR 22 Bom 176, p 183; *Govindammal v Gopalachariar*, (1906) 16 Mad LJ 524; *Subbayar v Monien*, (1913) ILR 36 Mad 8 : 10 IC 546; *Nitai v Champaklata*, (1919) 29 Cal LJ 250 : 51 IC 104; *Bai Devmani v Ravishankar*, (1929) ILR 53 Bom 321 : 116 IC 236 : AIR 1929 Bom 147.
112. *Sagaji v Namdev*, (1899) ILR 23 Bom 525; *Velayutha v Gvindaswami*, (1907) ILR 30 Mad 524; *Bai Devmani v Ravishankar*, (1929) ILR 53 Bom 321; *Sahadeo Singh v Kubernath*, (1953) ILR 1 All 265 : AIR 1950 All 632.
113. [1999] 2 LRI 243.
114. *Ind Kaur v Tara Singh*, (1978) 80 Punj LR 41.
115. *Bhartu v Nawal*, AIR 2012 All 91 : (2012) 5 ALJ 526.
116. *Matadin Yadav v Midas Lids Pvt Ltd*, AIR 2014 (NOC) 295 (Del) : 2014 III AD (Delhi) 268 : 205 (2013) DLT 484.
117. *Bhartu v Nawal*, AIR 2012 All 91 : LNIND 2012 ALL 6 : 2012 (3) ALJ 309.
118. *Baldeo Singh v Dwarika Singh*, AIR 1978 Pat 97; *Ganesh Prasad v Deo Nandan Raut*, AIR 1985 Pat 94 : p 97.
119. *Lal Achal Ram v Raja Kazim Hussain Khan*, 32 IA 113 : (1905) ILR 27 All 271.

adequacy. This decision was later overruled by the Supreme Court, in *Vidhyadhar v Manikrao*,[120] wherein they held that a person in his capacity as a defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff. This would also include the plea that the sale deed by which the title to the property was intended to be conveyed to the plaintiff was void or fictitious or, for that matter, collusive, and not intended to be acted upon. The whole question would depend upon the pleadings of the parties, the nature of the suit, the nature of the deed, the evidence led by the parties in the suit, and other attending circumstances. Thus, a distinction has been drawn between a deed which was intended to be real or operative between the parties, and a deed which is fictitious in character, and was never designed as a genuine document to effect transfer of title. In such a situation, it would be open even to a stranger to impeach the deed as void and invalid on all possible grounds. It may be noted that Madhya Pradesh[121] and Andhra Pradesh[122] High Courts have held that it is not open to third parties to challenge consideration for a sale. It is submitted that in view of the law laid down by the Supreme Court, these two judgments should be considered *per incurium*. When sale deed is relied upon for determination of market value, the consideration mentioned in the sale deed cannot be ignored. In absence of proof for undervaluation or proof that sale was a distress sale, it is not possible to ignore sale price mentioned in sale deed.[123]

(17) Extrinsic Evidence of Payment

Notwithstanding an admission in a sale deed that the price has been paid, it is open to the vendor to prove that no consideration was infact paid.[124] Extrinsic evidence is also admissible to show that a deed which was in form a deed of sale with a receipt for the consideration, was in reality intended to operate as a deed of gift.[125] If no price was in fact paid and the transfer was a reward for past cohabitation or with the object of future cohabitation, the ostensible sale deed may amount to a gift, but would be invalid under section 6(h) of TP Act.[126] The mere fact of non-payment of consideration will not make the sale deed fictitious, although it may sometimes be evidence that it was not intended to operate.[127] A compromise in which each side admits the title of the other to a part of the property in dispute does not require a written instrument, because in such case there is no transfer of title.[128]

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120. *Vidhyadhar v Manikrao*, (1999) 3 SCC 573 : AIR 1999 SC 1441; approving the view of the Calcutta, Patna and Orissa High Courts. See *Kamini Kumar Deb v Durga Charan, Nag* AIR 1923 Cal 521 : 37 Cal LJ 122; *Saradindu Mukherjee v Kunja Kamini Roy*, AIR 1942 Cal 514 : (1942) 46 CWN 798; *Jugal Kishore Tewari v Umesh Chandra Tewari*, AIR 1973 Pat 352 : 1973 BLJR 255; *Sanatan Mohapatra v Hakim Mohammad Kazim Mohammad*, AIR 1977 Ori 194 : 44 Cut LT 606.
121. *Vijay Bahadur v Surendra Kumar*, AIR 2003 MP 117, p 127 : (2003) 1 MPJR 393 : (2003) 2 MPLJ 86.
122. *Kavitha Goud v Nookala Sudarshan Reddy*, AIR 2004 AP 326, p 342 : (2004) 4 ALD 324 : (2004) 5 ALT 293.
123. *Executive Engineer (Electrical) Karnataka Power Transmission Corporation Ltd v Asst Commissioner and Land Acquisition Officer, Gadag*, (2010) 15 SCC 60 : 2011 (1) SCALE 288.
124. *Lal Chand v Indarjit*, (1900) ILR 22 All 370 : 27 IA 93; See also *Hukumchand v Hiralal*, (1879) ILR 3 Bom 159; *Vasudeva v Narasamma*, (1882) ILR 5 Mad 6; *Lala Himmat v Llewhellen*, (1885) ILR 11 Cal 486; *Chunni Bibi v Basanti Bibi*, (1914) ILR 36 All 537 : 24 IC 661; *Lodd Govindoss v Muthiah Chetty*, (1925) 48 Mad LJ 721 : AIR 1925 Mad 660; *Irpan Ali v Jogendra*, (1932) ILR 59 Cal 1111 : 143 IC 241 : AIR 1932 Cal 708; *Pancha Sahu v Janki Mandan*, AIR 1952 Pat 263. See also note "Recital of Payment" under section 55 below.
125. *Hanif-un-nissa v Faiz-un-nissa*, 38 IA 85 : (1911) ILR 33 All 340 reversing *Faiz-un-nissa v Hanif-un-nissa*, (1905) ILR 27 All 612.
126. *Subana v Yamanappu*, (1933) 35 Bom LR 345 : 149 IC 464 : AIR 1933 Bom 209.
127. *Alamdar Husain v Moti Ram*, (1918) 16 All LJ 454 : 46 IC 382; *Muniram Bibi v Amjan Ali*, (1928) 26 All LJ 539 : 114 IC 192 : AIR 1928 All 391.
128. *Balkrishna v Rangnath*, (1950) ILR Nag 618 : AIR 1951 Nag 171.

(18) Time whether Essence of Contract

So far as the contract of immovable property is concerned, time is not the essence of the contract. Of course, this dictum of law is subject to two exceptions. The first one being that it should be stipulated in the contract itself that time is the essence of the contract. The second one is that the party considering the time to be the essence of the contract should put the other party on notice specifying that time is concerned the essence of the contract. Unless both these conditions are not complied with, the rule that time is not the essence of the contract, so far as it is concerned with the immovable property, shall prevail.[129] However, time is essence of the contract in the case of a re-conveyance, it being a concession or a privilege given to the seller to repurchase the property under the agreement.[130]

II—Mode of Transfer by Sale

(19) Mode of Transfer

There are only two modes of transfer by sale, and these are (1) registered instrument; and (2) delivery of possession.

The first overlaps the second, for a transfer may in all cases be made by a registered instrument. It is only in the case of tangible immovable property of value less than ₹ 100, that the section allows the simpler alternative of delivery of possession. In all other cases, a registered instrument is compulsory.[131] The option of a simpler alternative is allowed in the case of tangible immovable property of value less than ₹ 100, because the formality of a registered instrument is not considered necessary in view of the small value, and the patent evidence of the transfer afforded by the delivery of physical possession.[132] Sale of such property would be complete as soon as delivery of possession is proved either on the basis of an unregistered instrument of sale or otherwise.[133]

The Supreme Court while discussing Uttar Pradesh Municipality Act held that unless a statute itself provides for vesting and transfer of immovable property from one person to other by acquisition or like, the question of transfer of ownership of property in the water works from the licensee to the Board could not have taken place, even if such work had been forcibly

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129. *Sri Brahadambal Agency and Partnership Firm v Ramasamy,* AIR 2002 Mad 352, p 362; *K Ramakrishan v Siddhammal,* AIR 2002 Mad 241, p 247.
130. *Mehdi Hussain Khan v Nusrat Hasan,* AIR 2004 AP 123 : (2004) 2 ALD 45 : (2004) 1 ALT 569.
131. The Supreme Court has held that prior to merger of state of Sikkim with UOI on 26 April 1975, the *Chogyal* was the owner of the entire properties, and if he excercised his right of "eminent domain" in relation to the suit properties which were said to be belonging to his private estate, no registered deed of sale was required to be executed in his favour—*MTW Tenzing Namgyal v Motilal Lakhotia,* (2003) 5 SCC 1, p 11 : AIR 2003 SC 1448. See also *Tandonbi Devi v Kalamu Singla,* AIR 2009 (NOC) 587; *Dayal Fuel Industry v Bihar State Financial Corporation,* AIR 2009 (NOC) 592 (Pat); *Vijay Kuamr Sharma v Devesh Bihari Saxena,* AIR 2008 All 66 : (2008) 1 AWC 664 : (2008) 104 RD 191; *Munnalal v Atmaram,* AIR 2008 (NOC) 843 (MP); *Subbi Reddy v K N Srinivasa Murthy,* AIR 2006 Kant 4 : (2005) 6 Kar LJ 489; *Jagir Singh v Ranjeet Singh,* AIR 2006 Raj 105 : RLW (2005) 4 Raj 2941 : (2005) 4 WLC 447; *Inder Chand v Sethi,* AIR 2006 Raj 251 : RLW 2006 (3) Raj 2248 : (2006) 4 WLC 144; *Anjum Reddy v Arjun C Thanga,* (2006) 7 SCC 756 : (2006) 8 SCALE 477; *Ramlal v Phagua,* (2006) 1 SCC 168 : AIR 2006 SC 623.
132. *Bhaskar Gopal v Padman Hira,* (1916) ILR 40 Bom 313 : 33 IC 267; *Mohinuddin v President, Municipal Committee, Khargone,* AIR 1993 MP 5, p 7 : (1993) 38 MPLJ 333; *Raj Bahadur v Babu Lal,* AIR 2011 All 48 : (2012) 4 AWC 3595; *Ramchandra v Hari Kirtan,* AIR 2004 All 345 : (2004) 4 AWC 3473.
133. *Raj Bahadur v Babu Lal,* AIR 2011 All 48 : (2012) 4 AWC 3595.

taken over, or the possession of the same had been given to the Board voluntary by the licensee.[134]

(20) Registration

The Registration Act, 1908, does not distinguish between tangible and intangible immovable property, and makes registration optional in the case of all immovable property of value less than ₹ 100. Under the said Act, a sale of intangible immovable property can only be made by a registered instrument, whatever the value of such property may be; and a sale of tangible immovable property, though of a value less than ₹ 100, must also be effected by a registered instrument, unless it is effected by delivery of possession.

It is significant to note that section 54 comprehends the value of the property, as distinguished from the purported consideration of alienation, and, therefore, even if the property worth more than ₹ 100 is transferred for a consideration of less than ₹ 100, it cannot be done without a registered document.[135]

In terms of section 54 of the TP Act as amended by Uttar Pradesh Act 2 of 1997, a contract of sale can be made only by registered instrument. The use of expression "only" here indicates that under law, contract to sale has got to be entered into by a registered instrument.[136] Where the sale deed requires registration, title does not pass until the sale deed is registered, even though the transfer of possession as well as payment of consideration takes place before registration of the document.[137] Since sale of immovable property becomes complete and effective only when it stands registered in a written instrument, there may be issues for determination of the market value of the property where the land also has a building over it, but the owner of the land does not own the building. Both the title in the land and in the building over the land are separable and vest in two different persons. In *Ashok Kumar v Chief Controlling Revenue Authority,*[138] the owner sold the land. The land had a hotel constructed over it and the owner of the land was not the owner of this hotel. It was held that while affixing stamps, the value of the land only would be included and not that of the hotel. Further, in such a sale of land, the title with respect to the land only will pass and not in the property constructed over the land, as the owner had no title in the hotel.

Ordinarily, the sale deed which was registered first has to prevail in the matter of conveyance of title over others.[139] The title under a sale deed passes on the date of the execution of the sale deed, even if the registration of the sale deed is completed on a later date, it must relate back to the date of sale.[140] Therefore, an agreement to sell executed prior to date of attachment before judgment, but registered thereafter, would prevail over such attachment.[141] In a conveyance of land situated in one registration district, the inclusion of one yard of land in another registration district for the purpose of giving jurisdiction to the registering authority of the latter district and without any intention to convey that one yard of land, is a device to evade the registration law, and does not constitute an effective

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134. *Noorulla Ghazanfulla v Municipal Board, Aligarh* AIR 1995 SC 1058 : 1995 Supp (2) SCC 667.
135. *Davendra Singh v State of Rajasthan,* AIR 2002 Raj 66, para 8.
136. *Godhan v Ram Bilas,* AIR 1995 All 357.
137. *Cherichi v Ittianam,* AIR 2001 Ker 184, para 23 : (2001) 1 Ker LJ 247.
138. *Ashok Kumar v Chief Controlling Revenue Authority,* AIR 2011 All 142 : LNIND 2011 ALL 61.
139. *G N Devan v Habitunissa,* (1987) SCC 688 (Supp).
140. *Kameshwar Choudhary v State of Bihar,* AIR 1998 Pat 141; *Bhawanbhai Karamanbhai Bharvad v Anegyanagar Co-op Housing Society Ltd,* AIR 2003 Guj 294, p 306 : (2004) 1 GLR 506.
141. *Adinarayana v S Gafoor Sab,* AIR 2004 AP 377 : (2004) 2 ALD 736 : (2004) 2 ALT 780.

registration and, therefore, no property passes.[142] The onus to prove that fraud on law of registration has been practised is on the party who alleges it.[143]

If immovable as well as movable property is sold for a single consideration by an unregistered deed, the sale is ineffectual not only as to the immovable, but also as to the movable property. This is because the document embodies only one transaction, and there is no separate transaction concerning the movable property.[144] Where the original registered sale deed is lost, secondary evidence to prove registration, and the contents of the deed would be admissible.[145]

Under Uttar Pradesh Selling of Property (Temporary Restriction of Transfer) Act, the law requires permission to be taken by the vendor by applying to the concerned authority, but such authority shall have discretion to grant or refuse the sanction, and it is immaterial that the agreement between the parties did not contain such terms as obliging the seller to take permission.[146]

(21) Transfer by Operation of Law

Transfers by operation of law,[147] or by or in execution of a decree or order of a court within the meaning of section 2(d) are outside the scope of section 54, and need not be registered. Thus where the property is sold at a court auction, a certificate of sale issued by the court is enough as the purchaser's document of title.[148]

(22) No other Mode of Transfer

The provisions of this section as to modes of transfer, i.e., (1) by registered instrument; and (2) by delivery of possession, are exhaustive; and a sale cannot be effected in any other way.[149] Title to land cannot pass under an oral sale,[150] or by mere admission when the statute requires a deed,[151] or by an unregistered sale deed accompanied by a money receipt stating the sale amount was in lieu of purchase of land.[152] An agreement of sale is not a document of transfer, nor by reason of execution of a power of attorney, can the right, title or interest of an immovable property be transferred.[153] Transaction in the nature of General Power of Attorney sales or sale

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142. *Inugante Venkataraman Rao v Appa Rao,* 63 IA 169 : (1936) All LJ 258 : 38 Bom LR 457 : 40 Cal WN 545 : 70 Mad LJ 378 : 161 IC 29 : AIR 1936 PC 91.
143. *Officiating Common Manager, Bhingarpur Debottar Estate v Brahman Nijan, Uttar Bada and Dakshinabada,* AIR 1990 Ori 190, p 195; *Hardayal v Aram Singh,* AIR 2001 MP 203, p 205 : (2001) 1 MPJR 339.
144. *Bhabhi Dutt v Ramlalbyamal,* 152 IC 431 : AIR 1934 Rang 303; *Bevan v Ganesh Das,* 34 IC 542; *CIT, Bhubaneshwar v Kalinga Industry Ltd,* (1974) 40 Cal LJ.
145. *Ramchandra Majhi v Hambai Majhi,* AIR 1989 Ori 27, p 30.
146. *Bishamber Nath v Kishan Chand,* AIR 1998 All 195.
147. See, for instance, *Lords Food Products (India) Pvt Ltd v Orissa State Financial Corporation,* AIR 2002 Ori 156, p 166 (with regard to section 29(2) of the State Financial Corporation Act, 1951).
148. *Megha Enterprises Pvt Ltd v Official Liquidator, Jaipur,* AIR 2008 Raj 138 : RLW 2009 (1) Raj 316.
149. *Papireddi v Narasareddi,* (1893) ILR 16 Mad 464; *Sheo Narain Singh v Darbari Mahton,* (1897) 2 Cal WN 207; *Makhan Lal v Bunku Behari,* (1892) ILR 19 Cal 623 overruling *Khatu Madhuram,* (1889) ILR 16 Cal 622; *Konormal v Nabin Chandra,* 15 IC 228; *Ma Mya v VPRVSA Annamalai Chettiyar* 151 IC 227 : AIR 1934 Rang 127; *Narayan Swami v Lakshmi,* (1939) 48 Mad LW 959 : (1939) Mad WN 98 : 183 IC 87 : AIR 1939 Mad 1220.
150. *Pankajakshy v Devaki Rama Krishna,* AIR 2011 Ker 30 : (2010) 4 KLT 113.
151. *Mathura Mohan v Ram Kumar,* (1916) ILR 43 Cal 790 : 35 IC 305.
152. *Bishun Kumar v Mahendra,* AIR 2005 Sik 33.
153. *G Ram v Delhi Development Authority,* AIR 2003 Del 120, para 14 : (2002) 98 DLT 800 : (2002) 64 DRJ 140.

agreements/Will do not convey title and do not amount to transfer, nor can they be recognized as valid modes of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title except to the limited extent of section 53A of the TP Act. Such transaction cannot be relied upon or made the basis for mutation in Municipal or revenue records. This rule applies not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered assignment of lease.[154] The Privy Council, referring to the transfer of a *zamindari* estate, said that it could not be transferred except by registered instrument, and that recitals in deeds and in petitions to officials could not amount to a transfer;[155] and in a later case referred to the mischievous, but persistent error that proceedings for the mutation of names could affect proprietary rights.[156]

(23) Where the Act is Not in Force

In Punjab, where the TP Act was not in force, an oral sale was valid in all cases.[157] The English rule that the contract makes the intending purchaser the equitable owner was also followed.[158] Similarly, in the old Gwalior state, where the section was not in force, it was held that the rules contained therein were merely procedural.[159] When a document is executed, it must be registered.[160]

Paragraphs 2 and 3 of section 54 have been in force within the limits of all municipalities in Punjab since 27 April 1935,[161] and throughout Punjab since 1 April 1955.[162]

(24) Ownership when Transferred in Cases of Registration

Property does not pass, in other words, ownership is not transferred until registration is affected.[163] By reason of section 47 of Registration Act, 1908, however, the title relates back to the date of execution for the purposes of priority, once registration is affected.[164] The ownership under sale deed passes on the date of the execution of the sale deed, irrespective of the date of registration,[165] unless there is a contrary intention depicted in the

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154. *Suraj Lamps & Industries Pvt Ltd v State of Haryana,* AIR 2012 SC 206 : (2012) 1 SCC 656.
155. *Immitdipattam Thirugnana v Periya Dorasami,* (1901) ILR 24 Mad 377 : 28 IA 46.
156. *Nirman Singh v Lal Rudra,* (1926) ILR 48 All 529 : 53 IA 220 : 98 IC 1013 : AIR 1926 PC 100; *Ram Sarup v Charitter Rai,* 100 IC 270 : AIR 1927 All 338; *Ram Prasad v Bedo,* 13 IC 436. See also note "Transfer" under section 5.
157. *Udho Das v Mehr Bakhsh,* 144 IC 340 : AIR 1933 Lah 262.
158. *Tomlinson v Hording,* (1930) 11 Lah LJ 467 : 120 IC 538 : AIR 1930 Lah 131.
159. *Sayyed Ibne Hasan v Mehtab,* AIR 1960 MP 237.
160. *Bank of Upper India v R H Skinner,* 69 IA 130 : (1942) All LJ 648 : 45 Bom LR 267 : 47 Cal WN 43 : (1942) 2 Mad LJ 559 : 202 IC 740 : AIR 1942 PC 67.
161. See *Sardarilal v Shakuntla Devi,* (1961) 63 Punj LR 362 : AIR 1961 Punj 378.
162. *Murid Khan v Usman Khan,* AIR 1962 Punj 475.
163. *Amol v Deorao,* AIR 2011 (NOC) 215 (Bom) : 2011 (2) All MR 22; *S Venkoji Rao v The Bangalore Development Authority,* ILR 2011 Kant 408 : 2011 (2) Kant LJ 286; *Ponnayya Goundan v Muttu,* (1894) ILR 17 Mad 146; *Venkataramiah v CIT,* [1965] 3 SCR 567 : AIR 1966 SC 115 : [1965] 2 SCJ 283; *Harbans Singh v Tekamani Devi,* AIR 1990 Pat 26, p 31; *Lakshmi Narain Bamwal v Jagdish Singh,* AIR 1991 Pat 99, p 105.
164. *Ganesh Prasad v Bhaiyalal,* AIR 1938 Nag 253; *Rameshwar Das v Tildhari Das,* (1958) ILR AP 312.
165. *Har Narain v Mam Chand,* 2011-1. L.W. 402; 2010 (83) ALR 716 : (2011)52 GLR 601(SC) : JT 2010 (11) SC 641 : 2010 (4) KLT 359 (SC) : (2011)1 MLJ 723 (SC) : 2011 112 RD184 : 2010 (10) SCALE 617 : (2010) 13 SCC 128; *Ittianam v Cherichi alias Padmini* (2010) 8 SCC 612 : LNIND 2010 SC 658 : 2010 (7) SCALE 495 : AIR 2010 SC 2994; *Kameshwar Choudhary v State of Bihar,* AIR 1998 Pat 141. See also note "Priority" under section 48 below.

contract,[166] but in absence of registration, ownership issues cannot be decided merely from the date of execution of the sale deeds.[167] So, a registered sale deed will not be defeated by another deed executed later, but registered earlier.[168] And if a deed is registered after a suit has been filed, the transfer will not be subject to *lis pendens* if the deed was executed before the suit was filed.[169]

A suit for pre-emption, which can only be filed after the completion of a sale, was held to be premature when it was filed after the deed was executed and lodged for registration, but before the registration was complete; this decision was based on the argument that as the document required registration, the transaction of sale could only be said to be complete when the registration formalities were complete.[170] As regards the word "ownership", the Supreme Court has held that the word must be assigned a wider meaning in section 32(1) of the Income Tax Act, 1961. A "building owned by the assessee" used in the Income Tax Act would mean the person who having acquired possession over the building, in his own right uses the same for the purposes of the business or profession though a legal title has not been conveyed to him consistently with the requirements of TP Act, Registration Act, etc., but nevertheless is entitled to hold the property to the exclusion of all others.[171]

Cancellation of sale deed, whether permissible

Where property is transferred by way of sale and the vendor divests himself of his ownership of the property, he retains no control or right over the said property. Thus the owner upon execution and registration loses completely his rights and the purchaser becomes its absolute owner. Such transfer cannot be annulled or cancelled unilaterally by vendor by executing a deed of cancellation[172] nor by consent or agreement between purchaser and vendor. Such deed of cancellation cannot be accepted for registration. The power to cancel the deed vests only with a court and can be ordered under section 31 of the Specific Relief Act.[173] Where *A*, managed to get the sale deed executed from *B*, fraudulently making him believe that the papers/documents he was signing were to enable him to get him grants distributed from the government to leprosy patients, which *B* successfully proved in court, the order for cancellation of the sale deed would be proper.[174]

Under section 68 of the Andhra Pradesh Registration Rules 1960, rule 26 (i) (k) (i) proviso the registrar is empowered to pass orders for ex-parte cancellation of the sale deed. The provision empowers the registrar to be presented with deed of cancellation of earlier deed of conveyance on behalf of the state. No prior notice to the parties to the deed is required under the said proviso and the sub registrar is the competent authority to register

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166. *Kaliaperumal v Rajagopal,* AIR 2009 SC 2122 : (2009) 4 SCC 193.
167. *Kantaben Chandulal Shah v Gajiben,* AIR 2005 Guj 49.
168. *Narayan v Laxuman,* (1905) ILR 29 Bom 42; *Lallubhai v Bai Amrit,* (1877) ILR 2 Bom 299, p 343; *Santaya v Narayan,* (1883) ILR 8 Bom 182, p 184; *Chander Singh v Jamuna Prasad,* AIR 1958 Pat 193.
169. *Venkataramana v Rangiah,* (1922) 41 Mad LJ 399 : 70 IC 212 : AIR 1922 Mad 249 dissenting from *Tilakdhari v Narain,* (1920) 5 Pat LJ 715 : 59 IC 290 : AIR 1921 AP 150; *Veerakutty v Ramaswami,* 32 IC 31; *Guru Basappa v Santhappa,* (1925) 48 Mad LJ 496 : 87 IC 568 : AIR 1925 Mad 710.
170. *Ram Saran Lall v Domini Kuer,* [1962] 2 SCR 474 : AIR 1961 SC 1747; *Tapan Krishna Das v Hazi Ali Khan,* AIR 2005 Cal 60 : (2004) 4 CHN 511.
171. *Mysore Minerals Ltd v CIT,* (1999) 7 SCC 106, p 112 : (1999) 239 ITR 775.
172. *M Manikandan v The Sub Registrar, Thamaraipatti,* WP (MD) No 10833 of 2011 and MP (MD) No 1 of 2011, decided on 20 January 2017. High Court of Madras (Madurai Bench); *Ms Latif Estate Line India Ltd v Hadeeja Ammal,* AIR 2011 Mad 66 : (2011) 2 CHN 450 : (2011) 2 CTC 1.
173. *K Rajan v Bangalore Development Authority,* AIR 2011 (NOC) 341 (KAR); *Thota Ganga Laxmi v Government of Andhra Pradesh,* (2010) 15 SCC 207 : 2012 (3) ALT 50 : 2012 (1) ALD 90.
174. *Champa Devi v Sudama Dubey,* AIR 2017 SC 3433.

unilateral deed of cancellation of the earlier registered deed. This ex-parte registration of deed of cancellation by the sub registrar would be valid.[175]

(25) Intention the True Test

The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property, and they must also intend that the price would be paid either *in praesenti* or in future. The intention is to be gathered from the recital in the sale deed, the conduct of the parties, and the evidence on record.[176] On the other hand, it does not follow that property passes as soon as the instrument is registered, for the true test is the intention of the parties.[177] Registration is prima facie proof of an intention to transfer, but it is no proof of an operative transfer if there is a condition precedent (which must be strictly proved) as to payment of consideration or delivery of the deed. Thus, the seller may retain the deed pending payment of price, and in that case there is no transfer until the price is paid, and the deed delivered.[178] The words "price paid or promised" in the definition show that the payment of price is not necessarily a sine qua non to the completion of the sale.[179]

A combined reading of section 8 and section 54 of the TP Act suggests that though on execution and registration of a sale deed, the ownership and all interests in the property pass to the transferee, yet that would be on terms and conditions embodied in the deed indicating the intention of the party. Such intention can be gathered by intrinsic evidence, namely, from the averments on the sale deed itself, or by other attending circumstances subject, of course to the provision of section 92 of the Indian Evidence Act, 1872.[180] Where, according to the terms of the deed, title was not to pass to the vendee on execution and registration of the deed, but was to pass only on exchange of equivalents, then title would not pass on execution of the deed.[181]

In a Patna case, according to the agreement, the title did not pass at the time of execution and registration, but was to pass when the vendee paid the balance of the consideration to the vendor. The title, it was held, will pass on tender of the balance within reasonable time, irrespective of the refusal of the vendor to receive the money. The vendor had no option in the matter.[182] The answer to the question whether the

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175. *Vatumalli Laxmi Prasanna v State of Telengana,* AIR 2018 Hyd 32.
176. *Vimal Chand Ghevarchand Jain v Ramakant Eknath Jajoo,* (2009 (5) SCALE 59 : LNIND 2009 SC 646 : 2009 (5) SCC 713; *Vidhyadar v Manikrao,* (1999) 3 SCC 573 : AIR 1999 SC 1441.
177. *Nitai v Champaklata,* (1919) 29 Cal LJ 25 : 51 IC 104; *Gangi v Govinda,* (1924) 46 Mad LJ 464 : 84 IC 626 : AIR 1924 Mad 544; *Seramot Ali v Samad Ali,* 19 IC 562; *Jogendra v Manmatha,* 34 IC 106; *Maung Mon v Ma Kin Oh,* (1927) ILR 5 Rang 636, p 640 : 106 IC 358 : AIR 1928 Rang 47; See also *Sundar v Lalji,* 145 IC 698 (a registered mortgage deed); *Parosottam Das v Syed Ali Haidar,* 171 IC 233 : AIR 1937 Oudh 493; *Rajkumar Singh v Uchit Tatwa* AIR 1951 Pat 454; *Harbans Singh v Tekamani Devi,* AIR 1990 Pat 26, p 31; *Lakshmi Narain Bamwal v Jagdish Singh,* AIR 1991 Pat 99, p 105; *Ramchandra Singh v S D Haripur,* AIR 1989 Pat 50, p 54.
178. *Sheo Narain Singh v Darbari Mahton,* (1897) 2 Cal WN 207; *Mauladan v Raghunandan,* (1900) ILR 27 Cal 7; *Sangu Ayyar v Cumarasami,* (1895) ILR 18 Mad 61; *Ramalinga v Ayyadora,* (1905) ILR 28 Mad 124; *Sarat Chandra v Hari Pada,* (1906) 4 Cal LJ 338; *Gostho Behary v Rohini,* (1908) 13 Cal WN 692 : 4 IC 541; *Jogendra v Manmatha,* 34 IC 106; *Hara Bewa v Bunchanidhi,* (1957) ILR Cut 380 : AIR 1957 Ori 243.
179. *Shiva Narayan Sab v Baidya Nath Prasad Tiwary,* AIR 1973 Pat 386.
180. *Prem Singh v Dt Board of Rawalpindi,* 151 IC 168 : AIR 1934 Lah 917.
181. *Shiv Narain v A N Mukerji,* AIR 1973 Pat 386 : (1973) ILR Pat 516.
182. *Baidyanath Misra v Udayanath Misra,* (1974) 2 CWR 978; *Iswar Das v Maralidhar Rai,* AIR 1992 Ori 170, p 174; *Hara Bewa v Banchanidhi Barik,* AIR 1957 Ori 243; *Umakanta Das v Pradip Kumar Ray,* AIR 1986 Ori 196, p 198.

transferor intends to transfer ownership by mere execution or registration, or whether he intends to do so only after receipt of consideration, would depend on the intention of the parties. The intention is primarily to be determined from the recitals of the sale deed, it is only when the recitals are ambiguous that extraneous evidence is admissible.[183] The deed may expressly provide that the sale will be void, unless the balance of price is paid in a fixed time.[184] However, if the intention was that the transfer should take effect on registration, property passes although the seller has not given possession,[185] or the buyer has not paid the price.[186] In *Kondu v Vishnu,*[187] a contract of sale was registered, and it provided that on certain conditions being fulfilled it should operate as a sale-deed. The buyer took possession under the contract, and it was held to operate as a conveyance, and passed property to him as soon as he had fulfilled the conditions. Where the property stood transferred by a genuine registered GPA sale/conveyance to transferee, as it was no longer the property of transferor, it cannot be attached as against judgement debtor.[188]

In some cases, the document of a sale deed may be termed differently, yet would operate as a sale deed. In *Udai Sapkota v Laxmi Prasad Sapkota,*[189] document used the words "Chinti Bikri". This was a Nepali Term that meant a complete sale. The content of the document stated that the seller was giving a written money receipt, after finally selling the dry field and that he shall register the land. It was held that the document would be a sale deed and not merely a money receipt. In the context of an agreement for sale of a flat, where the receipt did not contain a covenant to the effect that any formal Agreement to Sell would have to be executed, even a document styled as a "Receipt", can operate and be enforceable as a contract.[190]

(26) Sham and Void Transaction

A fictitious and void transaction would not convey a valid title. A sale deed executed at the time of the *nikhah*, by the bridegroom in favour of the bride's father at his request for enhancing his status without any money payment, would be fictitious.[191] In a case decided by Orissa High Court,[192] the deed was badly drafted, which did not clearly convey title to the vendee. Terms regarding consideration and vendee's title were all intermingled and possession of the property and also the documents remained with the

183. *Bishundeo Narain Rai v Anmol Devi,* AIR 1998 SC 3006 : (1998) 7 SCC 498.
184. *Bakhtawar Ram v Naushad,* 55 IC 659.
185. *Ponnayya Goundan v Muttu,* (1894) ILR 17 Mad 146.
186. *Sagaji v Namdeo,* (1899) ILR 23 Bom 525; *Chinnasamy Reddiar v Krishna,* (1906) 16 Mad LJ 146; *Amirthathamal v Periasamy,* (1909) ILR 32 Mad 325 : 4 IC 507; *Govindammal v Gopalachariar,* (1906) 16 Mad LJ 524; *Velayutha v Govindasami,* (1911) ILR 34 Mad 543 : 8 IC 364; *Shib Lal v Bhagwan,* (1888) ILR 11 All 244 dissenting from *Ikbal Begam v Gobind Prasad,* supra; *Baijnath v Paltu,* (1908) ILR 30 All 125; *Gostho Behari v Rohini* (1908) 13 Cal WN 692; *Nilmadahab v Hara Proshad,* (1913) 17 Cal WN 1161 : 20 IC 235; *Bhonu Lal v WA Vincent,* 65 IC 882 : AIR 1922 Pat 619; *Naran Das v Dhania,* (1915) ILR 38 All 154 : 35 IC 23; *Ramdhari v Gorakh,* (1931) ILR 10 Pat 264 : 133 IC 34 : AIR 1931 Pat 236; *Umedmal Motiram v Davu,* (1878) ILR 2 Bom 547 (before the Act); *Hari Chand v Gordhan Das,* (1957) 59 Punj LR 310 : AIR 1957 Punj 238; *Ajmer Singh v Nishi Kumar,* AIR 2004 P&H 85 : (2003) 135 PLR 728.
187. *Kondu v Vishnu,* (1913) ILR 37 Bom 53 : 17 IC 176.
188. *Maya Devi v Lalita Prasad,* (2015) 5 SCC 588.
189. *Udai Sapkota v Laxmi Prasad Sapkota,* AIR 2013 Sik 21.
190. *Sanjay Puri v Radhey Lal,* (2011) 121 DRJ 507 (DB) : (2011) 179 DLT 218 DB (Delhi).
191. *Munnan Khan v Ashrafunnissa,* AIR 1983 All 363, p 364, para 3.
192. *Kakila Dei v Balakrushna Behera,* AIR 1984 Ori 111.

executant. It was held that there was no sale. However, in another case,[193] where the power of attorney holder of the vendor admitted that execution of sale deed was only for defrauding creditors, it was held that such sale would be binding in view of section 43, and is not null and void. A sale by the power of attorney holder of the vendor to his sons is not a bona fide transfer when neither the general power of attorney was executed by the vendor, nor any amount was paid in presence of the Sub-Registrar.[194] Similarly, where the power of attorney, an affidavit and the receipt did not contain any date and neither the defendant, nor any of the witnesses produced by him were able to identify the photograph of the deceased allotee or give any description with regard to his physical characteristics, such as complexion, features, age etc. or provide any explanation to the failure to obtain the original letter of allotment, which would be the document of title, at the time of purchase, it was held that the transaction was a sham.[195] Again where the handwriting and fingerprint expert found dissimilarity in disputed and specimen thumb impression, it was held that sale deed was executed by an imposter and hence, is null and void,[196] but a sale of property worth more than ₹ 10 lakhs for a mere ₹ 4.60 lakhs would not be a sham sale, when the sale was coupled with a covenant that the vendee would purchase the property, subject to his accepting the onerous responsibility to evict the tenant occupying the property, and get vacant possession.[197]

The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent Court may issue in the suit against the vendor.[198]

Proof of execution

The execution of a sale deed in cases of conflict and doubts, can be testified by the witnesses. In *Udai Sapkota v Laxmi Prasad Sapkota*,[199] the scribe entered the witness box and testified the contents of the document and verified the same along with the son of the executants who also unequivocally corroborated the execution of the document. It was held that execution of the sale deed was duly proved and the fact that executants himself did not testify would not be material. Mere change of purpose of sale land use would not invalidate the sale deed,[200] but when the execution of sale deed is allegedly based on cheating, the party must bring it to the notice of the court at the earliest. The method of transfer of property i.e., acquiescence by delay and laches to be optional mode to transfer must be expressly stipulated in the contract.[201] There is a priority of mortgage over a sale made during the subsistence of the mortgage,[202] and likewise, a right of pre-emption recognized by statute, would be treated as mandatory.[203]

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193. *Biswanath Sahu v Tribeni Mohan*, AIR 2003 Ori 189 : (2003) I OLR 522.
194. *Hans Raj v Karmi*, AIR 2004 P&H 315 : (2004) 136 PLR 862.
195. *O P Kurechia v Manju*, (1998) 47 DRJ 706.
196. *Bashi Prasad v Babu Lal*, AIR 2003 All 206.
197. *P Retnaswamy v A Raja*, AIR 2002 Mad 131, p 142 : (2001) 3 LW 603.
198. *Thomson Press (India) Ltd v Nanak Builders Investors P Ltd*, AIR 2013 SC 2389.
199. *Jagtar Singh v State of Punjab*, AIR 2012 P&H 145 : LNIND 2012 PNH 41.
200. *Suresh Kumar Dagla v Sarwan*, (2014) 14 SCC 254 : 2014 (9) SCALE 675 : 2016 (4) All MR 487.
201. *State of Jharkhand v KN Farms and Industries Pvt Ltd*, (2012) 5 SCC 297 : LNINDU 2012 SC 1: 2012 (4)SCALE 142.
202. *Pradeep Kumar Sharma v Uttar Pradesh Finance Corporation, Rajpur Road, Dehradun*, (2012) 10 SCC 424 : 2012 (10)SCALE 511 : LNIND 2012 SC 691.
203. *Suresh Prasad Singh v Dulhin Phulkumari Devi*, (2010) 6 SCC 441 : LNIND 2010 SC 499 : 2010 (2) PLJR 167 : 2010 (5) SCALE 771.

(27) Interest that cannot be transferred

Where land is held by a person jointly with others, a transfer by him in excess of his interest is not totally invalid, but is valid to the extent of his interest in the land.[204] A sale deed executed by a widow upon her remarriage, is liable to be set aside since as per custom of the schedule tribe to which the widow belonged, a female could hold property till her life time or till she remarried.[205]

(28) Unregistered Deed

Immovable property can be lawfully transferred/conveyed only by a registered deed of conveyance.[206] Where the deed is not registered, there is no transfer, and property does not pass.[207] Mere delivery of the deed will not operate as delivery of the property;[208] nor will a recital in the sale deed of delivery of possession suffice, for such a recital might be inserted without any attempt at fulfillment.[209] This is so even if the property is tangible immovable property of value less than ₹ 100.[210] However, if the unregistered deed of value less than ₹ 100 is accompanied by delivery of the property, the sale would be effective by virtue of delivery of possession, and would not be rendered nugatory by the unregistered deed.[211] The deed would be evidence of the contract of sale or of any negotiations concerning the transaction.[212] If a document which is not registered is part and parcel of a single transaction which is evidenced in part by a registered instrument, then the other document must also be registered. However, if the agreement to reconvey the property can be treated as a separate transaction, then under section 54, it creates no interest in the property, and need not be registered.[213] An unregistered deed may, under the judgment of the Privy Council in *Varatha Pillai v Jeevarathammal*,[214] be used as evidence of the character of possession. Twelve years' possession under an unregistered sale deed will create title by adverse possession, not only when the property is of value less than ₹ 100, and section 49 of the Registration Act, 1908 does not apply,[215] but also when it is of that value and over.[216] Where a sale was affected by registered instrument, other parties claimed title on the basis of an unregistered agreement, but the claim was also based on co-ownership; the claim would be sustainable.[217]

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204. *Ganpath Sahu v Bull Sahu*, AIR 1974 Ori 192.
205. *Sonam Dolma v Phunchog Angrup*, AIR 2002 HP 77 : (2002) 1 Sim LC 308.
206. *Suraj Lamps &Industries Pvt Ltd v State of Haryana*, AIR 2012 SC 206 : (2012) 1 SCC 656.
207. *Numaanab v Hara Proshad*, (1913) 17 Cal WN 1161 : 20 IC 235; *Kaliram v Dularam*, 142 IC 582 : AIR 1933 Cal 544.
208. *Biswanath Prashad v Chandra Narayan*, (1921) ILR 48 Cal 509 : 48 IA 127 : 63 IC 770 : AIR 1921 PC 8.
209. *Nathu v Gulabchand*, 144 IC 919 : AIR 1934 Nag 13.
210. *Mokhan Lal v Bunku Behari*, (1892) ILR 19 Cal 623 overruling *Khatu v Madhuram*, (1889) ILR 16 Cal 622; *Konormal v Nabin Chandra*, 15 IC 228.
211. *Immamuddin v Ramzan*, (1885) All WN 201; *Kathari v Bhupati*, (1916) 29 Mad LJ 721 : 31 IC 52; *Gunga Narain v Kali Churn*, (1895) ILR 22 Cal 179; *Bhagabati Swarnakar v Sazhi*, 2 IC 413; *Gulab v Lalta*, (1919) 22 OC 58 : 51 IC 561; *Dayaram v Sita Ram*, 79 IC 394 : AIR 1925 All 206; *Tribhovan v Shankar*, AIR 1943 Bom 431; *Ram Chandra v Hari Kishan*, AIR 2004 All 345.
212. *Brajaballav v Akkoy Bagdi*, (1926) 30 Cal WN 254 : 93 IC 115 : AIR 1926 Cal 705; *Uma Jha v Chetu*, 95 IC 187; *Punchha Lal v Kunj Behari Lal*, (1913) 18 Cal WN 445 : 20 IC 803; *Sheikh Juman v Mohammad*, (1917) 21 Cal WN 1149 : 41 IC 779. See section 49 of Registration Act, 1908, as amended by Act 21 of 1929.
213. *Dave Ramshankar v Bai Kailasgauri*, AIR 1974 Guj 69.
214. *Varatha Pillai v Jeevarathammal*, (1919) ILR 43 Mad 244 : 46 IC 285 : 53 IC 901 (PC); *Abdul Alim v Abdul Sattar*, AIR 1936 Cal 130.
215. *Nailamuttu Pillai v Betha*, (1900) ILR 23 Mad 37; *Dawal v Dhanna*, (1917) ILR 41 Bom 550, p 559 : 41 IC 273.
216. *Kemam Kandaswamy v Chinappa*, (1921) 40 Mad LJ 105 : 62 IC 603 : AIR 1921 Mad 82.
217. *Tarinikamal v Prafulla Kumar*, AIR 1979 SC 1165.

Where there is no transfer of immovable property worth more than ₹ 100 in favour of the plaintiff by the defendant making the former owner of the property, nor was there any deed executed in his favour and the suit by the plaintiff for declaring him to be the owner is decreed and the decree is not registered under section 17 of Registration Act, the decree would be violative of section 54, TP Act. In such a case, section 2 (d) of the TP Act does not give any protection.[218]

In *Davendra Singh v State of Rajasthan*,[219] the land was purchased in 1950 vide an unregistered sale deed and in furtherance of such sale possession was delivered to the purchaser. It was held that though the value of the land was shown in the document as Rs 90 only, the said document was required to be registered and would therefore not be admissible in evidence. As per section 54, a document for sale of immovable property having value less than Rs 100, if written must be registered failing which the said document cannot be admitted in evidence. In determining the requirement of registration, the courts should dwell upon the issues in a proper perspective on issue of change of user of land, valuation of land and such other ancillary aspects.[220] In the case of unregistered sale deeds, the priority between buyers under interest, if any created by the unregistered sale deed is that the effect of possession under the first unregistered sale deed would terminate and prejudice the second buyer.[221]

(29) Delivery of Property

In case of tangible immovable property of a value less than ₹ 100, transfer may be made either by a registered document, or by delivery of possession. The delivery of possession takes place when the seller places the buyer or such person as he directs, in possession of the property.[222] This mode of transfer is only recognised in the case of tangible immovable property of small value, as delivery of possession is a patent act. Possession of land is given by going on the land, but it is not necessary to walk over the whole land.[223] Possession of a house may be given by delivery of the keys.[224] Doubtful causes can only arise when the property is already in possession of the buyer. The Calcutta High Court had held in *Sibendrapada v Secy of State* that in such a case an oral sale was invalid as the essence of a transfer by delivery of property is that possession is changed,[225] the vendor, by appropriate acts and declarations, converts permissive possession into possession as a vendee.[226] Similarly, where a mortgagor sold his equity of redemption of value less than ₹ 100 to the mortgagee in possession by pointing out the boundaries, the court said that the mortgagor had done what he could to deliver

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218. *Nachhitar Singh v Jagir Kuar*, AIR 1986 P&H 197, p 200, para 7.
219. *Davendra Singh v State of Rajasthan*, AIR 2002 Raj 66 : 2002 Civil CC 97 : 2002 (3) RCR (Civil) 341.
220. *Neeraj Jain v State, of UP* 2014 SCC OnLine SC 1091
221. *Ramesh Vajabhai Rabari v Pratiksha Real Estate*, (2014) 12 SCC 190 : AIR 2014 SC 2962 : 2014 (5) ABR 458 : 2014 (4) SCALE 555.
222. *Om Prakash v Shanti Devi*, (2015) 4 SCC 601 : LNIND 2015 SC 4 : AIR 2015 SC 976 : 2015 (1)SCALE 19; *Brijvasilal v Abdul Haji*, (2001) 9 SCC 367, p 368.
223. *Hanmanta v Mir Ajmodin*, (1904) 6 Bom LR 1104.
224. *Guest v Homfray*, (1801) 5 Ves 818.
225. (1907) ILR 34 Cal 207; followed in *Tilak Brittial v Rudeshwar*, 41 IC 8 and *Mrinalini v Mohima Chandra*, 6 IC 763.
226. *Kulachandra Ghosh v Jogendrachandra Ghosh*, (1933) ILR 60 Cal 384 : 144 IC 155 : AIR 1933 Cal 411; *Mahbub v Kalekhar*, AIR 1936 Lah 756; *Maung Mya Maung v Ma Khine*, 166 IC 267 : AIR 1936 Rang 497; *Chutia v Sonaram Chutia*, (1916) 20 Cal WN 195 : 34 IC 692; followed in *Santokhi Mister v Siro Jha*, 151 IC 55.

possession, and that the oral sale was valid.[227] In a case,[228] which was also a sale of an equity of redemption less than ₹ 100 in value to a mortgagee in possession, the Mardas High Court held that it was sufficient that the vendor, by appropriate declaration and acts, converts the possession of the vendee as mortgagee into possession as purchaser. The judges observed that it was not the intention of the TP Act to require sales of properties below ₹ 100 in value to be made by registered instrument when the vendee is in possession as a tenant. A relief for recovery of possession cannot be granted if the plaintiff fails to prove that possession of the property was delivered to him in pursuance of the execution of the sale deed and that he had applied for getting the revenue papers mutated in his name, more so as the property continued in the names of the defendants in the revenue records.[229]

(30) Usufructuary Mortgage

A Full Bench of the Allahabad High Court held, by a majority, that where the property was in possession of a usufructuary mortgagee, the interest of the mortgagor was tangible property, and could be transferred without a registered instrument;[230] and similar views have been expressed by the Bombay,[231] Orissa[232] and Madras High Courts.[233] There has, however, been a conflict as to whether, in such a case, delivery can be effected only by the mortgagee giving up possession as mortgagees, or whether possession can be delivered by the vendor doing all he can under the circumstances to indicate finally and unambiguously his intention to pass the title and the possession; Allahabad[234] and Bombay[235] High Courts have taken the former view; Patna[236] and Orissa[237] High Courts, the latter view.

(31) Oral Sale

If on the date of sale, the buyer gets possession, a delivery of possession by the seller may be inferred.[238] Before, however, an oral sale can be said to have taken place, a court must be

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227. *Sonai Chutia v Sonaram Chutia,* (1916) 20 CWN 195.
228. *Muthukaruppan v Muthu,* (1915) ILR 38 Mad 1158 : 25 IC 772; followed in *Sheikh Dawood v Moideen,* (1925) 48 Mad LJ 264 : AIR 1925 Mad 566 and *Ram Nath v Gajadhar,* 92 IC 478 : AIR 1926 All 300; *Swaminatha Udayar v Mottayya Padayachi,* (1957) 1 Mad LJ 17 : AIR 1957 Mad 209; *Bhanwarilal v Dhulilal,* (1958) ILR 8 Raj 572 : AIR 1959 Raj 218; *Sukatto v Panau,* AIR 1961 MP 176; *Thakurdas v Sobhachand,* (1916) 12 Nag LR 3 : 32 IC 233; *Dinanath v Manbodhi,* (1916) 12 Nag LR 139 : 36 IC 547. See also *Sibendrapada v Secy of State,* (1907) ILR 34 Cal 207; *Biswanath Prasad v Chandra Narayan,* (1921) ILR 48 Cal 509 : 48 IA 127 : 63 IC 770 : AIR 1921 PC 8; *Kulachandra Ghosh v Jogendrachandra Ghosh,* (1933) ILR 60 Cal 384 : 144 IC 155 : AIR 1933 Cal 411; *Mahbub v Kalekhar,* AIR 1936 Lah 756; *Maung Mya Maung v Ma Khine,* 166 IC 267 : AIR 1936 Rang 497.
229. *Inderjeet Singh v Nasim Meman,* AIR 2017 (NOC) 729 (Chh).
230. *Sohan Lal v Mohan Lal,* (1928) ILR 50 All 986 : 118 IC 177 : AIR 1928 All 726.
231. (1953) ILR Bom 1071 : 55 Bom LR 641 : AIR 1953 Bom 437.
232. *Trilochan v Bamadev,* AIR 1972 Ori 136; *Abas Ali Khan v Sahabuddin Khan,* (1980) 49 Cut LT 297.
233. *Nagammal v Krishnaswami Nayudu,* (1976) 2 Mad LJ 72.
234. *Sohan Lal v Mohan Lal,* (1928) ILR 50 All 986.
235. *Patel Bhikabhai v Shah Chimanlal,* supra. And see *Chinna Nagaiah v N Baliga,* AIR 1956 Hyd 170.
236. *Suraj Prasad v Aguta Devi,* (1958) ILR 37 Pat 577 : (1959) ILR AP 153; And cf *Puran Mahton v Bhago Mahton,* (1946) ILR AP 81.
237. *Trilochan v Bamadev,* AIR 1972 Ori 136.
238. *Gunga Narain v Kali Churn,* (1895) ILR 22 Cal 179; *Ummar Sahib v Vythilinga,* (1909) 5 Mad LT 263 : 4 IC 1135; *Ammani v Jagannatha,* (1915) Mad WN 442 : 30 IC 7; *Tukaram v Atmaram,* (1939) ILR Bom 71 : 40 Bom LR 1192 : 180 IC 40 : AIR 1939 Bom 31.

satisfied that the entire consideration has been paid, or that the possession of the property sought to be purchased has been delivered to the purchaser.[239]

When tangible immovable property of value less than ₹ 100 is delivered under an oral contract of sale, the sale is complete. No title is left in the vendor, and if he subsequently executed a registered conveyance to a third person, that person gets nothing, even though the price under the oral sale has not been paid.[240] The necessary ingredient for completion of sale is the handing over of the properties to the purchaser. In *Manickam v Chinnamma*,[241] A claimed that he has purchased the property as early as in the year 1976, but did not file any scrap of paper to show that he was put in possession, patta changed in his name and he paid the *kist* and that his name finds place in the Adangal. The sale was held as invalid.

(32) Delivery Plus Unregistered Sale Deed

In the case of tangible immovable property worth less than ₹ 100, if the transfer is not made by delivery, there must be a registered sale deed. An unregistered deed would be invalid, and would not operate as constructive delivery.[242] However, if there is delivery, it is, as already stated, not rendered nugatory by the existence of an unregistered deed.[243] But the delivery need not be contemporaneous with the unregistered deed; it may take place sometime later.[244]

(33) Oral Evidence

In a case,[245] Madras High Court had observed that the execution of an unregistered sale deed invalidated the oral sale by delivery, as the deed excluded evidence of the agreement of sale. However, this has been dissented from by the Patna High Court,[246] and it has been held that a sale deed though not registered is admissible as evidence of the contract of sale.[247] This is now made clear with reference to certain suits by the proviso inserted in section 49 of the Registration Act by Act 21 of 1929. Even if the property were worth more than ₹ 100 so that there could be no oral sale, the vendee in possession under an unregistered sale deed would be protected from dispossession by the doctrine of part performance enacted in section 53A; but such an unregistered deed would not support a suit on title.[248]

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239. *Sampatlal v Pokar,* (1954) ILR 4 Raj 705 : AIR 1955 Raj 70.
240. *Moidin v Avaran,* (1888) ILR 11 Mad 263.
241. *Manickam v Chinnamma,* 2017-2-LW 253 : (2017) 4 MLJ 6.
242. *Biswanath Prasad v Chandra Narayan,* (1921) ILR 48 Cal 509 : 48 IA 127 : 63 IC 770 : AIR 1921 PC 8.
243. *Immamuddin v Ramzan,* (1885) All WN 201; *Gunga Narayan v Kali Churn,* (1895) ILR 22 Cal 179; *Kathari v Bhupati,* (1916) 29 Mad LJ 721 : 31 IC 52; *Daya Ram v Sita Ram,* 79 IC 394 : AIR 1925 All 206; *Nagayya v Sayamma,* AIR 1951 Mys 42; *Ram Chandra v Hari Kirtan,* AIR 2004 All 345 : (2004) 4 AWC 473.
244. *Mahommad Yagoolally v Chottey Lal,* 179 IC 583 : AIR 1939 Pat 218; *Bhulkhoo v Hiriyabai,* (1949) ILR Nag 534.
245. *Kuppuswami v Chinnaswami,* 111 IC 677 : AIR 1928 Mad 546.
246. *Keshwar Mahton v Sheonandan,* 122 IC 533 : AIR 1929 Pat 620.
247. *Punchha Lal v Kunj Behari Lal,* (1913) 18 Cal WN 445 : 20 IC 803; *Sheikh Juman v Mohanmmad,* (1917) 21 Cal WN 1149 : 41 IC 779; *Kathari v Bhupati,* (1916) 29 Mad LJ 721; *Brajaballav v Akhoy Bagdi,* (1926) 30 Cal WN 254 : 93 IC 115 : AIR 1926 Cal 705.
248. *Ko Yan v Ma Mai Ni,* (1933) ILR 10 Rang 529 : 140 IC 777 : AIR 1933 Rang 4; see also *Bhabani Sarma v Narayan Sarma,* AIR 2003 Gau 171, p 176. *See also Chanda Bai v Anwarkhan,* AIR 1997 MP 238.

III—Contract for Sale

(34) Contract for Sale

An Agreement to sell does not create an interest in the proposed vendee in the suit property,[249] but only creates an enforceable right in the parties.[250] An "agreement for sale" is not the same as "sale", and the title to the property agreed to be sold, still vests in the vendor in case of an agreement for sale, but in the case of sale, title of the property vests with the purchaser. An "agreement for sale" is an executory contract, whereas "sale" is an executed contract. In all agreements for sale, the two most important conditions would be the date of payment of price, and date of delivery of possession of the property.[251] An agreement for sale of property, and a promise to transfer a property convey the same meaning and effect in law. A promise to transfer a property is an agreement for sale of a property.[252] A contract for the sale of immovable property differs from a contract for the sale of goods, in that the court will grant specific performance of it, unless special reasons to the contrary are shown.[253] An agreement to sell if unregistered can be admitted in evidence for collateral purposes in a suit for specific performance.[254] With respect to the admissibility of unregistered sale deeds executed in 1960 and 1963 respectively having value of the property as more than Rs 100/, the same would not be admissible in evidence and even for collateral purposes the sale deeds would not be permitted to be received in evidence.[255] The definition of contract for sale includes the settlement of the terms between the parties as one of the essentials for completion of a contract.[256] It is not within the competence of the guardian of a minor to bind the minor by a contract for the purchase of land; and as there is want of mutality, the minor on attaining majority cannot obtain specific performance of the contract.[257] Otherwise, a contract for the sale of land is subject to the general rules applicable to all contracts; and this and other sections of the TP Act are taken as part of the India Contract Act, 1872. There is no requirement of law that an agreement or contract of sale of immovable property should only be in writing. If it is in writing but not signed by the purchaser it does not mean that there is no concluded contract.[258] However, heavy burden lies on the party relying on an oral agreement to prove that there was consensus ad idem the parties for a concluded oral agreement for sale of immovable property, and that vital and fundamental terms for sale of immovable property were concluded between the parties orally and a written agreement, if any, to be executed subsequently would be a formal agreement incorporating

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249. *State of Uttar Pradesh v District Judge,* (1997) 1 SCC 496 : (1997) 1 SCC 496.
250. *Ningappa Bharamappa Sogi v Govt of Karnataka,* AIR 2011 Kant 115 : (2012) 1 ICC 621; *Baboo Lal v Nathi Lal,* AIR 2014 (NOC)201 (All); *Kumaran v Kumaran,* AIR 2011 Ker 75 : LNIND 2010 KER 747; *Namdeo v Collector,* AIR 1996 SC 973 : (1995) 5 SCC 598; *Ram Bhau Namdeo v Narain Bapuji,* (2004) 8 SCC 614 : AIR 2004 SC 4342.
251. *B R Koteshwara Rao v G Rameshwari, Bai* AIR 2004 AP 34, pp 38, 40 : (2003) 4 ALD 662.
252. *Bommaka Nagabhushana Reddu v W Srinivasa Rao,* (2002) 9 SCC 664, p 665 : (2001) 5 JT 487.
253. Specific Relief Act, 1963, section 10. See *Ram Swarup Gaur v Ratiram,* AIR 1984 All 369, p 373.
254. *Ghanshyambhai Dhirubhai Barvaliya v Rasikbhai Dhirubhai Ambaliya,* AIR 2017 Guj 164.
255. *Bali Devi v Chhagan, Lal* AIR 2017 (NOC) 271 (Raj) : 2017 (2) Raj LW 1756 (Raj).
256. *Satya Prakash Goel v Ram Krishan Mission,* AIR 1991 All 343, p 347. See also *Munna Lal v Atma Ram,* AIR 2008 (NOC) 843 (MP); *Subbi Reddy v K N Srinivasa Murthy,* AIR 2006 Kant 4 : (2005) 6 Kar LJ 489 : (2005) 4 KCCR 2751; *Jagir Singh v Ranjeet Singh,* AIR 2006 Raj 105; *Inder Chand v Sethi,* AIR 2006 Raj 251 : RLW 2006 (3) Raj 2248 : (2006) 4 WLC 144; *Anjum Reddy v Arjun C Thanga,* (2006) 7 SCC 756 : (2006) 8 SCALE 477; *Ramlal v Phagua,* (2006) 1 SCC 168 : AIR 2006 SC 623.
257. *Mir Sarwarjan v Fakhruddin Mahomed,* 39 IA 1 : 13 IC 331; *Venkatachalam v Setharam,* (1933) ILR 56 Mad 433 : 64 Mad LJ 354 : 142 IC 315 : AIR 1933 Mad 322.
258. *Aloka Bose v Parmatma Devi,* (2009) 2 SCC 582 : AIR 2009 SC 1527; *B Rajamani v Azhar Sultana,* AIR 2005 AP 260 : (2005) 2 ALD 862.

the terms already settled by the oral agreement.[259] Where the agreement of sale is reduced to writing and is coupled with delivery of possession of property in part performance of the contract, rights are created under the agreement and such document requires compulsory registration. Even such agreement of sale would partake the character of conveyance amenable to stamp duty.[260] A contract for sale by a minor is void, but a contract for sale to a minor is valid. The note under section 6(h), "Minor as transferee", deals with this aspect. Incidents peculiar to the sale of land are subject to section 55.

(35) Does Not of Itself Create any Interest

The law of India does not recognize equitable estates,[261] and the English rule that the contract makes the purchaser owner in equity of the estate, does not apply.[262] In *Rambaran v Ram Mohit,*[263] the Supreme Court settling a conflict of decisions, has held that a contract for sale does not create any interest in land.[264] Hence, apart from section 53A, "an averment of the existence of a contract of sale, whether with or without an averment or possession following upon the contract, is not a relevant defence to an action for ejectment in India".[265] Mere existence of a contract of sale would not confer a title on buyer and thus any charge or attachment created over property of seller prior to contract of sale would stand with priority over and above transfer of property.[266] A person who has contracted to buy land is not the owner of any interest in the land and is, therefore, not competent to apply to set aside an execution sale of the same land.[267] Similarly, he is not entitled to mesne profits.[268] It has also been held that even after a decree has been passed in a suit for specific performance, the purchaser has no interest in the property.[269] Section 54 of the TP Act specifically provides that the contract of sale does not, of itself create any interest in or charge on immovable property which is subject matter of contract of sale.[270] A person having an agreement to sell in his favour does not get any right in the property, except the right of litigation on that basis.[271]

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259. *Brij Mohan v Sugra Begum,* (1990) 4 SCC 147, p 158.
260. *Ningappa Bharaneppa Sogi v Government of Karnataka,* AIR 2011 Kant 115 : (2011) 1 KCCR 744.
261. *Webb v Macpherson,* (1904) ILR 31 Cal 57 : 30 IA 238; *Chhatra Kumari v Mohan Bikram,* (1931) ILR 10 Pat 851 : 58 IA 279 : 133 IC 705 : AIR 1931 PC 196; *Mian Pir Bux v Sardar Mohammed Tahar,* 61 IA 388 : 69 Cal LJ 370 : 67 Mad LJ 865 : (1934) All LJ 912 : 151 IC 326 : AIR 1934 PC 275; *Official Assignee v ME Moolla and Sons Ltd,* (1934) ILR 12 Rang 589 : 154 IC 9 : AIR 1935 Rang 84.
262. *Maung Shwe Goh v Maung Inn,* (1917) ILR 44 Cal 542 : 44 IA 15 : 38 IC 938; *Hormasji Manekji v Keshav,* (1894) ILR 18 Bom 13; *Rupchand v Jankibai,* (1925) 27 Bom LR 1441 : 91 IC 817 : AIR 1926 Bom 24; *Kalachand v Jatindra Mohan,* (1929) ILR 56 Cal 487 : 117 IC 855 : AIR 1929 Cal 263.
263. *Rambaran v Ram Mohit,* [1967] 1 SCR 293 : AIR 1967 SC 744; *Shiv Kumar v Ajodhia Nath,* AIR 1972 J&K 125; *Jiwan Dass Rawal v Narain Dass,* AIR 1981 Del 291; *Suraj Charan Lenka v Pramila Mumary Mohanty,* AIR 1986 Ori 74, p 75.
264. *Balwant Vithal Kadam v Sunil Baburaoi Kadam,* AIR 2018 SC 49 : 2018 (1) SCALE 35 : (2018) 2 SCC 82 : 2018 (1) SCJ 734.
265. *Mian Pir Bux v Sardar Mahomed Tahar,* 61 IA 388, p 396 : 60 Cal LJ 370 : 67 Mad LJ 865 : 36 Bom LR 1195 : 1934 All LJ 912 : 151 IC 326 : AIR 1934 PC 235; *The Official Assignee v ME Moolla and Sons Ltd* (1934) ILR 12 Rang 589 : 154 IC 9 : AIR 1935 Rang 84.
266. *Kumaran v Kumaran,* AIR 2011 Ker 75 : (2011) 1 KLJ 161; *Amol v Deorao,* AIR 2011 (NOC) 215 (Bom); *Kashi Nath Sah v Shri Nath,* 238 (2017) DLT 392 : 2017 IIIAD (Delhi) 311.
267. *Mahadeo v Vasudeo,* (1899) ILR 23 Bom 181.
268. *Ramalingam v GR Jagadammal,* AIR 1957 AP 960.
269. *Govinda Chandra v Provabati Ghose,* (1955) 59 Cal WN 886 : AIR 1956 Cal 147.
270. *Indira Fruits and General Market, Meerut v Bijendra Kumar Gupta,* AIR 1995 All 316; *Jayshree Oza v Rakesh Mohan,* (1998) 74 DLT 11; *Dewan and Sons Investments v DDA,* AIR 1997 Del 388; *Majidan v Ishaq,* AIR 2008 (NOC) 1135 (UP); *Basant Kaur v General Public,* AIR 2008 (NOC) 1406 (P&H); *Ramesh Chandra v Prem Lata Sinha,* AIR 2008 Pat 155 : (2008) 56 BLJR 2405.
271. *Mohinder Kaur v Sudarshan Krishnamurthy,* (1992) 23 DRJ 179.

In the absence of registered sale deed, nobody can call himself as owner by purchase on the basis of agreement to sell, and the power of attorney executed by the alleged vendor in favour of the prospective purchaser cum attorney.[272] As by reason of an agreement for sale, no interest in an immovable property is created, the question of transfer of any interest thereby would not arise and, therefore, the prohiobition of alienation created under section 4 of the Andhra Pradesh Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972 would not apply to such a transaction.[273]

Where a landholder is prohibited from transferring the land with effect from a certain date under the local tenancy Act, a transfer of the land subsequent to that date is void. The fact that agreements for the sale of such land were entered into before the specified date, is of no consequence, as such agreements do not create any right or interest in the property.[274] Where property agreed to be sold was compulsorily acquired, the vendee sued for specific performance of the contract; it was held that he was not even entitled to the compensation awarded in respect of such property.[275]

A contract for sale is, therefore, merely a document creating a right to obtain another document, and does not require registration.[276] As a contract for sale is not the same as a sale and is not required to be compulsorily registered and title remains with the vendor, but if an agreement of sale is coupled with delivery of possession in part performance of conveyance rights created under this document requires compulsory registration as this agreement of sale partakes the character of a conveyance and would require both registration and stamp duty.[277] Where the Registrar of Assurances declined to register the sale deed, executed in favour of the nominee of a party in whose favour the contract for sale was earlier made and who had signed the sale deed as a confirming party on the ground that the confirming party had acquired some interest in the land and ought to file income-tax clearance certificate as provided under section 230-A of the Income-Tax Act, 1961, it was held that since the confirming party was not the owner of the property, and had not acquired any right, title or interest in the property, on the strength of mere agreement to sell the property, the question of his obtaining income tax clearance certificate under section 230-A of the Income Tax Act did not at all arise.[278]

Where the contract is for the sale of unascertained goods, namely trees that were neither identified nor counted nor were in a deliverable state, the agreement in question is not a sale, but only an agreement to sell and the requisite permission from various departments could be obtained only by the owners.[279]

The concept of two classes of ownership—legal and equitable—is alien to Indian law, which recognises only one owner. The equitable doctrine of English law has no application in India.[280] However, many of the English equitable principles have taken statutory form in

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272. *Imitiaz Ali v Nasim Ahmed,* AIR 1987 Del 36 : (1986) 30 DLT 487 : 1986 RLR 632.
273. *K Venkateswarlu v K Pedda Venkaiah,* AIR 2002 AP 8 : (2001) 5 Andh LT 473.
274. *Gopal Singh v The State,* AIR 1984 Raj 174, pp 177, 178.
275. *Sujan Singh v Mokhan Chand Jain,* AIR 1983 P&H 180.
276. *Dave Ramnshankar v Baikailasgoure,* AIR 1974 Guj 69; *Amol v Deorao* AIR 2011 (NOC) 215 (Bom).
277. *State of Uttaranchal v Khurana Brothers,* (2010) 14 SCC 334 : LNIND 2010 SC 1056 : AIR 2011 SC 224; *Mohammad Siddique Khan v Balakdas Bairagi,* (2011) 2 MP LJ 130; *Vakil v Sakir,* 2010 SCC OnLine All 704; *Joseph Kantharaj v Attharunnisa Begum S,* (2010) 2 SCC 619 : [2010] 1 SCR 629 : SCC 352 : LNIND 2010 SC 1047 : 2010 (11) SCALE 461.
278. *Mural Viniyog Ltd v Registrar of Assurance,* AIR 1989 Cal 65, p 69.
279. *State of Himachal Pradesh v Motilal Pratap Singh and Co,* AIR 1981 HP 8.
280. *Amulya Gopal Majumdar v United Industrial Bank Ltd,* AIR 1981 Cal 404.

India. From the ultimate paragraph of section 54, and the ultimate and penultimate paragraphs of section 40, it is clear that though a contract for the sale of immovable property does not create an interest in, or a charge on, the property, it creates an obligation annexed to the ownership of the property, which may be enforced against a transferee without notice or a voluntary transferee.[281]

(36) Agreement to sell and suit for specific performance

Since an agreement to sell is primarily a contract between two parties, they must follow the terms and conditions laid down in the contract and if after entering into a contract for sale of property, the seller without any reasonable excuse avoids executing a sale deed, the buyer can proceed to the court and file a suit for specific performance of the contract. The court would award his suit and direct the seller to execute a sale deed in his favour. But for that it must be established by the buyer, that he has fulfilled his part of the bargain, be it payment of price or any other condition. In addition he must state the facts clearly and truthfully before the court. His intentions must be bonafide. In a suit for specific performance of alleged agreement of sale, the admission of unregistered sale deed as evidence is allowed.[282] Whether an agreement of sale concluded or remained an offer is a question of fact. When an agreement deed is executed whereby the seller agrees to sell immovable property to buyer for consideration, and the buyer pays the consideration in part, it would be a concluded contract of sale. If either he is not ready and willing to perform his part of the bargain or he wants execution of sale deed after stipulating some conditions that did not form part of the agreement to sell, or misquotes the terms of the agreement and set up a false claim merely to create a basis for specific performance such as that the land would be converted into Lal Dora and that the payment of the balance amount was to be dependent on such event, he would not be entitled to a decree of specific performance.[283] In an agreement to sell and a decree for specific performance of the contract, the contract between parties is not extinguished upon passing of the decree, and this passing of the decree does not modify or abrogate any of the express or implied terms of the contract. Parties to the contract continue to bear the rights and obligations to complete the contract in accordance with the terms and conditions of the contract. It does not confer an indefeasible right upon the decree holder to get the property straightway in his own name as the decree for specific performance merely recognizes the claim for specific performance of contract. The Court shall presume unless and until the contrary is proved that breach of contract to transfer immovable property cannot be adequately relieved by compensation in money. This presumption is a rebuttable one.[284] The consequences of an agreement to sell includes the creation of right in respect of the property being sold in favour of vendee when the agreement to sell had been executed in favour of a person, he gets right to get that property transferred in his favour by filing a suit of specific performance.[285]

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281. *Dorabai v Mathuradas Govinddas,* AIR 1980 SC 1334 : (1980) 3 SCC 545.
282. *S Kaladevi v V R Somasundaram,* (2010) 5 SCC 401 : LNIND 2010 SC 340 : AIR 2010 SC 1654 : 2010 (3) SCALE 641.
283. *Matadin Yadav v Midas Lids Pvt Ltd,* AIR 2014 (NOC) 295 (Del) : (2015) 5 SCC 650.
284. *Shanker Singh v Narinder Singh,* 2013 (4) AJR 456 : 2012 (90) ALR 698 : 2012 2 AWC1826 SC : 2012 (1) CGBCLJ 48 : [2012 (2) JCR 44 (SC)] : JT 2011 (14) SC 106 : 2012-1-LW231 : 2012 (1) PLJR 189 : 2012 (1) RCR (Civil) 576 : 2011 (13) SCALE 574 : 2012 (1) UJ80.
285. *Sanjeev Lal v CIT Chandigarh,* (2015) 5 SCC 775 : AIR 2014 SC 3589 : 2014 (8) SCALE 432 : 2014 (6) SCJ 401.

In *Mohd Hafizullah v Javed Akhtar*,[286] an agreement to sell the property was executed by *A*, *B* and *C*, in favour of *X* and *Y*. The property comprised of a residential house and the share of all three sellers constituted 3/4th of the house. 1/4th was under the ownership of *W*. She prayed that the buyers be directed to purchase her share as well, as nobody else would be interested to buy virtually an undivided small share in a house. The court granted her prayer and directed that she be permitted to sell her share to either *X* or *Y* or to their nominee. *W* was approached by *Q* as the nominee of *X* and *Y* but offered to purchase the share of *W* in her own right and not as a nominee of *X*/*Y*. The property was sold to her. When *X* and *Y* came to know that the property had been sold to somebody else, without informing them, they approached the court for cancellation of the sale deed in favour of *Q* as the same according to them was procured by fraud and for a suit for specific performance of the contract of sale in their favour. Upholding their claim, the court ordered for cancellation of the sale deed executed by *W* in favour of *Q* as the same was procured by fraud and without giving any notice to *X* and *Y*, and decreed specific performance in favour of *X* and *Y*.

When a decree for specific performance of agreement of sale of immovable property is passed in favour of transferee under prior contract for sale, resulting in cancellation of sale with subsequent purchaser, seller cannot retain sale consideration received from subsequent purchaser.[287]

(37) Adverse Possession

Even after the contract to sell, title clearly resides in the vendor, and even though the proposed vendee has taken possession, his possession is under the contract and is, therefore, clearly permissive. In *Achal Reddy v Ramakrishna Reddiar*,[288] the Supreme Court held that: "In the case of an agreement of sale, the party who obtains possession acknowledges title of the vendor even though the agreement of sale may be invalid. It is an acknowledgement and recognition of the title of the vendor which excludes the theory of adverse possession... Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse." Supreme Court has further held in *Thakur Kishan Singh v Arvind Kumar*[289] that mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession. In *Roop Singh v Ram Singh*,[290] the Supreme Court has gone a step further, and held that once it is admitted by implication that the plaintiff came in possession of the land lawfully under the agreement and continued to remain in possession till the date of the suit, the plea of adverse possession would not be available to the defendant, unless it has been asserted and pointed out that hostile animus of retaining possession as an owner after getting possession of the land existed.

In a suit for declaration, possession and permanent injunction on the grounds of adverse possession, *A* claimed uninterrupted possession of the property on the basis of an unregistered sale deed executed in 1951, in his favour by the owner *B*. Such possession was not denied by *B* at the time of *suo moto* eviction proceedings under Orissa Regulation 2 of

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286. *Mohd Hafizullah v Javed Akhtar*, (2015) 5 SCC 650 : 2014 (8) SCALE 292 : 2014 (7) SCJ 444.
287. *Rathnavathi v Kavita Ganashamdas*, (2015) 5 SCC 223 : LNIND 2014 SC 918 : 2014 (12) SCALE 386.
288. *Achal Reddy v Ramakrishna Reddiar*, AIR 1990 SC 553 : (1990) 4 SCC 706.
289. *Thakur Kishan Singh v Arvind Kumar*, (1994) 6 SCC 591, para 5 : AIR 1995 SC 73.
290. *Roop Singh v Ram Singh*, (2000) 3 SCC 708, para 9 : AIR 2000 SC 1485; *Moturi Seeta Ramabrahmam v Bobba Rama Mohana Rao*, AIR 2000 AP 504 : (2000) 5 ALD 111 : (2000) 5 ALT 73; *Baruna Giri v Raja Kishore Giri*, AIR 1983 Ori 107.

1956 and thereafter as well. *B* pleaded that *A* had taken advantage of his drunken position and sought permission to construct shops and lease them out, but did not plead any forgery. In light of the fact that there was no evidence of any compelling circumstance or situation demanding such construction, absence of any terms of such construction and possession, and the fact that there was no close relation between *A* and *B*, presumption as regards the nature of possession of *A* would arise as that of the owner and he would be entitled to a declaratory order.[291]

(38) Attachment

There was a conflict of decision as to whether the obligation created by a contract for sale will prevail over claims enforceable under an attachment.[292] The matter is, however, set at rest by the Supreme Court holding that a sale deed having been executed prior to attachment before judgment, though registered subsequently, will prevail over attachment before judgment.[293] The Supreme Court has gone even to the extent of holding that not only a sale deed, but even an agreement of sale will prevail over attachment before judgment made subsequent to such agreement of sale.[294]

(39) Equities of Person Contracting to Buy

If the transaction is still in the stage of contract, the buyer, even if he has paid the price or part of the price and even if he has taken possession, is not the owner, and the property is still in the seller. However, these circumstances may give rise to equities in favour of the buyer. A buyer who has paid the price or part of the price in anticipation of a conveyance is entitled under section 55(6)(b) to a charge on the property for the amount paid. If the contract is still capable of specific performance, the buyer may file a suit for specific performance, and complete his title. If the buyer is in possession in pursuance of the contract, he is protected from dispossession by the right enacted in section 53A. However, if section 53A does not apply, "an averment of the existence of a contract of sale, whether with or without possession following upon the contract", is not a defence to an action for ejectment in India.[295] It has, however, been held that though a contract of sale does not, of itself, create an interest in property, there is transfer of ownership, when, in addition, a part of the purchase price has also been paid.[296] This decision, it is submitted, is not correct, for ownership can pass only on registration or delivery of possession.

(40) Estoppel

An admission that land has been sold will not operate as an estoppel so as to do away with the necessity for a registered conveyance.[297] Title to land will not pass by mere admission when the Act requires a conveyance.[298] However, it has been held that section 54 has no application when there is clear evidence that following the contract for sale, the proposed

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291. *Mangru Oram v Abdul Razak,* AIR 2017 (NOC) 901 (Orissa).
292. *Varghese v Koran,* AIR 1952 Tr&Coch 407. See also note "Attachment" under section 40.
293. *Hamda Ammal v Avadippa Pathar,* (1991) 1 SCC 715, p 723; *Abdul Jalal v Mariya Financer,* AIR 2002 Ker 276 : (2002) 1 Ker LJ 482.
294. *Vannarakkal Kallalathil Sreedharan v Chandramaath Balakrishnan,* (1990) 3 SCC 291, p 294; overruling *Mohinder Singh v Nanak Singh,* AIR 1971 P&H 381.
295. 61 IA 388; (1934) ILR 12 Rang 589.
296. *Rabindra Nath v Haredra Kumar,* (1955) 97 Cal LJ 62 : AIR 1956 Cal 462.
297. *Maung Po Yin v Maung Tel Tu,* (1924) ILR 2 Rang 459 : 86 IC 205 : AIR 1925 Rang 68.
298. *Mathura Mohan v Ram Kumar,* (1916) ILR 43 Cal 790 : 35 IC 305; *Maung Po Yin v Maung Tel Tu,* (1925) ILR 2 Rang 459 : 86 IC 205 : AIR 1925 Rang 68.

purchaser was put into physical possession, and he continued to do so uninterruptedly till execution of sale deed and formal delivery.[299]

The recitals in the documents are binding on the persons party to the document. In *Surendra V K v V K Thimmaiah,*[300] decided by the Supreme Court, late Kunnaiah had sold some properties at Hoskote under a registered sale deed, where the reason for sale of the said lands was mentioned as that to discharge the loan borrowed by him for the purpose of purchasing the lands at Kaikere Village and to improve the lands. The properties at Hoskote were belonging to his grandfather Thimmaiah. In this background the High Court had rightly held that the properties purchased by Kunnaiah at Kaikere Village out of the money received by him from the sale of the ancestral lands, are the ancestral properties. The High Court held that the recitals in the document are binding on the parties and it was not open for any party to say that the said properties are self-acquired properties of late Kunnaiah. This view was upheld by the Supreme Court.

The unilateral self-serving recitals in a Sale Deed, in the facts of the case, cannot be construed as conclusive, according to Patna High Court.[301]

(41) Mahomedan Law

The exception in favour of rules of Mahomedan law in section 2(d) only refers to such rules as differ from the general rules contained in chapter II. However, section 54 occurs in chapter III and, therefore, applies to Mahomedans.[302] Under the Mahomedan law rule, the execution of an instrument of sale is in no case necessary and the sale becomes absolute on payment of price and delivery of possession,[303] but the section renders this rule obsolete where the TP Act is in force. In cases where the Mahomedan right of pre-emption is claimed, there was a conflict of judicial opinion[304] as to whether the right arises when the sale is complete under Mahomedan law, or only when it is complete under the provisions of this section. The rule generally applied was that it was the intention of the parties which determined the system of law applicable, and the date when the sale can be said to be complete;[305] and this rule had been approved by the Privy Council.[306] The Supreme Court has,[307] however, concluded the question and held that if the TP Act was in force, no sale could be said to be complete, unless the provisions of section 54 were complied with, regardless of the intention of the parties. There was no justification for importing any rule of personal law to override the express provisions of the TP Act.

The transaction called the *hiba-bil-iwaz* may[308] or may not[309] be a sale depending upon the facts and circumstances of the case. A *hiba-bil-iwaz* by which a Mahomedan transfers

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299. *Bhabani Sarma v Narayan Sarma,* AIR 2003 Gau 171, p 176.
300. *Surendra V K v V K Thimmaiah,* 2013 (10) SCC 211.
301. *Sachida Nand Sarma v State of Bihar,* AIR 2013 Pat 89.
302. *Ghafur-ud-din v Hamid,* (1912) 10 All LJ 154 : 16 IC 679.
303. *Begam v Muhammad,* (1894) ILR 16 All 344, p 346.
304. Ibid; *Najm-un-nissa v Ajaib Ali,* (1900) ILR 22 All 343; *Janki v Girjadat,* (1885) ILR 7 All 482; *Budhai v Sonaullah,* (1914) ILR 41 Cal 943 : 23 IC 395; *Kheyali v Mullick,* (1916) 1 Pat LJ 174 : 34 IC 210.
305. *Jadu Lal v Janki Koer,* (1908) ILR 35 Cal 575; *Abdulla v Ismail,* (1921) ILR 46 Bom 302 : 64 IC 913 : AIR 1922 Bom 124.
306. *Sitaram v Jiaul Hasan,* (1921) ILR 45 Bom 1056 : 48 IA 475 : 64 IC 826 : AIR 1923 PC 41.
307. *Radhakisan Laxminarayan v Shridhar Ramchandra,* [1961] 1 SCR 248 : AIR 1960 SC 1368 : [1961] 1 SCJ 215. See also *Janki v Girjadat,* (1885) ILR 7 All 482
308. See *Mulla's Mahomedan Law; Masum Vali Sahib v Iluri Mohin Sahib,* (1952) ILR Mad 1010 : (1952) 1 Mad LJ 611 : AIR 1952 Mad 671.
309. *Abdul Hamid v Abdul Ghani,* 148 IC 801 : AIR 1934 Oudh 163.

property to his wife in satisfaction of dower debt, is not a sale.[310] A dower debt being a debt payable by husband to wife, a gift in lieu of dower debt cannot be held to be valid, inasmuch as repayment of dower debt being consideration, no property can be transferred by way of a gift in lieu thereof.[311] Where it amounts to a sale, if the property is immovable property of the value of ₹ 100 or upwards, it must be effected by a registered instrument.[312]

(42) Reconveyance

In a sale coupled with an agreement to re-convey, there is no relation of debtor and creditor, nor is the price charged upon the property is conveyed, but the sale is subject to an obligation to re-transfer the property within the period specified. Distinction between mortgage by conditional sale, and sale with condition to re-convey is the relationship of debtor and creditor, and the transfer being a security for the debt.[313] An option to re-purchase is a privilege or concession,[314] because option by its very nature is dependent entirely on the volition of the person granted the option. He may or may not exercise it. Its exercise cannot be compelled by the person granting the option. It is because of this one-sidedness or "unilaterality" that the right is strictly construed.[315] A total absence of a clause of reconveyance in the sale deed would lead to an inference of it being an outright sale.[316]

It is well-settled that time is an essence of the contract in the case of a re-conveyance.[317] An agreement of sale even though described as a re-conveyance, does not by itself mean that it is an option to repurchase, nor does it in any way alter the substance of the deed. It merely records a historical fact—that the property which is to be sold was being purchased by the person who used to be the owner. The agreement remains an agreement for sale of immovable property, and must be governed by the same provisions of law.[318]

It is true that it is customary to include a recital regarding the agreement of re-conveyance in the sale deed itself. However, where there was an agreement preceding the sale deed and that agreement contained such a clause, and a sale deed, was executed consequent thereto, the absence of reference to the agreement of re-conveyance in the sale deed would not lead to the inference that the said right was given up by the plaintiff, executant of sale deed. Unless there is a detailed plea, and also evidence that before execution of the sale deed there was novation, and parties expressly agreed to give a go-bye to the agreement of re-conveyance, no contrary presumption can be drawn.[319] In another case, the question arose about the genuineness of the document of a re-conveyance in respect of two properties, before the Supreme Court. The sale

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310. *Chaudhri Talib Ali v Kaniz,* (1927) ILR 2 Luck 575 : 102 IC 142 : AIR 1927 Oudh 204; *Bashir Ahmed v Zubaida,* (1926) ILR 1 Luck 83 : 92 IC 265 : AIR 1926 Oudh 186.
311. *Saimunissa v S K Mohiuddin,* AIR 1991 Pat 183, p 186; *Usman Khan v Amir Main,* AIR 1949 Pat 237.
312. *Abbas Ali v Karim Baksh,* (1909) 13 Cal WN 160 : 4 IC 466; *Sarifuddin v Mohiuddin,* (1927) ILR 54 Cal 754 : 105 IC 67 : AIR 1927 Cal 808; *Fateh Ali v Muhammad,* (1928) ILR 9 Lah 428 : 119 IC 258 : AIR 1928 Lah 516; *Saburannessa v Subdu Shaikh,* (1934) 38 Cal WN 747 : 152 IC 422 : AIR 1934 Cal 693; *Usman Khan v Amir Khan,* (1947) ILR 26 Pat 361 : AIR 1949 Pat 23; *Ghulam Abbas v Razia Begaum,* (1952) ILR 1 All 477 : (1950) All LJ 917 : AIR 1951 All 86.
313. *Bhaskar Waman Joshi v Shrinarayan Rambilas Agarwal,* AIR 1960 SC 1954; followed in *Kamal Shivajirao Katkar v Gajarabi Sopanrao Algude,* AIR 2001 Bom 369 : (2001) 3 Mah LR 290.
314. *Shanmugam Pillai v Anna* AIR 1950 PC 38 : 1949 FCR 537 : (1950) 1 MLJ 683; *K Simiathmull v Nanjalingiah Gowder,* AIR 1963 SC 1182.
315. *V Pechimuthu v Gowranmal,* (2001) 7 SCC 617, p 626 : AIR 2001 SC 2446.
316. *Vitthal Maharn Patil v Fakira Bhavsing Patil,* AIR 2011 (NOC) 292 (Bom).
317. *Mehdi Hussain Khan v Nusrat Hasan,* AIR 2004 AP 123 : (2004) 2 ALD 45 : (2004) 1 ALT 569.
318. *V Pechimuthu v Gowranmal,* (2001) 7 SCC 617, p 627–628 : AIR 2001 SC 2446.
319. *Babu Ram v Indra Pal Singh,* AIR 1998 SC 3021 : (1998) 6 SCC 358.

deed did not contain any stipulation about the re-conveyance, however subsequent deed for re-conveyance was executed by the agent of the purchaser. The seller expressed the absence of stipulation of re-conveyance in the sale deed as per the advice given by their legal advisor. Further, the existence of re-conveyance deed was supported by a letter returned by seller to the purchaser, besides the parties re-conveyed one of the two properties within the time limit fixed under the deed of re-conveyance, and for the same amount as stipulated in the re-conveyance deed. It was held that the re-conveyance deed was genuine.[320] In *D R Rathna Murthy v Ramappa*,[321] after the execution of the sale deed, a clause relating to reconveyance was inserted without the knowledge of the buyer in unusual manner to convert the character of the deed. On the issue of the validity of the reconveyance clause, the court said that in determination of whether a sale is absolute or conditional, the Act provides the complete code in property law and held that the deed would continue to remain an absolute sale and the reconveyance clause inserted post execution of an absolute sale fraudulently would be totally invalid. In another case, it was found that the sale deed was in reality not an outright sale, but an anomalous mortgage, and the agreement to sell is in reality a supplement to the anomalous mortgage. It was agreed between the mortgagors of the one side and the mortgagee on the other that the amount of loan would carry interest at the rate of 18 per cent per annum, and in pursuance of which agreement the possession of the suit property was delivered to mortgagee, and it was further agreed between them that after completion of five years, the accounts would be settled and on payment of balance amount, if any, the mortgagee would re-convey and re-deliver the possession of suit property to the mortgagors.[322] Where it was found that there was no recital in document as to whether amount paid by transferee was towards mortgage consideration or loan amount, and there was no stipulation of interest and entire property was given in possession under document to transferee, which he was continuously enjoying, and transferee got the property mutated in his name, and further transferor never exercised his right to repurchase property or offered to pay the amount back, it was held that the transaction is a simple conditional sale with a right of re-purchase, and not mortgage with conditional sale.[323] In *Rajamma v B Renuka Murthy*,[324] the property was agreed to be sold absolutely for family necessity and to pay family debts for a consideration of Rs 2000/ and the title and possession was delivered to the purchaser with the execution of the document with the clause in the document empowering him and his successors to enjoy the property by paying taxes to the government. At the same time the transferor and his legal representatives had no right in the property and the transferee was entitled to enter into any kind of transaction with the property including sale. The vendors also undertook to repay the entire amount within five years and execute sale deed. The court held that this transaction was a conditional sale with an option of repurchase.

(43) Bonafide Purchaser

A purchaser ought to make necessary enquiry and only after being satisfied about the title of property, should he purchase the same. In *Ethiraj V v Sridevi*,[325] the Karnataka High Court considered a case where the purchaser purchased entire property from the defendant though he

320. *S V R Mudaliar v Rajababu F Buhari*, AIR 1995 SC 1607 : 1995 4 SCC 15.
321. *D R Rathna Murthy v Ramappa*, (2011) 1 SCC 158. AIR 2011 (NOC) 292 (Bom).
322. *Habeeb Khan v Valasula Devi*, AIR 1997 AP 53.
323. *Kundurthi Ranganadham v Puli Ragaiah*, AIR 2004 AP 415 : (2004) 3 ALD 629 : (2004) 4 ALT 209.
324. *Rajamma v B Renuka Murthy*, AIR 2017 (NOC) 614 (Kant) : 2011 (2) RCR (Civil) 414 : 2010 (10) SCALE 625 : (2011) 1 SCC 158.
325. *Ethiraj V v Sridevi*, AIR 2014 Kar 58.

was aware that the defendant was only owner of half portion of the said property and held that it is not open for the purchaser to contend that he is a bonafide purchaser.

55. Rights and Liabilities of buyer and seller.—In the absence of a contract to the contrary, the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1) The seller is bound—

(a) to disclose to the buyer any material defect in the property [326][or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(c) to answer to the best of his information all the relevant questions put to him by the buyer in respect of the property or the title thereto;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

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326. Ins. by Act 20 of 1929, sec. 17.

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer, of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, [327][any transferee without consideration or any transferee with notice of the non-payment], for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part [from the date on which possession has been delivered].

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

327. Ins. by Act 20 of 1929, sec. 17.

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller of such person as he directs:

provided that, where the property is sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any encumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, [***][328] to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

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(1) Amendments

The following amendments have been made by Act 20 of 1929. In section 55(l)(a), the words "or in the seller's title thereto" have been inserted. These give effect to the decision in *Haji Essa v Dayabhai*[329] that a material defect in the property includes a defect in the title of the seller. In section 55(4)(b), the words "any transferee without consideration or any transferee with notice of the non-payment" have been inserted after the words "to a charge upon the

329. *Haji Essa v Dayabhai,* (1896) ILR 20 Bom 522.

property in the hands of the buyer". The effect is that the unpaid seller's charge is available not only against the buyer, but against a transferee from the buyer with notice of a gratuitous transferee. At the end of the sale clause, the words "from the date on which possession has been delivered" have been added to indicate that the buyer is liable for interest on unpaid price only from the date when he is put in possession. In section 55(6)(b), the words "with notice of the payment" have been omitted. This makes the charge of the buyer for price prepaid effective not only against the seller, but against all persons claiming under him, irrespective of notice.[330]

(2) In the Absence of a Contract to the Contrary

Note (56) under the same head may be referred to.

(3) Rights and Liabilities

The section set forth the rights and liabilities of the buyer and seller—

(1) Before completion.

(2) After completion.

These rights and liabilities are as follows:

(i) Before completion

	Seller's liabilities		*Buyer's liabilities*
section 55(l)(a)	To disclose material defects.	section 55(5)(a)	To disclose facts materially increasing value.
section 55(l)(b)	To produce title deeds.		
section 55(l)(c)	To answer question as to title.		
section 55(l)(d)	To execute conveyance.	section 55(5)(b)	To pay price.
section 55(l)(e)	To take care of the property.		
section 55(l)(g)	To pay outgoings.		
	Seller's right		*Buyer's right*
section 55(4)(a)	To take rents and profits.	section 55(6)(b)	Charge for price prepaid.

The rights and liabilities before completion are all contractual with the exception of the seller's right to take the rents and profits under section 55(4)(a), which is a right the seller has because he continues to be the owner after the contract. The seller's liabilities—to produce title deeds under section 55(l)(b); to answer question as to title under section 55(1)(c); to execute conveyance under section 55(l)(d); and to disclose defects under section 55(l)(a); and the buyer's liability to disclose facts materially increasing the value

330. *Hari Bapuji v Bhaga Sadhu,* (1936) 38 Bom LR 1200 : 167 IC 804 : AIR 1937 Bom 142; *Abdul Hamid Khan v Mahomed Ali,* (1951) 53 Bom LR 817 : AIR 1952 Bom 67.

under section 55(5)(a)—merge in the conveyance. There is no remedy on them after the conveyance except on the ground of fraud, but omission of disclosure is expressly declared to be fraudulent. The buyer's liability to pay the price under section 55(5)(b) does not merge in the conveyance, and after conveyance is enforced by the seller's charge for unpaid price, in terms of section (55)(4)(b). Conversely, if the buyer has paid purchase money before conveyance, he has a charge under section 55(6)(b). The seller's liability to take care of the property under section 55(l)(e) and to pay outgoings under section 55(1)(g) are obligations collateral to the contract, which do not merge in the conveyance and can be enforced after completion.

(ii) After completion

	Seller's liabilities		*Buyer's liabilities*
section 55(l)(f)	To give possession.	section 55(5)(c)	To bear loss to the property.
section 55(2)	Implied covenant for title.		
section 55(3)	To deliver title deeds on receipt of price.	section 55(5)(d)	To pay outgoings.
	Seller's right		*Buyers' right*
section 55(4) (b)	Charge for price not paid.	section 55(6)(a)	Benefit of increment.

The buyer's rights and liabilities after completion—section 55(6)(a), section 55(5)(c), and section 55(5)(d))—are not contractual, but are incidents of the ownership that has been transferred to him. The seller's charge for unpaid price under section 55(4)(b) is a security for the enforcement of the buyer's liability to pay the price in terms of section 55(5)(b) which has not merged in the conveyance. The liability to give possession under section 55(1)(f), and to guarantee title as per section 55(2) are contractual liabilities implied in the conveyance.

(4) Open Contract for Sale

When nothing is said as to the way in which the seller shall prove his title, and the contract for sale merely fixes the price which is to be paid for a certain piece of land, it is said to be an open contract.[331] The section sets forth the rights and liabilities that are implied in an open contract for sale, i.e., a contract in which the terms are not subject to particular conditions. They are merely an elaboration of the fundamental duties of the parties which are that the seller must make out a good title, execute a conveyance, and deliver the property and title deeds to the buyer; while the buyer must examine title, accept it if good, draft a conveyance for the seller to execute, and pay the price.

These implied conditions are usually varied and supplemented by particular conditions which are comprised in the comprehensive phrases "contract to the contrary." A contract to execute a sale deed "containing the necessary stipulations" means a contract for sale on the conditions implied by this section.[332]

331. *Halsbury's Laws of England*, 3rd Edn, vol 34, p 228.
332. *Ram Sundar Saha v Raj Kumar Sen*, (1928) ILR 55 Cal 285 : 104 IC 527 : AIR 1927 Cal 889.

(5) Section 55(1)(a)—Seller's Duty of Disclosure

A contract for sale of land is not a contract *uberrimae fidei;* but although the duty of disclosure is not absolute, the seller is under an obligation to disclose latent defects of which he is aware. This is the same rule as in the sale of goods under section 16 of the Indian Sale of Goods Act, 1930. In *Carlish v Salt*[333] J Joyce said:

> In the case of a sale of the chattel, the law as stated by Bramwell, B in *Horsfall v Thomas*[334] is that if there be a defect known to the manufacturer, and which cannot be discovered on inspection, he is bound to point it out. Upon consideration of the authorities, I am of opinion that the vendor of real estate is under a similar obligation with respect to a material defect in the title or the subject of the sale, which defect is exclusively within its knowledge, and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions.

A latent defect is a defect which the buyer could not with ordinary care discover for himself. There is no duty to disclose defects of which the buyer has actual,[335] or constructive notice.[336] If at the time of execution of an agreement to sell, a proposal for acquisition of such land was pending before the government, but a notification of the same was not issued, the same does not constitute a material defect and the seller is not bound to disclose the same to the buyer.[337] As to patent defects and defects of which the seller is unaware, the maxim of *caveat emptor* applies. However, a mutual mistake as to the matter of fact essential to the agreement will render the agreement void.[338] The fact that rooms and flats constructed were not authorized and were illegal is a material fact, a non-disclosure of which would attract the application of this section.[339] A litigation pending in the court with respect to the property that is proposed to be sold is a material fact. The rights of a bona fide purchaser who purchased the property in ignorance of the pending litigation in its regard ought to be protected, but the purchaser must be a bona fide purchaser who bought the property for adequate price.[340] It has been held that there is a patent defect where it is obvious that there is a right of way enjoyed by some third person or by the public in general;[341] but that the existence of a public right of way is a latent defect if the land is not such as to indicate clearly a right of public user.[342] The ruinous condition of a house is a patent defect.[343] The buyer can see these on inspection and if he is not vigilant and omits to take inspection, he has only himself to blame. An underground culvert or drain is a latent defect.[344]

Material defect

The latent defect whether of property or of title must be material. This is decided with reference to the principle laid down by CJ Tindall in *Flight v Booth*[345] that it must be of

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333. *Carlish v Salt,* [1906] 1 Ch 335, p 341.
334. *Horsfall v Thomas,* (1862) 1 H & C 90.
335. *Ramasubbu v Muthiah,* 85 IC 999 : AIR 1925 Mad 968.
336. *Godrej & Boyce Manufacturing Co Ltd v State of Maharashtra,* (2014) 3 SCC 430 : LNIND 2014 SC 70 : 2014 (1)SCALE 707 : AIR 2014 SC 1446; *Harilal v Mulchand,* (1928) ILR 52 Bom 883 : 113 IC 27 : AIR 1928 Bom 427; *Ganpat Ranglal v Mangilal Hiralal,* AIR 1962 MP 144.
337. *Sukhdev Kaur v Gurdev Singh,* AIR 2011 P&H 122 : (2011) 164 PLR 16.
338. *Nursing Das v Chuttoo Lall,* (1923) ILR 50 Cal 615 : 74 IC 996 : AIR 1923 Cal 641; *Meghi v Tyeballi,* (1924) 26 Bom LR 1019 : 90 IC 9 : AIR 1925 Bom 64.
339. *Dilip Kumar Mukherjee v Kolkata Municipal Corporation,* (2013) 5 SCC 336 : LNIND 2012 SC 1041 : AIR 2013 SC 927 : JT 2012 (10) SC 361.
340. *B S Oberoi v P S Oberoi,* (2010) 117 DRJ 257 (Delhi).
341. *Bowles v Round,* (1800) 5 Ves 508; *Ashburner v Swell,* (1891) 3 Ch 405, p 408.
342. *Yandle & Sons v Sutton,* [1922] 2 Ch 199 : [1922] 2 All ER Rep 425.
343. *Grant v Munt,* (1815) Coop G 173.
344. *Re Puckett & Smiths Contract,* (1902) 2 Ch 258 : [1900-3] All ER Rep 114.
345. *Flight v Booth,* (1834) 1 Bing (NC) 370.

such a nature that it might be reasonably supposed that if the buyer had been aware of it he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy. The terms of the contract will be referred to in order to decide whether the case falls within the rules in this case. Where land was sold for building purposes, an underground drain was held to be a material defect;[346] but not when a house, and land were sold mainly for residence.[347] Lack of an independent passage to the factory would be a material defect and a non-disclosure of the same, despite repeated correspondence; and a false assurance of clear independent approach road would hold the seller liable for not only non-disclosure, but actually misleading the buyer with respect to a material defect.[348]

Defects in property

It was at one time doubted whether this phrase included defect in title, but the Bombay High Court held that it did,[349] and the amending Act of 1929 has adopted this decision by adding the words "or in the seller's title thereto." A defect in title is a material defect.[350] A defect may be of property or of title and a defect of property may also be a defect of title, for a right of way across land would be a good objection to title. Defects of property are defects which interfere with the physical enjoyment of the land sold. Trifling defects such as rotten boards or joints need not be disclosed.[351]

Defect in title

Defects in title are always latent defects,[352] for a seller's title is a matter exclusively within his own knowledge and he is bound to state it explicitly, and to tell the entire truth which is relevant to the mater in hand.[353] In the absence of words to the contrary, the presumption is that the seller is giving a title free from reasonable doubt and this rule is implied in section 25(b) of the Specific Relief Act, 1877, which corresponds to section 17 of the Specific Relief Act, 1963. A title free from reasonable doubt is a marketable title which can at all times be forced upon an unwilling purchaser.[354]

The following are instances of a defect in the seller's title: an encumbrance;[355] a notification and not a mere proposal[356] of intended acquisition under the Land

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346. *Re Puckett & Smiths Contract* (1902) 2 Ch 258; *Re Brewer & Hankins Contract,* (1899) 80 LT 127.
347. *Re Brewer and Hankins Contract,* (1899) 80 LT 127.
348. *Haryana Financial Corporation v Rajesh Gupta,* AIR 2010 SC 338 : (2010) 1 SCC 655.
349. *Haji Essa v Dayabhai,* (1896) ILR 20 Bom 522; *Sheo Ram v Thakur Mahton,* 58 IC 529; *Mohomed Siddiq v Li Kan Shoo,* 92 IC 766 : AIR 1925 Rang 372; *Ramasubbu v Muthiah,* 85 IC 999 : AIR 1925 Mad 968.
350. *Baljit Singh v Improvement Trust, Ludhiana,* AIR 2009 SC 1254 : (2009) 2 SCC 558.
351. *Sugden,* 14th Edn, pp 334, 341.
352. *Baljit Singh v Improvement Trust, Ludhiana,* AIR 2009 SC 1254 : (2009) 2 SCC 558.
353. *Re Banister, Broad v Munton,* (1879) 12 Ch D 131; *Re Marsh and Granville (Earl),* (1883) 24 Ch D 11; *Bai Dosibai v Bai Dhanbai,* (1925) ILR 49 Bom 325 : 85 IC 597 : AIR 1925 Bom 85.
354. *Pyrke v Waddingham,* (1852) 10 Hare 1; *Haji Mahomed Mitha v Musaji Esaji,* (1891) ILR 15 Bom 657; *Shrinivasdas v Meherbai,* (1917) ILR 41 Bom 300 : 44 IA 36 : 39 IC 627; *Rajendra Kumar v Poosammal,* AIR 1975 Mad 379 : (1975) 2 Mad LJ 59.
355. *Re Banister Broad v Munton,* (1879) 12 Ch D 131; *Mahomed Siddiq v Li Kan Shoo,* AIR 1925 Rang 372; contra, *Madan Mohan v Jwala Prasad,* AIR 1950 East Punj 276.
356. *Haryana Financial Corporation v Rajesh Gupta,* AIR 2010 SC 338 : (2010) 1 SCC 655.

Acquisition Act;[357] a restrictive covenant;[358] an easement;[359] a party-wall notice and award throwing upon the owner the liability to contribute to rebuilding;[360] unusually onerous covenants in a sale of lease-hold property;[361] or the fact that the agreed root of title is a voluntary conveyance.[362] In a Bombay case[363] it was held that an outstanding equitable mortgage was not a material defect in the title, as the amount of the mortgage was less than the price and could be cleared by the vendor. Where a person sells property not belonging to him, it is clearly a case of fraud and not a mere material defect in title. The case is outside section 55(l)(a), and such a person must make good the loss suffered by the other party.[364]

Non-disclosure

If before he has accepted the conveyance the buyer discovers a material defect which has not been disclosed, he may claim damages or rescind the contract for misrepresentation. He may also resist a suit for specific performance. The duty of disclosure merges in the conveyance, but if the buyer has accepted the conveyance he has a remedy in damages on the covenant for title.[365] The fact that the buyer knew of the defect in title of the seller prior to the purchase, does not prevent him from suing for damages for breach of the covenant.[366] Again, as non-disclosure of a material defect is a fraud, he may sue to set aside the sale and claim damages.

Illustrations

(*1*) *A* sells to *B* an enclosed field. Before accepting the conveyance, *B* discovers that the public have a right of way across the field of which there is no visible indication on the land. This is a defect both on the property and in the seller's title. *A* not having disclosed this defect, *B* may refuse to complete and claim damages. He can also resist a suit for specific performance.

(2) *A* sells a property to *B*. After he has accepted the conveyance, *B* discovers that under a decree for partition a portion of the property had been allotted to *C*. *A*'s omission to disclose the decree is fraudulent and *B* may sue to set aside the conveyance.[367]

The onus of showing a failure to disclose a defect in title is on the purchaser.[368]

In a case where Flat buyers buying Flats and occupying the same with full awareness that revised plans for their flats had been rejected by authorities, the Supreme Court held that the

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357. *Lallubhai Rupchand v Chimanlal Nandlal,* (1935) ILR 59 Bom 83 : 36 Bom LR 1041 : 155 IC 564 : AIR 1935 Bom 16.
358. *Nottingham Patent Brick & Tile Co v Butler,* (1885) 15 QBD 261 : (1886) 16 QBD 778; *Halkett v Dudley (Earl),* (1907) 1 Ch 590 : [1904-7] All ER Rep 465; *Bai Dosibai v Bai Dhanbai,* (1925) ILR 49 Bom 325 : 85 IC 597 : AIR 1925 Bom 85; *Lallubhai Rupchand v Chimanlal Nandlal,* (1935) ILR 59 Bom 83 : 36 Bom LR 1041 : 155 IC 564 : AIR 1935 Bom 16.
359. *Heywood v Mallalieu,* (1883) 25 Ch D 357; *Turner v Moon* (1901) 2 Ch 825; *Great Western Rly v Fisher,* (1905) 1 Ch 316; *Lallubhai Rupchand v Chimanlal Nandlal,* (1935) ILR 59 Bom 83.
360. *Carlish v Salt,* (1906) 1 Ch 335.
361. *Reeve v Berridge,* (1888) 20 QBD 523; *Re White and Smiths' Contract,* (1896) 1 Ch 637; *Re Haedicke and Lipskis Contract,* (1901) 2 Ch 666; *Molyneux v Hawtrey* (1903) 2 KB 487 : [1900-3] All ER Rep 472.
362. *Re Marsh and Granville (Earl),* 24 Ch D 11.
363. *Haji Essa v Dayabhai,* (1896) ILR 20 Bom 522.
364. *Shaik Buddan Sah v Nigamma,* AIR 1979 AP 90.
365. *Turner v Moon,* (1901) 2 Ch 825.
366. *Thammineni v Dhavala Polinaidu,* AIR 1945 Mad 205.
367. *Gajapathi v Alagia,* (1886) ILR 9 Mad 89.
368. *Ratanlal v Nanabhai,* AIR 1926 Bom 175.

only remedy available to flat owners is to sue sellers of flats/developers for refund of their money and/or for damages.[369]

(6) Section 55(l)(b)—Production of Title Deeds

Under this sub-section the seller is to produce his title deeds for inspection, and not for delivery. Title deeds are delivered on receipt of the whole of the purchase money under section 55(3). This sub-section requires the seller to produce the title deeds for inspection by the buyer in order that the buyer should satisfy himself as to title, but it makes no reference to the title abstract.[370]

There is no obligation to produce title deeds unless the buyer makes a request.[371] They must be produced within a reasonable time, and this is so even if the agreement requires them to be produced "forthwith".[372] However, the buyer must not omit to take inspection, otherwise he will be held to have constructive notice of matters which he would have discovered, if he had investigated the title.[373]

The words "in the seller's possession or power" indicate that the seller must produce not only documents which are in his possession, but also in his power. They do not enable a purchaser to insist on the production of documents not in the possession or power of the seller or to claim expenses of incurring a search for them in the office of the Collector or Registrar. Such a right can be derived by an express term of contract.[374]

(7) Section 55(1)(c)—Requisitions

When the documents of title are produced under the last sub-section the buyer examines them and if he is not satisfied, he makes requisitions or objections. These are (1) requisitions on title; (2) requisitions as to matters relating to conveyance; and (3) merely inquiries.

Requisitions on title are objections purporting that the documents do not show the agreed title or that the documents are not efficacious, i.e., not duly attested or not executed by parties having the capacity to convey, or that the identity of the property is not established, or that further evidence is necessary. Examples of such requisitions will be found in the cases mentioned in the footnote herewith.[375]

Requisitions as to matters relating to conveyance refer to such matters as the joinder or concurrence of parties to the conveyance.

Inquiries are for the protection of the buyer, and call attention to possible omissions of disclosure by the seller, and seek information on such points as easements, party walls and insurance.

The conditions of sale usually contain a stipulation requiring requisitions to be made within a certain time of the delivery of the abstract. This stipulation is construed as referring

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369. *Esha Ekta Apartments Co-operative Housing Society Ltd v Municipal Corporation of Mumbai,* AIR 2013 SC 1861.
370. See the observations of CJ Rankin in *Jyotiprasad v HV Low Co,* (1930) ILR 57 Cal 1189, pp 1193-1194 : 128 IC 321 : AIR 1930 Cal 561.
371. *Maung Po Te v Maung Shwe Ko,* 35 IC 373.
372. *Jitendra Nath v Maheswari Bose,* AIR 1965 Cal 45.
373. See note "Wilful abstention from inquiry or search" under section 3.
374. *Rathna Bai v A R Barrass,* AIR 1943 Mad 593; see also *Molly Ajithkumar v Vimala Sasidharan,* AIR 2012 Ker 87 : LNIND 2012 KER 16 : 2012 (1) Ker LJ 499.
375. *Shrinivasdas v Meherbai,* (1917) ILR 41 Bom 300 : 44 IA 36 : 39 IC 627; *Hirachand v Jayagopal,* (1925) ILR 49 Bom 245 : 89 IC 553 : AIR 1925 Bom 69.

to the delivery of a perfect abstract, i.e., an abstract which shows all the documents, and gives all the facts upon which the vendor's title is based.[376] Such a stipulation cannot operate to thrust upon a purchaser a property to which no title is shown.[377]

Answers to requisitions

The seller is bound to answer all requisitions which are relevant to the title and which are specific. He is not bound to answer a general inquiry as to whether there was within the knowledge of the seller or his solicitor any settlement, deed, fact, omission or encumbrance affecting the property, and not disclosed by the abstract.[378] He is bound to answer to the best of his information questions regarding the income or rental of the property.[379] The contract may give the vendor an express power of rescission if requisitions are made which he is unwilling to comply with. But even so, the vendor is not relieved of his duty to make out his title.[380] Where the vendor has failed to answer requisitions, the purchaser is entitled to rescind the contract; he need not formally demand answers or make time the essence.[381] The duty to answer requisitions is altogether distinct from the duty of disclosure under section 55(l)(a), for the omission of the buyer to make a requisition will not absolve the seller if he has not made a full disclosure.[382] Where a vendor sells land under an open contract, he cannot compel the purchaser to accept a statutory declaration as sufficient evidence to contradict statements appearing in the documents of title, such as the consideration stated in a deed which shows prima facie that the deed is insufficiently stamped.[383]

Waiver of requisitions

The buyer may waive requisitions. Waiver may be express, or may be implied from conduct as when a buyer does not press a requisition that has been made, or ask for time to pay the price;[384] or when he enters into possession or pays the whole or part of the price.[385] Such conduct constitutes waiver as it shows an acceptance of title. However, the question is one of fact to be decided on all the circumstances of the case, and payment of price and entry into possession will not have this effect if the contract provides that this may be done before completion.[386] Such implied waiver only refers to the title shown in the abstract or the documents produced, but not to an extraneous defect subsequently discovered,[387] or to an encumbrance removable by the seller.[388]

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376. *Nilmani Addy v Dinendranath Das,* (1930) ILR 57 Cal 1115 : 126 IC 705 : AIR 1930 Cal 428; *Hobson v Bell,* (1839) 2 Beav 17; *Blacklow v Laws,* (1842) 2 Hare 40; *Pryce-Jones v William,* (1902) 2 Ch 517.
377. *Nilmani Addy v Dinendranath Das,* (1930) ILR 57 Cal 1115.
378. *Re Ford v Hill,* (1879) 10 Ch D 365; approved in *Taylor v London & County Banking Co,* (1901) 2 Ch 231, p 258.
379. *Premchand v Ram Sahai,* 140 IC 209 : AIR 1932 Nag 148.
380. *Lakhmidas & Co v DJ Tata,* (1927) 29 Bom LR 19 : 101 IC 229 : AIR 1927 Bom 195; *Quinion v Home,* (1906) 1 Ch 596.
381. *Re Stone and Saville's Contract,* (1963) 1 WLR 163 : [1963] 1 All ER 353 (CA).
382. *Heywood v Mallalieu,* (1883) 25 Ch D 357.
383. *Re Spollon and Long's contract,* (1936) 1 Ch 713 : [1936] 2 All ER 711.
384. *Burroughs v Oakley,* (1819) 3 Swans 159, p 172.
385. *Fludyer v Cocker,* (1806) 12 Ves 25; *Fleetwood v Green,* (1809) 15 Ves 594; *Haydon v Bell,* (1838) 1 Beav 337; *Ghousiah v Rustumjah,* (1890) ILR 13 Mad 158, p 160.
386. *Bolton v London School Board,* (1878) 7 Ch D 766; *Stevens v Guppy,* (1828) 3 Russ 171.
387. *Blacklow v Laws,* (1842) 2 Hare 40.
388. *Re Gloag and Miller's Contract,* (1883) 23 Ch D 320.

(8) Section 55(1)(d)—Execution of Conveyance

The execution of the conveyance, and the payment of price are reciprocal duties to be performed simultaneously.[389] If either party sues for specific performance, he must show that he was ready and willing to perform.

It is the duty of the buyer to tender a conveyance,[390] but unless time is made the essence, it need not be tendered at any particular time.[391] The buyer has to send a notice to the seller calling him to execute a sale deed. Without sending such a notice, the buyer is not entitled to a suit for specific performance of contract. Thus where *A* requested *B* to execute a sale deed on the assurance that he was ready and willing to fulfil his part of the contract of paying the balance of the consideration amount, but *B* instead of executing the sale deed in favour of *A* executed a lease deed of the same property in favour of *C*, and *A* sent him a notice demanding his money back, a suit for specific performance of the contract seeking relief of execution of sale deed would not be granted by the court, without A sending him notice to the effect of execution of sale deed.[392] Both the obligation to tender a conveyance[393] and to pay the price at the time of execution[394] are, of course, subject to a contract to the contrary. Where on the sale and purchase of land, the description in the contract affords a sufficient and satisfactory identification of the property sold without a plan, the purchaser cannot require, at the expense of the vendor, a plan to supplement the description.[395] There is no indication in the section as to what is the proper time and place for execution. The time is usually settled by the contract, and if it is not so settled, the proper time is the date when the seller makes out his title. If a time is fixed, and an unreasonable delay occurs, the proper course is to give notice making time the essence of the contract.[396] In India, in the absence of any express terms, the buyer has to pay the cost of the stamp.[397] A vendor is under an obligation to oblige the purchaser and execute conveyance in favour of the assignee of the purchaser, where the conditions of the tender/bid do not so prohibit, where the contract is not one of personal service or where the purchaser is not to discharge any obligation to the seller after the execution of the sale deed. When the whole of the bid amount has to be deposited. However recognizing right of assignment prior to deposit of the whole of the consideration and confirmation of sale would not defeat the entitlement of the applicant.[398] If there has been a re-sale by the buyer and the conveyance is direct to the sub-purchaser, the seller may require the original buyer to be a party to the conveyance if there is a difference of price;[399] but not otherwise, for an ordinary contract of sale is to convey to the purchaser or to such persons as the purchaser shall direct.[400] The payment of price is usually acknowledged in the conveyance, and a receipt also is endorsed upon it, and attested by the seller's solicitors. The purchaser on receipt of the executed conveyance presents it for

389. Indian Contract Act, 1872, section 51.
390. *Ma Hrit v Maung Po Pu,* (1920) 31 Cal LJ 87 : 55 IC 791, *Dinkar Rao v Ayub,* 75 IC 889 : AIR 1923 Nag 37. See, however, *Andhra Paper Mills Co Ltd v State of Andhra,* AIR 1961 AP 57, p 58.
391. *Brijmohan v Chandrabhagabai,* (1940) ILR Nag 643, p 646 : AIR 1939 Nag 173.
392. *Jagannath Malik v Surendra Gartia,* AIR 2017 Orissa 128.
393. *Prabodh Kumar Das v Gillanders Arbuthnot & Co,* (1934) 59 Cal LJ 503 : 152 IC 571 : AIR 1934 Cal 699.
394. *Ram Krishna v Mukand Shanker,* (1962) All LJ 1082 : AIR 1963 All 47.
395. *Re Sharman's Contract,* (1936) 1 Ch 755 : [1936] 2 All ER 1547.
396. *Jamshed v Burjorji,* (1916) ILR 40 Bom 289 : 43 IA 26 : 32 IC 246.
397. Indian Stamp Act, 1890, section 29(c).
398. *Re Rathi Alloys and Steels Limited,* [2015] 191 Comp Cas 475(Raj).
399. *Halsbury's Laws of England,* 3rd Edn, vol 34, p 346.
400. *Egmont (Earl) v Smith,* (1877) 6 Ch D 469, p 474; *Rahimtulla v Official Assignee, Bombay,* (1935) 37 Bom LR 440 : 152 IC 1062 : AIR 1935 Bom 340.

registration. The seller had to admit execution before the Registrar, and he should also be called upon to admit receipt of the price.[401] An auction purchaser can seek issuance of the sale certificate in favour of his nominee and the vendor has to oblige.[402]

(9) Section 55(l)(e)—Care of Property

Although a contract of sale transfers no right in rem (as it does in English law) yet, as already explained,[403] it imposes upon the seller a personal obligation in the nature of a trust, and though he is still the owner, this sub-section imposes on him the same duties as are imposed upon a trustee by section 15 of the Trusts Act. The English law imposes the same liability;[404] and in *Phillips v Silvester*[405] Lord Selborne said that:

> the vendor is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person.

The seller must do what a prudent owner ought to do, and keep the property in reasonable repair and protect it from injury by trespassers.[406] The seller must also take care of the title deeds, for loss of the deeds depreciates the value of the property, and is damage done to the estate.[407] On completion he must deliver the title-deeds to the buyer.[408]

The obligation declared by this sub-section is one collateral to the contract, and does not merge in the conveyance. Section 55(5)(c) also implies that after completion the buyer is not responsible for any loss caused by the seller. If the seller neglects his duty, the buyer is entitled to compensation to be deducted from the purchase money; and after completion, the buyer may recover damages.[409]

(10) Section 55(l)(f)—Possession

It is the duty of the seller to give possession and not to leave the buyer to get possession for himself,[410] notwithstanding a condition in the sale deed that if no possession is given the vendee may take steps to take possession.[411] The implied contract to give possession may be enforced by a suit for specific performance.[412] The vendee, however, has no right to obtain from the vendor expenses which he may have incurred subsequent to the sale in obtaining the possession of the property.[413]

There are four classes of possession: possession in consequence of proprietary interest, possession in consequence of licensory or contractual right and gratuitous or purely

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401. See Indian Registration Act, 1908, section 58(1)(c).
402. *Umrah Developers, Bangalore v Deputy Commissione, Bangalore Urban District,* AIR 2010 Kant 186.
403. See note "Does not of itself create any interest," under section 54, above.
404. *Sherwin v Shakespear,* (1854) 5 DeG M & G 517, p 537; *Phillips v Sliverster,* (1872) 8 Ch App 173; *Egmont (Earl) v Smith,* (1877) 6 Ch D 469; *Golden Bread Co v Hemmings,* (1922) 1 Ch 162 : [1921] All ER Rep 569.
405. *Phillips v Silvester,* (1872) 8 Ch App 173, p 177; *Sashi Bhushan v Rai Chand,* AIR 1950 Cal 333.
406. *Royal Bristol Permanent Building Society v Bomash,* (1887) 35 Ch D 390, p 397.
407. *Homby v Matcham,* (1848) 16 Sim 325; *Brown v Sewel,* (1853) 11 Hare 49 : (2010) 5 Kar LJ 430 : (2010) 3 KCCR 2201.
408. *Re Duthy and Jesson,* (1898) 1 Ch 419.
409. *Clarke Ramuz,* (1891) 2 QB 456 (CA).
410. *Darpan v Kedar Nath,* (1916) 1 Pat LJ 140 : 35 IC 539.
411. *Barisal Loan Officer v Satesh Chandra,* AIR 1936 Cal 12.
412. *Sundara v Sivalingam,* (1924) ILR 47 Mad 150 : 7 IC 542 : AIR 1924 Mad 360; see *Babu Lal v Hazari Lal Kishori Lal,* (1982) 1 SCC 525, p 534.
413. *U Mya v Chettyar Firm,* 167 IC 84 : AIR 1937 Rang 31.

permissive possession. In the case of gratuitous or permissive possessee, a suit of injunction against dispossession by owner of premises is not maintainable as such person holds the property on behalf of the owner and acquires no right or interest irrespective of long possession. The protection of the court may be granted only if there is a valid subsisting rent agreement, lease deed or licence agreement in his favour.[414] It is not necessary in a suit for specific performance either to separately claim possession, or for the court to pass a decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligation of the parties in such a matter being indicated by section 55 of TP Act.[415] The most important part of such a decree is the portion where the court directs that the contract to be specifically performed, and the details which follow do not in any way limit the jurisdiction of the executing court to take particular steps which were mentioned in the decree, but all other steps which ought to be taken for giving full effect to the decree of specific performance are not only within the competence of the court, but the court is bound to assist the party to the decree.[416]

The sub-section does not say when the seller should give possession, but section 55(4)(a) shows that possession should be given when ownership passes to the buyer.[417] This would be at the time of execution of the sale deed,[418] unless it was the intention of the parties that the transfer of ownership should be deferred till the payment of the price.[419] If that is not the intention, the seller cannot refuse possession because the price has not been paid.[420] However, the right of the buyer to obtain possession under section 55(l)(f),and the right of the seller to realize the unpaid balance of the price under section 55(4)(b), may be enforced in the same action. The High Court of Calcutta, Allahabad and Rangoon have held that if the buyer sues for possession, he may be required to deposit the balance in court within a time specified, failing which his suit will be dismissed.[421] But the High Court of Madras has held that the vendee is entitled to possession, and cannot be put to equitable terms as to payment of price.[422] The Bombay High Court has held that in a suit by the vendee to recover possession, the court is not competent to pass a decree for possession conditional upon payment of the unpaid price, but may incorporate in the decree for possession, the statutory charge under section 55(4)(b) for the unpaid price.[423] Where the vendor is not in a position to give possession of the property agreed to be sold by him to the purchaser, the

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414. *Maria Margarida Sequeira Fernandes v Erasmo Jack de Sequeira,* (2012) 5 SCC 370 : LNIND 2012 SC 194 : 2012 (3) AIR Bom R 857; *A Shanmugam v Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam,* (2012) 6 SCC 430 : LNIND 2012 SC 259 : AIR 2012 SC 2010 : 2012 5 MLJ 618 SC.
415. *Uttam International v Jogender Pal Singh,* (1999) 78 DLT 254.
416. *Prataprai Trambaklal Mehta v Jayant Nemchand Shah,* AIR 1996 Bom 296.
417. *Subbaroyar v Kottava,* (1916) Mad WN 284 : 34 IC 737.
418. *Sri Ram v Kidari Parshad,* (1925) ILR 6 Lah 308 : 88 IC 743 : AIR 1925 Lah 481.
419. See note under section 54 "Does not of itself create any interest".
420. *Sagaji v Namdev,* (1899) ILR 23 Bom 525; *Velayutha v Govindasawmi,* (1900) ILR 30 Mad 524 and (1911) ILR 34 Mad 543 : 8 IC 364; *Krishnamma v Mali,* (1920) ILR 43 Mad 712 : 56 IC 530; *Kutcherlakota Vijaylakshmi v Radimeti Rajuratnamba,* AIR 1991 AP 50, p 53.
421. *Nilmadhab v Hara Proshad,* (1913) 17 Cal WN 1161 : 20 IC 325; *Shib Lal v Bhagwan,* (1888) ILR 11 All 244, p 251; *Baijnath v Paltu,* (1908) ILR 30 All 125; *Pran Dei v Sat Deo,* 111 IC 761 : AIR 1929 All 85; *U Tin v MPM Chettyar Firm,* 147 IC 742 : AIR 1933 Rang 401; *Dhuri v Kishun Prasad,* AIR 1965 Pat 29. See also note under section 55(4)(b).
422. *Velayutha v Govindaswami,* (1900) ILR 30 Mad 524; *Krishnamma v Mali,* (1920) ILR 43 Mad 712; *Ramayya v Rama Aiyyar,* AIR 1947 Mad 92; and see *Veerni Soorayya v Kateeza Begum,* AIR 1957 AP 688.
423. *Basalingava v Chinnava,* (1932) ILR 56 Bom 556 : 34 Bom LR 427 : 138 IC 534 : AIR 1932 Bom 247; distinguishing *Kevaldas v Nagindas,* (1909) 11 Bom LR 383 : 2 IC 429.

purchaser will be entitled to rescind the contract, and claim the advance that may have been paid.[424] The forfeiture of money paid as part payment of purchase price and not as earnest money is impermissible. The justification of the forfeiture of advance money being a part of "earnest money" should be clear and explicit in the contract.[425]

As its nature permits

These words refer to physical possession in the case of tangible property, and symbolical in the case of intangible property. (Property already in the possession of the buyer is dealt with in the note "Delivery of Property" under section 54.) Possession is a flexible term, and does not necessarily import personal occupation. So when a buyer had notice of a tenancy[426] or of a usufructuary mortgage,[427] he was only entitled to symbolical possession. In this connection it may be noted that a direction by the mortgagor to the tenants to pay rents to the mortgagee constitutes a usufructuary mortgage.[428] Ordinarily, in the absence of a contract to the contrary, if the agreement is to sell a house in which the seller has the sole and absolute interest, the possession that its nature permits delivery of, is vacant possession. The possession of tenants or trespassers in the house cannot affect the nature of the property. Thus, when property is sold with all rights and free from encumbrances, the seller is bound to give vacant possession of the property which is occupied by the trespassers.[429] Where the sale is through the court, then the court has to ensure delivery of possession of property even if there was no prayer to that effect by the buyer.[430] It has been held that in the case of agricultural land, the vendor must normally give vacant possession.[431]

(11) Section 55(1)(g)—Outgoings Pending Completion

The liability imposed upon the seller by this sub-section is collateral to the contract, and may be enforced after completion. The same liability exists under English law. It results from his duty under section 55(l)(e) to take care of the property pending completion. The English phrase "outgoings" includes reasonable repairs; but under the TP Act the seller's liability for such is attributable to his duty under section 55(l)(e) to take care of the property. The seller who repairs is, under section 55(4)(a), entitled to the rents and profits for the same period, i.e., between contract and completion, as these constitute the fund out of which he would bear the expense. By agreement, the parties may agree that the vendor shall pay all public charges due at the date of the delivery of possession instead of at the date of the sale.[432] When the vendor has contracted to sell the property free from encumbrances, but due to the non-payment of interest since the contract of sale on the mortgage already created on the property, the mortgage dues have been considerably increased, and the vendor is unable to deliver possession of the property free from encumbrance, he cannot be allowed to take advantage of his own wrong.[433]

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424. *Vuddandam v Juluri Venkatakameshwara Rao,* (1950) 2 Mad LJ 807 : AIR 1951 Mad 470.
425. *Satish Batra v Sudhir Rawal,* (2013) 1 SCC 345 : LNIND 2012 SC 665 : 2012 (10) SCALE 393.
426. *Lake v Dean* (1860) 28 Beav 607; *Hughes v Jones,* (1861) 3 De G E & J 307; see also *Royal Bristol Permanent Building Society v Bomash,* (1887) 35 Ch D 390, p 394; See also *Purna Chand v Official Liquidator,* AIR 1960 Punj 51; *Raj Kumar v Shanti Saroop Gandhi,* AIR 1992 P&H 18, p 20.
427. *Mumtaz-un-nissa v Bhagirath,* 6 IC 114.
428. *Venkataratnam v Varahaliah,* (1932) 63 Mad LJ 301 : 139 IC 449 : AIR 1932 Mad 768.
429. *Sashi Bhushan v Raichand,* AIR 1950 Cal 333.
430. *Sunita Devi v Dinbandhu Shah,* AIR 2010 Jhar 151.
431. *Anandilal v Abdul Hussain,* AIR 1964 Raj 240, rel upon *Hyam v ME Gubbay,* (1916) 20 Cal WN 66 : AIR 1916 Cal 1; *Panchapagesa Ayyar v M Arunachla Mudaliar,* (1932) Mad WN 122; *Sashi Bhusan v Rai Chand,* AIR 1950 Cal 333.
432. *Govindram v State of Gondal,* 77 IA 156 : 52 Bom LR 450 : AIR 1950 PC 99.
433. *Arun Prakash v Tulsi,* AIR 1949 Cal 510.

(12) Encumbrances

If the property is not sold free from encumbrances, the seller's duty to discharge an encumbrance may also be referred to after completion of the covenant for title implied by section 55(2). In *Nathu Khan v Burtonath,*[434] the Privy Council said:

> The purchase deed contained the express declaration that the property was sold free from encumbrances and consequently by section 55(l)(g), sub-section (2) of the Transfer of Property Act the vendor must have been deemed to contract with the buyers that he had power to transfer the property so sold, and consequently, that the property was free from burdens.

If the buyer has to discharge such an encumbrance owing to the seller's default, the seller is liable, under section 69 of the Indian Contract Act, 1872, for the moneys paid by the buyer to clear his title.[435] However, when a buyer has agreed to discharge the encumbrance, he cannot claim to be reimbursed by the seller.[436] Under section 18(c) of the Specific Relief Act, 1877, which corresponds to section 13 of the Act of 1963, the buyer has a right to compel the seller to discharge the encumbrance. The buyer is not bound to accept an indemnity from the seller.[437] But, if the seller has not paid off the encumbrance, the buyer may do so himself under section 55(5)(b), and set off the amount against the price. If the buyer is dispossessed by the encumbrancer, he may sue for damages on the implied covenant for title recognised in section 55(2), and in this subsection.[438] If the encumbrance is a common charge on the property sold and other properties, the buyer may under section 56 insist on its being discharged out of the other properties. If the buyer sues for specific performance of the contract for sale, the court may direct the seller to discharge the encumbrance before he is paid the price.[439]

It is immaterial that the buyer was aware of the encumbrance when he contracted to buy.[440] In such a case, there is no duty of disclosure by the seller under section 55(l)(a) and, therefore, no fraud, but the statutory liability does not depend upon proof of fraud.[441] If the buyer pays the encumbrance, he has a right to be indemnified by the seller.[442] The existence of a covenant in the sale deed guaranteeing non-existence of an encumbrance would entitle the seller to indemnity.[443] This right of indemnity was denied in an Allahabad case[444] before the TP Act on the ground that there was no express provision in the contract of sale, and no such relation as is contemplated by sections 69 and 70 of the Indian Contract Act, 1872. It is submitted that it should have been treated as an implied term of the contract, and that

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434. *Nathu Khan v Burtonath,* (1922) 24 Bom LR 571 : 26 Cal WN 514 : 66 IC 107 : AIR 1922 PC 176.
435. *Nathu Khan v Burtonath,* (1922) 24 Bom LR 571 : 66 IC 107 : AIR 1922 PC 176; *Manishanker v Ramkrishna,* (1904) 6 Bom LR 832; *Bhagwati v Banarsi Das* (1928) ILR 50 All 371 : 55 IA 135 : 108 IC 687 : AIR 1928 PC 98; *Ganpat Ranglal v Mangilal Hiralal,* AIR 1962 MP 144.
436. *R Muninarayana v C P Chimanswamy,* AIR 1952 Mys l20 : (1953) ILR Mys 29.
437. *Re Weston and Thomas's Contract,* (1907) 1 Ch 244; *Re Kidd and Gibbons Contract,* (1893) 1 Ch 695.
438. *Gobardhan Das v Afzal Husain,* 138 IC 495 : (1932) All LJ 598 : AIR 1932 All 553.
439. *Kathamuthu v Subramaniam,* (1926) 50 Mad LJ 228 : 94 IC 561 : AIR 1926 Mad 569.
440. *Ram Chunder Dutt v Dwarkanath,* (1889) ILR 16 Cal 330; *Basaraddi Sheikh v Enajaddi,* (1898) ILR 25 Cal 298; *Subbaroya v Rajagopala,* (1915) ILR 38 Mad 887 : 23 IC 570; *Vellayappa Rowthen v Bava Rowthen,* 29 IC 747; *Mahomed Ali v Venkatapathi,* (1920) 39 Mad LJ 449 : 60 IC 235; *Chendrayya v Hanumayya,* 98 IC 450 : AIR 1927 Mad 193; *Lakhpat Kuer v Durga Prasad,* (1929) ILR 8 Pat 432 : 117 IC 654 : AIR 1929 Pat 338.
441. *Basaraddi Sheikh v Enajaddin,* (1898) ILR 25 Cal 298.
442. *Nathu Khan v Burtonath,* (1922) 24 Bom LR 571; *Manishanker v Ramkrishna,* (1904) 6 Bom LR 832; *Harcharan Lal v Nurul Hasan,* 152 IC 221 : AIR 1934 Oudh 492; *Gawri Shankar v Munnu,* 153 IC 811 : AIR 1935 Oudh 142; *Rinsa Ansa v Mohanlal,* AIR 1938 Nag 257.
443. *Imam Din v Bhag Sing,* AIR 1936 Lah 746.
444. *Dost Muhammad v Sangad,* (1884) ILR 6 All 67.

section 69 was applicable. In another case, the buyer was not allowed any damages when it was found that in defending a suit by the mortgagee he did not show sufficient diligence.[445]

The sale is not subject to encumbrances, unless there is an express provision to that effect.[446] If the sale is subject to encumbrances, the seller in addition to the price of his interest gets under section 55(5)(d) an implied indemnity against encumbrances affecting the property.[447] In a case where property was sold subject to an encumbrance which was stated to be of ₹ 16,300, and the buyer had to pay ₹ 23,000 to clear it, it was held that he was not entitled to recover the difference from the seller.[448] This was, however, merely a matter of the construction of the sale deed. Where the purchaser purchases the property being secured assets being the highest bidder at an e-auction believing them to be free from all encumbrances and charges and in addition the bank also issued sale certificates that the scheduled property is free from all encumbrances, there would be no obligation on part of the purchaser to discharge the liability of outstanding dues towards previous owner.[449]

Proof of discharge of encumbrance

If the sale is not subject to encumbrances, the vendor does not make out a marketable title, unless he gives satisfactory evidence of the discharge of encumbrances. Thus, if he produces a release of a mortgage, he must show that the release is signed by a person duly authorized.[450]

(13) Rents

The seller of leasehold property is bound to pay rents accruing due upto the date of sale.[451] In the same way, the buyer is required by section 55(5)(d) to pay rents accruing due after ownership has passed to him.

(14) Public Charges

Public charges would include tax liabilities to the statutory authorities,[452] i.e., government revenue,[453] municipal taxes, and payments charged upon land by statute either expressly or impliedly, by reason of their being recoverable by distress or other process against the land. If the buyer has to pay such charges owing to the seller's default, he would have the same right to indemnity as in the case of an encumbrance. The public authority imposing the charge will levy it on the party who is the owner for the time being, and is not concerned with the rights inter se of the buyer and seller.[454] The liability exists before the completion of the sale and continues thereafter, whether the existence of such

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445. *Lookmanji v Mangal Sing,* AIR 1938 Lah 743.
446. *Jugal Kishore v Banwari Lal,* (1929) ILR 51 All 1053 : 119 IC 1 : AIR 1929 All 791; *Harcharan Lal v Nurul Hasan,* 152 IC 221 : AIR 1934 Oudh 492; *Mahmood Mamuna v National Bank of India,* AIR 1944 Mad 572; *Parshotam Parshad v Taiwar, Ali* AIR 1945 All 39.
447. *Izzat-un-nissa Begam v Kunwar Pertab Singh,* (1909) ILR 31 All 583 : 36 IA 203 : 3 IC 793; *Ram Barai Singh v Sheodeni,* (1912) 16 Cal WN 1040 : 16 IC 73.
448. *Bidhubhushan Pal v Umeshchandra,* (1930) ILR 57 Cal 683 : 128 IC 183 : AIR 1930 Cal 568.
449. *M J Steel Sales v State of Punjab,* AIR 2017 P&H 144.
450. *Shirinivasdas Meherbai,* (1917) ILR 41 Bom 300 : 44 IA 36 : 39 IC 627; *Hirachand v Jayagopal,* (1925) ILR 49 Bom 245 : 89 IC 553 : AIR 1925 Bom 69.
451. *Phus Kuer v Rambhajan Singh,* 75 IC 975 : AIR 1924 Pat 822.
452. *Diamond Infotech Pvt Ltd v Kolkatta Municipal Corporation,* AIR 2010 (NOC) 910 (Cal).
453. *Dantaluri v Kanjuluri,* 8 IC 435.
454. *Nellore Municipality v Dwarapally Kottamma,* (1907) ILR 30 Mad 423.

charges or encumbrances is discovered before or after the completion. The obligation, unless there is a contract to the contrary, is absolute.[455] Such a contract to the contrary must be express and not implied, as a result whereof the meaning of the term encumbrance would be expanded.[456] Where electricity is disconnected for nonpayment of dues, the distributor cannot be compelled to give connection to the buyer without making recovery from him,[457] but where the property of a company under liquidation is purchased on "as is where is basis" and the buyer applies for fresh connection in his name, the buyer would not be liable to pay arrears of electricity dues of erstwhile company for availing supplies.[458]

(15) Duty to Enable Completion

It has been held by the Privy Council[459] that there is an implied covenant by the vendor to do all things necessary to effect a transfer, so where a vendor contracts to sell *sir* land, which can only be transferred after sanction by the revenue authorities, the vendor must apply for such sanction. This decision has been followed by the Supreme Court in *Chandnee Widya Vati Madden v C L Katial,*[460] and *Nathulal v Phoolchand.*[461] The Supreme Court in *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai*[462] has held that if the vendor agrees to sell the property which can be transferred only with the sanction of some government authority, the court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming to convey to the purchaser within a certain time. Following the said decision, the Delhi High Court has held that the seller cannot avoid the agreement on his own *ipse dixit* for non-performance of the terms on his part as agreed.[463]

(16) Section 55(2)—Covenant for Title

In a Calcutta case,[464] CJ Rankin observed that this clause contemplates a completed contract, and corresponds to the covenant for title in an English conveyance. The Madras High Court has said that this sub-section applies to cases where the transaction has not progressed beyond the stage of contract,[465] and the clause was referred to in a Lahore case while the transaction was still at the stage of contract,[466] but these cases, it is submitted, are incorrect.

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455. *State of Gondal v Govindram,* AIR 1945 Bom 187, p 195.
456. *Special Officer (Commerce) NESCO v Raghunath Paper Mills Pvt Ltd,* 2010 SCC OnLine Ori 495 : AIR 2011 Ori 52 : 2011 (Supp. 1) OLR 943 : 2011 (1) RCR (Rent) 905.
457. *Carbon Resources Pvt Ltd v The Assam Electricity Regulatory Commission,* AIR 2010 Gau 131.
458. *Special Officer (Commerce), NESCO v Raghunath Paper Mills Pvt Ltd,* AIR 2011 Ori 52 : 2011 Supp (1) OLR 943.
459. *Motilal v Nanhelal,* 57 IA 333, p 338 : (1931) ILR 58 Cal 692 : AIR 1930 PC 287; *Kishanlal v Suryadatta,* AIR 1958 MP 239.
460. *Chandnee Widya Vati Madden v C L Katial,* [1964] 2 SCR 495 : AIR 1964 SC 978.
461. *Nathulal v Phoolchand,* [1970] 2 SCR 854 : AIR 1970 SC 546 : (1969) 3 SCC 120; *Eramma v Parwataimna,* AIR 1972 Mys 121.
462. *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai,* (1986) 3 SCC 300 : AIR 1986 SC 1912.
463. *Raghunath Rai v Jageshwar Prashad Sharma,* AIR 1999 Del 383.
464. *Jyotiprasad v HV Low & Co,* (1930) ILR 57 Cal 1189 : 128 IC 321 : AIR 1930 Cal 561.
465. *Adikesavan v Gurunatha,* (1917) ILR 40 Mad 338, p 350 : 39 IC 358; *Kathamuthu v Subramaniam,* (1926) 50 Mad LJ 228 : 94 IC 561 : AIR 1926 Mad 569; See also *Sigamani v Munabadra,* (1926) 49 Mad LJ 668 : 91 IC 514 : AIR 1926 Mad 225; *Arunachala v Ramasami,* (1915) ILR 38 Mad 1171 : 25 IC 618; *Subayya v Garikapati,* (1955) ILR AP 170 : AIR 1957 AP 307.
466. *Sri Ram v Kidari Parshad-Cheddi Lal,* (1925) ILR 6 Lah 308 : 88 IC 743 : AIR 1925 Lah 481.

Prior to completion and in the absence of any express stipulation in the contract, the buyer's right is to a title, free from reasonable doubt. Under section 17(b) of the Specific Relief Act, 1963, a vendor cannot enforce specific performance, unless he can give the buyer a title free from reasonable doubt. In *Babu Bindeshri v Mahant Jairam,*[467] the buyer sued for specific performance of a contract for sale as the seller had refused to give him a guarantee of good title, but the Privy Council dismissed the suit as the plaintiff was not entitled to an absolute guarantee of title. However, the refusal of a vendor to give such a guarantee does not disentitle the buyer from claiming specific performance of the contract of sale.[468]

The expression "title free from reasonable doubt" is analogous to the expression "marketable title" adopted by courts of law while interpreting section 55(2). Bare expectancy of getting a right in course of time is not the same thing as asserting that the person asserting has an interest in the immovable property. "Marketable title" is one in which the vendor would be in a position to force the property concerned on an unwilling purchaser under all circumstances. It should be shown to be free from doubts which a court of law would be disposed to accept as serious or sufficient.[469] Covenant under section 55(2) relates only to the title conveyed. If the title itself is restricted—eg subject to statutory charge—there cannot be a covenant of higher title. If the title is subjected to statutory charge under section 55(4), then the plaintiff who prevents defendant from cutting and removing the trees is not in breach of the covenant.[470]

The provisions of section 55(1) enable the buyer before completion to ascertain if the title offered is free from reasonable doubt. Once he has accepted the conveyance and the sale is completed, he has no remedy on the contract except for fraud. Thus, a dispute arising subsequent to the contract for sale of the property about a particular clause in the deed during the negotiations about the form the deed should take, cannot affect the completeness of the contract already made, nor can it amount to a repudiation when it is not persisted.[471] If the sale is vitiated by fraud, the buyer can sue to set aside the sale and to recover the price. Omission to make disclosure under section 55(l)(a) is fraud.

The implied covenant of title applies to any lawful eviction by the title paramount, and imports an absolute warranty of the title professed to be transferred, and of the seller's power to deal with it. It, therefore, supersedes the strict rule of English law by which the doctrine of *caveat emptor* applies after the buyer has accepted the conveyance.[472] The covenant for title implied by section 55(2) gives the buyer a further remedy in cases of defects discovered after the conveyance.[473] The implied covenant for title has nothing to do with the question whether the buyer has notice of the defect of the title; even if the buyer was aware of the defect at the time of the contract, he may, under this covenant, hold the

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467. *Babu Bindeshri v Mahant Jairam,* (1887) ILR 9 All 705 : 14 IA 173 (PC).
468. *Deepchandra v Sajjan Ali Khan,* (1950) ILR All 1033 : (1951) All LJ 81 : AIR 1951 All 93; *Surendra Maneklal v Bai Narmada,* AIR 1963 Guj 239.
469. *Rajendrakumar v Poosammal,* AIR 1975 Mad 379; (1975) 2 Mad LJ 59.
470. *Mani J Meenattoor v Amy Homi Colabawalla,* AIR 1986 Ker 149.
471. *Durga Prasaa v Deepchand,* [1954] SCR 360 : AIR 1954 SC 75 : [1954] SCJ 23; *A K Parvalhamlal v A Goundar,* (1978) 1 Mad LJ 196.
472. *Basafaddi Sheikh v Enajaddi,* (1898) ILR 25 Cal 298; *Mehdi Husain v Jafar Khan,* (1905) 8 OC 345; *Muhammad Ibrahim v Nakched,* (1910) 7 All LJ 752 : 6 IC 890; *Raghava v Samachariar,* (1914) Mad WN 57 : 22 IC 42; *Kanshi Ram v Jaimal Singh,* (1923) 6 Lah LJ 31 : 75 IC 562 : AIR 1923 Lah 590.
473. *Vishvanath v Bala,* (1916) 18 Bom LR 292 : 34 IC 147; *Harilal v Mulchand,* (1928) ILR 52 Bom 883 : 113 IC 27 : AIR 1928 Bom 427; *Bapu v Kashiram,* (1929) 31 Bom LR 658 : 119 IC 659 : AIR 1929 Bom 361.

seller responsible in damages,[474] and claim a return of the purchase money if he is dispossessed by reason of a defect in title.[475] However, the seller's liability is limited to the title which he has professed to transfer. If he describes himself as *malik* and does not mention that he has derived title from Hindu women, the interest which he professes to transfer is a full proprietary title. If he has only professed to transfer occupancy right,[476] he is not liable if the buyer is evicted by title paramount. However, if the vendor sells occupancy land as if he was absolutely entitled, he is liable in damages for breach of this covenant, irrespective of whether the buyer was aware of the defect.[477] So also if he sells non-transferable cantonment land as if he were absolutely entitled,[478] or if he sells as free from encumbrances, land which is subject to an encumbrance.[479] A mortgage debt is immovable property and if the mortgage debt is sold, and it then appears that the mortgage was invalid, the buyer is entitled to damages for breach of the implied covenant for title.[480] If an owner of property which is made non-transferable by statute agrees to transfer that property in a manner intended to circumvent the provision of the statute, the agreement is void in law and unenforceable, and damages cannot be awarded for breach of such an agreement. However, if a person purports to convey and agrees to guarantee quiet enjoyment to the vendee, the vendor or any person claiming under him cannot avoid paying damages for breach of the agreement.[481] Where a suit for the return of purchase money is based on the express covenant contained in the deed, section 55(2) has no application.[482] An agreement to sell by a mortgagee does not extinguish the equity of redemption. In such a case, the vendor is not liable for damages, but only to the return of the purchase money.[483]

Two persons purchasing as co-tenants have separate interest with reference to the implied covenant for title, and may enforce it by separate suits.[484]

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474. *Ram Chunder Dutt v Dwarkanath,* (1889) ILR 16 Cal 330; *Basaraddi Sheikh v Enajaddi,* (1898) ILR 25 Cal 298: *Subbaroya v Rajagopala,* (1915) ILR 38 Mad 887 : 23 IC 470; *Arunachala v Gurunatha,* (1917) ILR 40 Mad 338 : 39 IC 358; *Mahomed Ali v Venkatapathi,* (1920) 39 Mad LJ 449 : 60 IC 235; *Lachman Das v Jawahar Singh,* 70 IC 250 : AIR 1924 Lah 476; *Bapu v Kashiram,* (1929) 31 Bom LR 658 : 119 IC 659 : AIR 1929 Bom 361; *Velayappa Rowthen v Bava Rowthen,* 29 IC 747; *Parasurma v Muthuswamy,* (1925) 50 Mad LJ 100 : 91 IC 313 : AIR 1925 Mad 1209; *Lakhpat Kuer v Durga Prasad,* (1929) ILR 8 Pat 432 : 117 IC 654; *Muhammad Ibrahim v Nakched,* (1910) 7 All LJ 752 : 6 IC 890; *Nawal Kishore v Sarju,* (1932) ILR 54 All 774 : (1932) All LJ 611 : 139 IC 99 : AIR 1932 All 546; *Kalka Singh v Namdar Khan,* 144 IC 406 : (1933) All LJ 938 : AIR 1933 All 389; *Rinsa Ansa v Mohanlal,* AIR 1938 Nag 257; *Avadesh Kumar v Zakaul Hussain,* AIR 1944 All 243; *Saraswatibai v Madhukar,* (1950) ILR Nag 467 : AIR 1950 Nag 229; *Sheokumar Tewari v Central Co-operative Bank,* AIR 1947 Pat 477; *Ram Swarup v Futtu,* (1959) ILR 2 All 521 : (1959) All LJ 841 : AIR 1960 All 367; *Basappa v Kodliah* (1958) ILR Mys 237 : AIR 1959 Mys 46; *Sohan Lal v Bal Kishan,* (1959) ILR Punj 1463 : 61 Punj LR 672 : AIR 1960 Punj 275; *Nannapaneni v Ankineedu,* AIR 1962 AP 192; *Gouri Amma Kanakamma v Kasavan Govindan,* AIR 1986 Ker 30, p 31, distinguishing *Ramalinga Padayachi v Natesa Padayachi,* AIR 1967 Mad 461.
475. *Kali Din v Madho,* 77 IC 862 : AIR 1923 All 169.
476. *Kulla Mal v Umra,* 61 IC 604; *Sankaran Nair v Ramaswami,* 27 IC 889.
477. *Shaligram v Narain,* 45 IC 669.
478. *Thomas v Hanuman Prasad,* (1929) 27 All LJ 1122 : 122 IC 675 : AIR 1929 All 837.
479. *Gobardhan Das v Afzal Husain,* 138 IC 495 : (1932) All LJ 598 : AIR 1932 All 553.
480. *Balagurumurthy v Ramakrishna,* (1921) 41 Mad LJ 267 : 69 IC 473 : AIR 1921 Mad 277; dissenting from *Samu Pathan v Chidambara,* (1916) 29 Mad LJ 454 : 31 IC 179.
481. *Gulabchand Daulatram v Suryajirao,* (1950) 52 Bom LR 614 : AIR 1950 Bom 401.
482. *L Dugar Mal v Gobind Saroop,* AIR 1950 East Punj 74.
483. *Abraham Ezra Issac Mansoor v Abdul Mahomed Alibhai,* (1949) 51 Bom LR 47 : AIR 1949 Bom 154.
484. *Chidambaram v Sivathasamy,* (1905) 15 Mad LJ 396.

Mere existence of contract for sale or a decree for specific performance would not confer a title on the buyer and even if the buyer has been put in part performance of the contract in terms of section 53 A of the Act, such claim does not confer any title to buyer. The transfer of title occurs only when execution and registration of document takes place. Any charge or attachment created over the property of seller prior to the contract of sale would stand with priority over and above transfer of property.[485] The questions regarding the validity of an agreement and enforceability without redemption of mortgage by transferor in the case of an agreement for sale of property mortgaged with bank are therefore required to be determined by courts.[486]

(17) Misdescription

Misdescription may be either of title, or of the property. Misdescription of title is a breach of the covenant for title, and gives a right to damages as explained in the last paragraph. However, the covenant for title does not extend to misdescription of property or corporeal misdescription, i.e., as to the extent of the land sold.[487] In such a case, a suit will lie for rectification in a case of mutual mistake or fraud under section 31 of the Specific Relief Act, 1877, corresponding to section 26 of the Act of 1963. But there may be a special covenant in the conveyance for compensation for errors.[488] In such a case, even a sub-purchaser may recover damages, for the benefit of the covenant runs with the land.[489]

Misdescription before completion

If the misdescription is discovered before the conveyance is executed the purchaser may rescind or claim damages if the misdescription is in a material and substantial point, so far affecting the subject-matter of the contract, that it may reasonably be supposed, that but for such misdescription, the purchaser would never have entered into the contract.[490] This is so even though there is a condition for compensation. However, if the misdescription does not materially alter the substance of the contract, the purchaser must complete and accept compensation.[491]

(18) Limitation

A suit for the return of purchase money may or may not be based on the implied covenant for title; if it is not, limitation is either under Article 24 or Article 47 of the Act of 1963, corresponding respectively to Article 62 and Article 97 of the Act of 1908. If it is, limitation is under Article 55 of the Act of 1963, corresponding to Article 116 of the Act of 1908. After the Limitation Act, 1963 was enacted, the distinction is of little importance, as the period of limitation under Article 55 is also three years.

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485. *Kumaran v Kumaran,* AIR 2011 Ker 75 : LNIND 2010 KER 747.
486. *Shamsher Singh v Rajinder Kumar,* (2015) 5 SCC 531 : AIR 2014 SC 2253 : 2014 (5) SCALE 292 : 2016 (1) SCJ 35.
487. *Joliffe v Baker,* (1883) 11 QBD 255; *Abdulla Khan v Abdur Rahman Beg,* (1896) ILR 18 All 322; *Janga Venkata v Jamal Ahmed,* (1915) 29 Mad LJ 122 : 29 IC 394; *Delli Gramani v Ranachandran,* (1952) ILR Mad 682 : (1951) 2 Mad LJ 611 : AIR 1953 Mad 769; *RN Dawar v Ganga Saran Dhama,* AIR 1993 Del 19, p 22.
488. *Palmer v Johnson,* (1893) 12 QBD 32.
489. *Kishenlal v Kinloch,* (1881) All WN 164.
490. *Flight v Booth,* (1834) 1 Bing NC 370.
491. *Re Fawcett and Homes' Contract,* (1889) 42 Ch D 150 (CA); *Administrator-General of Bengal v Aghore Nath,* (1902) ILR 29 Cal 420; *Hussonally v Tribhowandas,* (1921) 25 Cal WN 385 : 61 IC 301 : AIR 1921 PC 40.

In *Hanuman v Hanuman*,[492] the Privy Council held that a suit relating to a voidable sale deed was governed by Article 97 (corresponding to Article 47) as the sale went off on an objection taken by the coparceners of the vendors. It was observed, however, that if the sale was *void ab initio*, the appropriate article would be Article 62 (corresponding to Article 24). This was followed in *Tulsiram v Murlidhar*,[493] where the sale was voidable and Article 97 was applied, and in *Ardeshir v Vajesing*,[494] where the sale was void and Article 62 was applied. The same rule applied to cases governed by TP Act. If the sale is voidable, limitation is under Article 97 (corresponding to Article 47 of the 1963 Act) from the date of dispossession,[495] or from the date when the imperfection of title is declared.[496] If the sale is void and possession is not given, Article 24 (corresponding to Article 62 of the Act of 1908) would no doubt be applied. However, the case where possession is given even though the sale is void, is not treated as a case of total failure of consideration ab initio, and Article 97 corresponding to Article 47 of the Act of 1963 is applied from the date of dispossession.[497]

If the suit for refund of the purchase money is on the implied covenant for title, Article 116 corresponding to Article 55 of the Act of 1963 applies. This is because the word "compensation" in Article 116 is not restricted to a claim for unliquidated damages and includes a claim for a certain and liquidated sum;[498] and a covenant in a registered deed is contract in writing registered within the article.[499] Therefore, if the sale is void as the seller has no title to convey and possession is not given, limitation is under Article 116 from the date of the sale deed.[500] The distinction between the breach of registered contracts and other contracts has been abrogated in the Limitation Act, 1963.

The covenant for title is a covenant that the vendor has a present title to convey, and is broken on the execution of a sale deed containing such a covenant.[501] It might, therefore, be supposed that if the vendee is put into possession and subsequently dispossessed owing to a defect of title, limitation under Article 116 corresponding to Article 55 of the Act of 1963 would still run from the date of the sale deed. But CJ Macleod in *Multanmal v Budhumal*,[502]

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492. *Hanuman v Hanuman*, 18 IA 158.
493. *Tulsiram v Murlidhar*, (1902) ILR 26 Bom 750.
494. *Ardeshir v Vajesing*, (1901) ILR 25 Bom 593.
495. *Subbaroya v Rajagopala*, (1915) ILR 38 Mad 887 : 23 IC 570; *Sankara v Kalathil*, (1923) ILR 46 Mad 40 : 70 IC 787 : AIR 1923 Mad 46; approved by the SC in *Chettiar v Iyer* [1966] 3 SCR 608 : AIR 1967 SC 359 : [1966] 2 SCJ 711.
496. *Juscrun Boid v Pirthichand Lal*, 46 IA 52; *Bapu v Kashiram*, (1929) 31 Bom LR 658 : 119 IC 659 : AIR 1929 Bom 361; *Venkatanarasimhulu v Peramma*, (1895) ILR 18 Mad 173; *Venkatarama v Venkata*, (1901) ILR 24 Mad 27.
497. *Nursing v Pachu*, (1913) ILR 37 Bom 538; *Kashiram v Zabu* 136 IC 225 : AIR 1932 Nag 5.
498. *Ganapat Putta v Hammad Saiba*, (1925) ILR 49 Bom 596 : 89 IC 59 : AIR 1925 Bom 440; *Lalchand Nanchand v Narayan Hari*, (1913) ILR 37 Bom 656 : 21 IC 315; *Tricomdas Cooverji v Gopinathji Thakur*, 44 IA 65 : 39 IC 156.
499. *Krishnan v Kannan*, (1896) ILR 21 Mad 8; *Muhammad Siddiq v Muhammad Nuh*, (1930) ILR 52 All 604 : 124 IC 185 : AIR 1930 All 771.
500. *Ganapa Putta v Hammad Saiba*, (1925) ILR 49 Bom 596 : 89 IC 59 : AIR 1925 Bom 440; *Arunachala v Ramasami*, (1915) ILR 38 Mad 1171 : 35 IC 618; *Injad Ali v Mohini*, (1923) 27 Cal WN 1925 : 80 IC 623 : AIR 1924 Cal 148; *Krishnan v Kannan*, (1898) ILR 21 Mad 8; *Narayana Reddi v Peda Rama*, (1891) 1 Mad LJ 479.
501. *Raju Malu v Krishna Ray*, (1878) ILR 2 Bom 273; *Tulsiram v Murlidhar*, (1902) ILR 26 Bom 750; Dart on Vendors and Purchasers, 7th Edn, vol II, p 768.
502. *Multanmal v Budhumal*, (1921) ILR 45 Bom 955 : 61 IC 70 : AIR 1921 Bom 255; *Lakhpat Kuer v Durga Prasad*, (1929) ILR 8 Pat 432 : 117 IC 654 : AIR 1929 Pat 388; *Muhammad Siddiq v Muhammad Nuh*, (1930) ILR 52 All 604 : 124 IC 185 : AIR 1930 All 771; *Abdul Rahim v Kadu*, 118 IC 203 : AIR 1930 Sau 12; *Chandrawatibai v Valabdas*, 133 IC 76 : AIR 1931 Sau 141.

pointed out that the discovery of the defect and dispossession might occur more than six years from the date of sale so that the *terminus a quo* for limitation should be the date of dispossession. If there is an express covenant for quiet enjoyment or for indemnity in case of dispossession, limitation will be under Article 116 corresponding to Article 55 of the Act of 1963 from the date of disturbance.[503]

(19) Express Covenant for Title

Express covenants override and do away with the effect of all implied covenants.[504] However, although an express covenant is a special stipulation which alone governs the right of the parties, yet the implied covenant cannot be got rid of except by clear and unambiguous expressions;[505] so that the express covenant is over and above that implied by this sub-section.[506] For instance, in a case[507] where the covenant was:

> you shall henceforward be enjoying the same hereditarily and with right of alienation by gift, sale or otherwise as you please. Removing the hindrances to this arising from my agnates or king or neighbour, I shall see that the sale is given effect to in your favour without any obstruction—

it was held to be covenant for title as well as a covenant for quiet enjoyment. But although the recitals showed that title was derived from a widow, yet the implied covenant for title was not excluded because there were no clear and unambiguous expressions showing that the vendor did not mean to guarantee that he had a good title. The usual express covenant for title, is, like the above, one that includes a covenant for quiet enjoyment.[508] An express stipulation to compensate the purchaser for any defect in title is not an express covenant for title, and does not exclude the implied covenant for title prescribed by section 55(2); the purchaser can, therefore, maintain a suit for the refund of a portion of the purchase money.[509] A covenant for quiet enjoyment does not exclude the covenant for title, for a specific covenant will not exclude an implied covenant, unless it relates to the same subject matter. Thus, in the case of sale of his interest by a mortgagee with a covenant to make good any sums that had been paid by the mortgagor, this covenant was referred to the personal debt and did not exclude the implied covenant for title, and the mortgagee was liable in damages when the mortgage proved to be invalid.[510] In another case, the covenant in a sale deed was that "if any dispute arises through me in respect of the land, I shall get it settled", the Madras High Court held that this was an express covenant for quiet enjoyment and that it did not exclude the implied covenant for

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503. *Ramachandra v Tohfah,* (1904) ILR 26 All 519; *Ram Jaggi Rai v Kauleshar Rai,* (1908) ILR 30 All 405; *Mul Kunwar v Chattar Singh,* (1908) ILR 30 All 402; *Hanwant Rai v Chandi Prasad,* (1929) ILR 51 All 651 : 119 IC 243 : AIR 1929 All 293; *Mangaladha v Gandamal,* 120 IC 424 : AIR 1929 Lah 388; *Ratanbai v Ghasiram,* (1932) ILR 55 Bom 565 : 134 IC 1157 : AIR 1932 Bom 36.
504. *Subramania v Saminatha,* (1898) ILR 21 Mad 69; *Line v Stephenson,* (1838) 4 Bing (NC) 678 : (1938) 5 Bing (NC) 183; *Debbett v Atherton,* (1872) LR 7 QB 316; *Saraswatibai v Madhukar,* (1950) ILR Nag 467 : AIR 1950 Nag 229.
505. *Mahomed Ali v Venkatapathi,* (1920) 39 Mad LJ 449 : 60 IC 235; *Seaton v Mapp,* (1846) 2 Coll 556; *Page v Midland Rly,* (1894) 1 Ch 11; *Digambar Das v Nishibala Debi,* 8 IC 91; *Gwasha Lal v Kartar Singh,* AIR 1961 J&K 66.
506. *Kashirao v Zabu,* 136 IC 225 : AIR 1932 Nag 5.
507. *Mahomed Ali Sheriff v Venkatapathi,* (1920) 39 Mad CJ 449, p 450; *Nanhi v Ketki,* (1932) 30 All LJ 69 : 136 IC 73 : AIR 1932 All 224.
508. *Cf Nagardas v Ahmed Khan,* (1897) ILR 21 Bom 175.
509. *Nathuni Sah v Satyanarain Prasad,* (1961) ILR AP 11.
510. *Balagurumurthy v Ramakrishna,* (1921) 41 Mad LJ 267 : 69 IC 473 : AIR 1921 Mad 277.

title.[511] This is correct, for a covenant for quiet enjoyment is a future covenant. However, where in an Allahabad case[512] the covenant was:

> if, God forbid, any person comes forward as partner or co-sharer and brings a claim, or if an encumbrance, etc. is found... and the property passes out of the possession of the vendees we, the vendors shall... pay to the vendees... the consideration of this sale deed with costs.

It was held to exclude the implied covenant for title and when the vendees had to pay a sum exceeding the purchase-money to clear a prior mortgage, the court held that they had no remedy. But this decision was erroneous and was reversed by the Privy Council.[513]

Their Lordships observed:

> With regard to the last portion of the sale deed, which states what is to ensue in the event of the vendees being put out of possession, it may, of course, be an additional safeguard, it may have been a thing suggested by the parties to cover contingencies which were not yet wholly foreseen, but that it contradicts or restricts the wider language of the contract of sale or that it either narrows or wipes out the obligation under the statute, cannot be maintained.

In other words, their Lordships held that it was a covenant for quiet enjoyment, which did not exclude the implied covenant for title. It has been held that eviction by a pre-emptor is due to the buyer being disqualified to purchase and is, therefore, not a breach of covenant for title.[514] The correctness of this decision is very doubtful for the seller's covenant is "that he has power to transfer", and this must mean transfer to the buyer. With reference to the covenant for quiet enjoyment, a general covenant to indemnify the purchaser against any loss that might accrue in connection with sale has been held to apply to eviction by a pre-emptor.[515] However, a covenant to refund the purchase money in case of dispossession does not apply to eviction by a pre-emptor, as the pre-emptor would have to pay the purchase money.[516] A covenant for quiet enjoyment does not become a covenant for delivery of possession. There is no breach of covenant of quiet enjoyment in a case where no possession was delivered under the sale deed, and there is no subsequent dispossession.[517] A recital in a sale deed to the effect that there was no encumbrance of whatever nature such as usufructuary mortgage implies that the purchaser would be reimbursed, if he suffers damage in consequence of any dispute.[518]

(20) Fiduciary Character

The implied covenant for title does not apply in the case of a trustee; or in the case of a guardian selling on behalf of a minor.[519] A trustee is only deemed to covenant that he has done no act whereby the property is encumbered or his power of transfer restricted. If a trustee conveys without disclosing his fiduciary character, he could no doubt be required to

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511. *Raghava v Samachariar,* (1914) Mad WN 57 : 22 IC 42.
512. *Ram Chander v Bhagwati,* (1924) 22 All LJ 576, p 578 : 79 IC 590 : AIR 1914 All 937.
513. *Bhagwati v Banarsi Das,* (1928) ILR 50 All 371 : 55 IA 135, p 138 : 108 IC 687 : AIR 1928 PC 98; *Nanhi v Ketki* 136 IC 73 : 30 All LJ 69 : AIR 1932 All 224; *Nand Ram v Purshotam Das,* 145 IC 615 : (1933) All LJ 201 : AIR 1933 All 203.
514. *Ghulam Jilani v Imdad,* (1881) ILR 4 All 337.
515. *Khonmon Bibi v Shah Mali,* (1908) PR 111 : 4 IC 690; *Sita Ram v Nanak Chand,* 92 IC 313 : AIR 1926 Lah 182; *Kaliyan Singh v Fazal Din,* 94 IC 1055 : AIR 1926 Lah 455; *Hanwant Rai v Chandi Prasad,* (1929) ILR 51 All 651 : 119 IC 243 : AIR 1929 All 293.
516. *Ishro v Naubat Rai,* 146 IC 120 : AIR 1933 Lah 522.
517. *Vishwanath v Deokabai,* (1948) ILR Nag 50 : AIR 1948 Nag 382.
518. *Ramamurthi v Kuppasami,* (1950) 1 Mad LJ 499 : AIR 1950 Mad 621.
519. *Maida v Kishan Bahadur,* (1934) ILR 56 All 997 : 151 IC 826 : (1934) All LJ 645 : AIR 934 All 645.

convey "as beneficial owner" so as to become subject to the usual covenants for title. Section 38 of the Trust Act, 1882, empowers trustees to sell on special conditions.

(21) Runs with the Land

The benefit of the implied covenant for title runs with the land.[520] It is, therefore, enforceable by subsequent purchasers of the land; and if the buyer re-sells to several purchasers, each one is entitled to sue on the covenant in respect of his part. In *David v Sabin*:[521]

> *A* granted a lease to *B*, and *B* mortgaged to *C*. *B* then surrendered the term to *A*. *A* mortgaged to *D*, and then *A* and *D* conveyed to *E*. *A* had, however, not got in the interest left outstanding in *C*. *C* established his charge by suit against *E*. The Court of Appeal held that *A* was liable on the covenant for title to E and that as the covenant ran with the land it was no difference that *B* had mortgaged without the knowledge of *A*.

Restrictive covenant in a deed of conveyance running with the land, has been dealt with in several cases.[522] Covenants running with the land are further dealt with in the notes on sections 40, 108(c), and 108(j).

(22) Section 55(3)—Delivery of Title Deeds

The title deeds are things which pass with the conveyance without being named, as accessory to the estate.[523] This has been a principle of English law since the earliest times.[524] Accordingly, as in England, the seller has to deliver to the buyer all deeds relating to the property conveyed.[525] This includes documents in his power, but not in his possession and the cost of obtaining them must be borne by the seller.[526] Counterpart leases and *kabuliyets* are deeds of title accessory to the estate;[527] and it has also been held that village account books should be delivered on the sale of a village, as they are necessary for the enjoyment and management of the estate.[528]

Prior to completion, the seller is bound under section 55(l)(b) to produce all title deeds in his possession and power, for inspection. However, the duty to deliver them does not depend upon completion. Even if the seller has executed the conveyance and put the buyer in possession, he need not deliver the deeds, until the price has been paid in full. This accords with the English law under which the seller's equitable lien gives him a right to retain the deeds of title until payment.[529] In *Ma Hnit v Maung Po Pu*,[530] where the price had already been paid, the Privy Council observed that:

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520. *Hanwant Rai v Chandi Prasad,* (1929) ILR 51 All 651 : 119 IC 243 : AIR 1929 All 293; *Bapu v Kashiram,* (1929) 31 Bom LR 658 : 119 IC 659 : AIR 1929 Bom 361; *Ramayya v Kottayya,* (1930) Mad WN 195 : 127 IC 617 : AIR 1930 Mad 748; *Abdul v Kisan,* (1931) 29 Nag LR 392 : 136 IC 879 : AIR 1931 Nag 166.
521. *David v Sabin,* (1893) 1 Ch 523.
522. Ecclesiastical Commissioner for England (1936) 1 Ch 430; *Drake v Gray,* (1936) 1 Ch 451 : [1936] 1 All ER 363; *White v Bijou Mansions Ltd,* (1937) 1 Ch 610 : [1938] 1 All ER 546; *Marquess of Zetland v Driver,* (1939) 1 Ch 1 : [1938] 2 All ER 158.
523. *Austin v Croome,* (1842) Car & M 653.
524. *Buckhurst (Lord) v Fenner,* (1572) 1 Co Rep 1.
525. *Bhavani v Devrao,* (1887) ILR 11 Bom 485; *Re Williams and Newcastle's (Duchess) Contract,* (1897) 2 Ch 144, p 148 (the right to the deed would go with the land).
526. *Re Duthy and Jesson,* (1898) 1 Ch 419.
527. *Bhawani v Devrao,* (1887) ILR 11 Bom 485.
528. Ibid.
529. Shephard and Brown note that the English law is different, but the learned authors have been misled by Dart. See Dart on Vendors and Purchases, 8th Edn, p 607. The editors submit that the statement in the text is correct—see Dryden v Forst (1938) 3 My & Cr 670, p 672.
530. *Ma Hnit v Maung Po Pu,* (1919) 31 Cal LJ 87 : 55 IC 791 (PC).

> the duty of the purchaser ... was to tender a conveyance, and he would then, and not before such a tender was either made or waived, have the right to the deeds as the accompaniment of the transferred title.

The first exception to the rule is where the seller retains part of the property comprised in the deeds in which case he may retain the deeds, but is under an obligation for their safe custody and to produce and give true copies of them when required.

The second exception is when the property is sold in different lots. In that case the purchaser of the lot of the greatest value is entitled to the documents, but is under the same liability as to their safe custody and production, as stated in the preceding paragraph. This rule may be excluded by an express contract to the contrary, eg that the purchaser of "the largest lot", i.e., the lot of the greatest area, should have the deeds.[531] The sub-section does not explain what is to be done if the sales are at different times. In that case, the last purchaser would be entitled to the documents.[532]

(23) Section 55(4)(a)—Rents and Profits

As already explained, the contract for sale transfers no right in rem.[533] The seller is the owner subject to an obligation to fulfil the contract and accordingly, he has to take care of the property—section 55(l)(e); and to pay public charges and rents—section 55 (1)(g). This sub-section, therefore, declares his right to receive rents and profits which belong to him as owner, and which are the funds out of which he performs the duties of maintenance. The right to receive rents and profits remains with the owner despite an agreement to sell the property which passes no title on the prospective vendee.[534]

This sub-section shows that possession should be given by the seller when ownership passes to the buyer.[535] But if the buyer takes possession before completion, he would, as he takes the rents and profits, pay interest on unpaid purchase-money. This is because it is inequitable that the same person should enjoy both the rents and profits of the land as also the interest of the money.[536] It makes no difference that the land yields no profit, and that the delay in completion is due to the seller.[537] The rule in *Fludyer v Cocker*[538] that possession and interest are mutually exclusive was applied by the Judicial Committee in a case of compulsory acquisition, and the owner was allowed interest on price from the date on which he was dispossessed.[539] The committee said:

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531. *Griffiths v Hatchard,* (1854) 1 K & J 17.
532. *Re Lowe Capel v Lowe,* (1901) 36 LJ 73; *Khanderao v Romer,* AIR 1941 Bom 48.
533. See note "Does not of itself create any interest," above.
534. See *B R Mulani v A B Aswathanarayana,* AIR 1993 Kant 257, p 276 distinguishing *Malikajappa Bhimappa Bennur v Bhimappa Kashappa Parasannavar,* AIR 1966 Mys 86; *Shiddappa Adiveppa Jadi v Ramamaa,* AIR 2002 Kar 416, p 422.
535. *Subbaroyar v Kottaya,* (1916) Mad WN 284 : 34 IC 737. This statement of law in this passage was approvingly referred in *Kishanlal Soni v Chandrabala Devi,* AIR 1990 AP 72, p 74; *National Insurance Co v Life Insurance Corporation,* AIR 1963 SC 1171, p 1179.
536. *Fludyer v Cocker,* (1805) 12 Ves 25, p 27 ("the act of taking possession is an implied agreement to pay interest"); *Birch v Joy,* (1852) 3 HLC 565, p 590; *Binks v Rokeby,* (Lord) (1818) 2 Swan 222, p 226; *Plews v Samuel* (1904) 1 Ch 464; *Muthia Chetty v Sinna,* (1912) ILR 35 Mad 625, p 627 : 10 IC 662; *Suryaprakasa Rao v Venkata Dikshitulu,* 146 IC 317 : AIR 1933 Mad 844.
537. *Ballard v Shutt,* (1880) 15 Ch D 122.
538. *Fludyer v Cocker,* (1805) 12 Ves 25.
539. *Ratanlal Choonilal v Municipal Commissioner,* (1919) ILR 43 Bom 181 : 45 IA 233, p 245 : 48 IC 404; *Pandurang v Mahadev,* (1922) ILR 46 Bom 195 : 64 IC 492 : AIR 1922 Bom 186; *Dinkar Rao v Ayub,* 75 IC 889 : AIR 1923 Nag 37; *Malikajappa v Bhimappa,* AIR 1966 Mys 86.

> The Lordships are of opinion that the right to interest depends upon the following broad and clear considerations. Unless there is something in the contract of parties which necessarily imports otherwise, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand, the new owner has possession, use, and fruits; on the other, the former owner parting with these, has interest on the price. This is sound in principle, and authority fully warrants it.

The Supreme Court has followed this principle.[540] It has been observed, however, that this rule is outside the provisions of the TP Act, and may be negatived by an express or implied condition to the contrary, or by evidence of conduct.[541]

The only exception to this rule is when after the buyer has taken possession, the seller delays completion and the circumstances are such as to require the purchaser to keep the purchase money lying idle and unproductive. In such a case the seller will not be entitled to interest.[542] If the seller refused to execute a conveyance or to give possession, the buyer will be entitled to specific performance by execution of the conveyance, and compensation which would be mesne profits from the date when the conveyance should have been executed and possession given.[543] If the buyer takes possession before completion, the seller is entitled to interest on unpaid price from the day on which buyer actually takes possession although the buyer might safely have taken possession earlier.[544]

(24) Section 55(4)(b)—Seller's Charge for Unpaid Price

Clause (b) of sub-section (4) of section 55 provides that where the ownership of the property is transferred to the buyer before payment of the whole of the sale price, the vendor is entitled to a charge on that property for the amount of the sale price as also for interest thereon from the date of delivery of possession. Originally, there was no provision with regard to the date from which interest would be payable on the amount of unpaid purchase money. It was on the recommendation of the Special Committee that the words "from the date on which possession has been delivered" were inserted into this clause by section 17 of the Transfer of Property (Amendment) Act, 1929. This clause obviously applies to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. The statutory charge is inflexible.[545]

If the sale is completed by conveyance and the price or any part of the price is unpaid, the seller has under this sub-section a charge for the balance of price unpaid. This charge is the converse of the buyer's charge for price prepaid under section 55(6)(b). The mere execution of a promissory note by the vendee for the purchase money in favour of the vendor does not put an end to the vendor's charge for the unpaid purchase money, even if the vendor sues

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540. *Satinder Singh v Umrao Singh,* [1961] 3 SCR 676 : AIR 1961 SC 908 : [1961] 2 SCJ 372; *Govindaraju v CIT,* [1967] 3 SCR 653 : AIR 1968 SC 129 : [1967] 2 SCJ 852. See also *National Insurance Co v Life Insurance Corporation,* AIR 1963 SC 1171 : p 1179.
541. *State of Madras v Andhra Paper Mills Co,* (1956) ILR AP 87 : AIR 1957 AP 34.
542. *Narasingerji v Panuganti,* (1921) Mad WN 519 : AIR 1921 Mad 498 : on app (1924) ILR 47 Mad 729 : 51 IA 305 : 82 IC 993 : AIR 1924 PC 226; *Cf Powell v Martyr* (1803) 8 Ves 146; *Pulliyadi Ellarayan v Nagendra,* 42 IC 509. This statement of law in this passage was approvingly referred in *Kishanlal Soni v Chandrabala Devi,* AIR 1990 AP 72, p 74; *National Insurance Co v Life Insurance Corporation,* AIR 1963 SC 1171, p 1179.
543. *Subbaroyar v Kottaya,* (1916) Mad WN 284 : 34 IC 737; *Hari Prasad v Haribar,* 70 IC 804 : AIR 1923 Pat 205; cf *Nilkamal v Sri Gunomani,* (1871) 7 Beng LR 113 (PC).
544. *Maung Shwe Goh v Maung Inn,* (1917) ILR 44 Cal 542 : 44 IA 15 : 38 IC 938 (PC).
545. *Vidhyadhar v Manikrao,* (1999) 3 SCC 573 : AIR 1999 SC 1441.

upon the note and obtains advance or even if he assigns the decree.[546] Where the contract stipulated the specific date by which the price was to be paid, a suit for specific performance of contract at the instance of the transferee would be dismissed if the price was not paid by that date and was deposited only after court's notice.[547] A sum of money kept with the vendee under a sale deed by the vendor, is a portion of the unpaid purchase money for which the vendor has a lien on the property sold.[548] If besides the averment in the plaint the purchaser gives no evidence to show that the amount was kept ready and available it would be presumed that the buyer was not ready and willing to pay the price.[549] Thus, in a case where an agreement was entered into and a sale deed was executed by which the vendee agreed to pay an additional amount if the property sold yielded a larger amount of the profit, it was held that the additional amount agreed to be paid, was a part of the purchase price and was a charge on the property.[550] Where a mortgagee having purchased the entire mortgaged property, an arrangement was arrived at between the mortgagee and the widow and infant son of the original mortgagor, pursuant to which the mortgagee reconveyed one village out of the mortgaged properties purchased by him and the widow being unable to pay the price executed a mortgage in favour of the mortgagee-purchaser which mortgage, however, was found invalid for want of attestation, the Privy Council held that the transaction constituted a sale and under section 55(4)(b), the mortgagee-purchaser who became the vendor was entitled to a charge on the village for the unpaid purchase price.[551] According to the practice prevalent in Bihar known as "*ta khubzul badlain* (that is title to the property passing to the purchaser only when there is exchange of equivalent), where a sale deed recites that entire sale consideration has been paid and possession has been delivered, but registration receipt as also the possession of the property is retained by vendor as agreed consideration (either full or in part) is not received, irrespective of recitals in sale deed, title would not pass to the purchaser till payment of entire consideration to vendor and registration receipt is obtained by purchaser in exchange. In such cases on sale deed being executed and registered, registration receipt (which is issued by the sub-registrar) authorizing holder thereof to receive registered sale deed on completion of formalities is received and retained by vendor and is not given to the purchaser. The vendor who holds the registration receipt will either receive the registered document or keep the original sale deed in his custody or may keep the registration receipt without exchanging it for the registered document from the registrar till payment of the consideration is made. Where the purchaser pays the price, i.e., the whole price or part that is due, on or before the agreed date, he receives in exchange the registration receipt from the vendor entitling him to receive the original registered sale deed as also the possession. If payment is not made as agreed, the vendor could repudiate the sale and refuse to deliver the registration receipt/ registered document as the case may be, which is in his custody and proceed to deal with the property as he deems fit, by ignoring the rescinded sale.

Thus where the vendees had not paid the consideration of ₹ 22000 at the time of execution and registration of sale deed, the recitals in the sale deed that the vendor had received the entire price of ₹ 22000 from the purchasers and had transferred all his rights therein and that on such sale the vendor had relinquished and transferred possession of

546. *Somu Achari v Singara Achari,* AIR 1945 Mad 407.
547. *Nalamathu Venkaiya v B S Neelkanta,* AIR 2005 AP 535 : (2005) 5 ALD 767 : (2005) 6 ALT 585.
548. *Kesho Das v Jiwan,* (1941) ILR Lah 568 : 43 Punj LR 450 : 195 IC 980 : AIR 1941 Lah 10.
549. *B Rajamani v Azhar Sultana,* AIR 2005 AP 260 : (2005) 2 ALD 862.
550. *Rajaram v Chedda,* (1951) 55 Cal WN 765 : AIR 1952 Cal 93.
551. *Kocharlokota Venkata v Ravu Venkata Kumara,* 63 IA 304 : (1936) All LJ 915 : 38 Bom LR 760 : 40 CAL WN 1130 : 71 Mad LJ 347 : 163 IC 4 : AIR 1936 PC 204.

property to purchasers will not be of any assistance to the vendees to contend that the title had passed to them or part consideration was paid.[552]

Where, however, the title in the property has passed, but possession has not been delivered, the seller is not entitled to interest on the purchase price.[553] In an Andhra Pradesh case, a part of the sale consideration remained unpaid under the compromise decree for specific performance. Therefore, by the operation of section 55(4)(b), the seller had the first charge on the property that was passed on to the buyers. In the event of any breach of the express terms of the decree by any one of the parties, the other party could enforce it. Hence, a charge created by the operation of section 55(4)(b) for the unpaid purchase money in a decree for specific performance can be enforced by bringing the property to sale without a further suit under O 34, rule 14 of the Code of Civil Procedure 1908.[554]

To an oral sale, section 55(4)(b) does not apply, and the vendor has no charge on the unpaid part of the consideration.[555]

In case of the non payment of the balance amount by the buyer, the seller is not empowered to forfeit the earnest amount paid by him without notice and without there being a clause in the contract to that effect. In such cases the court can direct the seller to return the earnest with interest to the buyer.[556]

Punjab

The principle of section 55(4)(b) has been applied to Punjab as a rule of justice, equity and good conscience.[557]

Non-possessory

The charge has been said to be a non-possessory lien,[558] i.e., it is not a right to retain possession.[559] Accordingly, as the ownership has passed, the charge gives the seller no right to refuse possession.[560] The Madras High Court has held that if the vendee sues to recover possession after the execution of conveyance but before payment of price, the court has no power to put him on equitable terms as to the payment of price.[561] However, the Calcutta High Court, following a judgment of J Mahmud in an Allahabad case,[562] has held that such terms may be imposed as "there is no reason why the right of the purchaser to obtain

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552. *Janak Dulari Devi v Kapildeo Rai,* AIR 2011 SC 2521 : (2011) 6 SCC 555.
553. *Subba Rao v Vesudevsastry,* AIR 1956 AP 113.
554. *Hema Bala Sundrai v P Sakuntala,* AIR 1983 AP 49.
555. *Mungamuru Lakshmidewamma v Land Acquisition Officer,* AIR 1985 AP 200.
556. *Nalamathu Venkaiya v B S Neelakanta,* AIR 2005 AP 535 : (2005) 5 ALD 767 : (2005) 6 ALT 585.
557. *Sohan Singh v State Bank of India,* (1964) ILR 1 Punj 143 : AIR 1964 Punj 123 rel on *Mela Ram & Sons v Ram Das Joshi & Sons,* (1942) ILR 24 Lah 17 : 44 Punj LR 415 : 203 IC 462 : AIR 1942 Lah 275. See, however, *Dayal Das Chanan Das v Harkishan Singh,* (1930) ILR 11 Lah 587 : AIR 1930 Lah 568.
558. *Velayutha v Govindasawmi,* (1907) ILR 30 Mad 524; *Krishnamma v Mali,* (1920) ILR 43 Mad 712 : 56 IC 530.
559. *Vidhyadhar v Manikrao,* (1999) 3 SCC 573 : AIR 1999 SC 1441.
560. *Sagaji v Namdev,* (1899) ILR 23 Bom 525; *Velayutha Chetty v Govindasawmi,* (1907) ILR 30 Mad 524 : and (1911) ILR 34 Mad 543 : 8 IC 364; *Krishnamma v Mali,* (1920) ILR 43 Mad 712; *Raj Lingam v Somanna,* AIR 1967 AP 7.
561. *Krishnamma v Mali,* (1920) ILR 43 Mad 712 : 56 IC 530; *Velayutha Chetty v Govindasawmi,* (1907) ILR 30 Mad 524; dissenting from *Subramania Ayyar v Poovan,* (1904) ILR 27 Mad 28; *Poomabai v Annamal,* AIR 1944 Mad 124.
562. *Shib Lal v Bhagwan,* (1888) ILR 11 All 244; followed in *Baijnath v Paltu,* (1908) ILR 30 All 125; *Pran Dei v Sat Deo,* 111 IC 761 : AIR 1929 All 85; *Dhuri v Kishun Prasad,* (1965) ILR AP 29.

possession under section 55(l)(f), and the right of the vendor to realise the unpaid balance of the purchase money under section 55(4)(b) should not be recognised and enforced in one action".[563] The Rangoon High Court has followed the High Court of Calcutta.[564] The Bombay High Court, while not making payment of the balance of the purchase money a condition of the purchaser obtaining possession, proceeds as if the vendor had counter-claimed. The purchaser's suit for possession is decreed, but in the decree a declaration of the vendor's charge is incorporated with a direction that the vendor should on payment of the court fee recover the amount by sale of the property.[565] The same view is taken by the Nagpur High Court.[566] The Allahabad High Court held that the provisions of section 55 did not exclude the application of the principles of equity; hence, where a purchaser who has not paid the full price, sues for possession, he can be put to terms by the decree.[567] If the seller is not in possession, he cannot of course rescind and reclaim possession because the buyer has not paid.[568] The seller's only remedy is to sue to enforce his charge, and he may also under section 55(3) refuse to part with the title deeds, if he has not already done so. Part of the purchase money left with the vendee, if unexpended, ensures for the benefit of the vendee, and not of the vendor.[569]

Section 55(5)(b) is reciprocal with and complimentary to section 55(4)(b). Where the amount of the purchase price is left with the vendee for payment to an usufructuary mortgagee, it is not the money that is due to the vendor under section 55(5)(b) and, therefore, a statutory charge or a vendor's lien cannot be said to exist where an agreement between the parties is that the vendee should discharge the mortgage and recover possession.[570]

(25) Several Buyers

If there are several purchasers, the seller is not concerned with the proportion to be paid by each, but he has a charge on the whole property for unpaid purchase money.[571]

(26) Substitution of Equivalent Property

If the seller is unable to deliver possession of the property sold and the buyer accepts in substitution other equivalent property, the buyer remains liable for unpaid price.[572]

(27) In the Hands of the Buyer

This expression has been made more intelligible by the addition of the words inserted by the Amending Act 20 of 1929. The phrase now is "in the hands of the buyer, any transferee without consideration or any transferee without notice of the non-payment."

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563. *Nilmadhab v Hara Proshad,* (1913) 17 Cal WN 1161, p 1164 : 20 IC 325.
564. *U Tin v MPM Chettiyar Firm,* 147 IC 742 : AIR 1933 Rang 401.
565. *Baslingava v Chimnaya,* (1932) ILR 56 Bom 556 : 34 Bom LR 42 : 138 IC 534 : AIR 1932 Bom 247 distinguishing *Kevaldas v Nagindas,* (1909) 11 Bom LR 383 : 2 IC 429.
566. *Sobhalal Shyamlal v Sidhlal Halkelal,* (1939) ILR Nag 636 : 185 IC 169 : AIR 1939 Nag 210.
567. *Peary Lal v Hub Lal,* AIR 1945 All 139.
568. *Bansiram v Panchami Dasi,* (1916) 20 Cal WN 638 : 35 IC 284; *Trimalrav v Municipal Commissioners,* (1879) ILR 3 Bom 172.
569. *Kailasnath v Jyoti Prasad,* AIR 1948 All 307.
570. *Vinaitheertha Thevar v Viswanatha Ayyar,* (1954) ILR Mad 484 : (1953) 2 Mad LJ 504 : AIR 1954 Mad 508.
571. *Bhag Mal v Shiromani Gurudwara,* 150 IC 725 : AIR 1934 Lah 348.
572. *Mathura Prasad v Ram Sarup,* 149 IC 304 : AIR 1934 All 617.

This construction seems to have been put upon the section by the Privy Council in *Webb v Macpherson.*[573] It was adopted by the courts in India,[574] and has now received the sanction of the legislature.

ILLUSTRATION

A sold his house to *B*. There was a recital in the sale deed that the price had been paid. But the price had not been paid and 11 days after registration, *B*, as he could not raise the money, returned the deed to *A* with an endorsement rescinding the conveyance. The endorsement was not registered and did not affect *B*'s title. The house was attached and sold by an execution creditor of *B*. The purchaser became the legal owner of the house but took subject to *A*'s charge for unpaid purchase money. The purchaser could not claim to be a purchaser without notice as *A* was in possession at the date of the sale.[575]

In a case where the seller admitted receipt of consideration by a recital in the deed and also by a receipt endorsed on the deed, it was held that he was estopped from enforcing his charge against a transferee for value.[576] However, in another case it was said that recitals of receipt of consideration where none was paid was so common that there was no estoppel.[577] In such cases, it becomes a question of fact whether the transferee took with notice of the charge.

(28) Interest

After the words "interest on such amount or part" the words "from the date on which possession has been delivered" have been added by the amending Act 20 of 1929. This amendment adopts the decision of the Madras High Court in *Muthia Chetty v Sinna Velliam*[578] that the rights to interest depends upon the circumstances and equities of each case, and that interest on the unpaid purchase money will not be payable as long as the seller is in possession of the land. The purchaser is not liable if he retains part of the purchase money as security for the seller discharging an encumbrance.[579] However, if the purchaser retains part of the purchase money in order to pay off an encumbrance himself, and then fails to do so, he is liable for interest.[580]

(29) Enforcement

The charge is enforced under section 100 by a suit for sale as if the seller were a mortgagee. The charge cannot be enforced by a creditor,[581] or by a judgment creditor.[582] Being

573. *Webb v Macpherson,* (1904) ILR 31 Cal 57 : 30 IA 238.
574. *Meghraj v Abdullah,* (1914) 12 All LJ 1034 : 25 IC 208; *Gur Dayal v Karam Singh,* (1916) ILR 38 All 254 : 35 IC 289; *Rama Nana Bharti v Sheo Das,* (1921) ILR 43 All 314 : 60 IC 933 : AIR 1921 All 54; *Syed Hasan Bagar v Thakur Sheo Narain Singh,* (1926) ILR 1 Luck 7 : 91 IC 917 : AIR 1926 Oudh 81; *Alliance Bank of Simla v Walsh,* (1883) PR 66.
575. *Umedmal Motiram v Davu,* (1878) ILR 2 Bom 547.
576. *Tehitram v Kashibai,* (1909) ILR 33 Bom 53 : 1 IC 614.
577. *Meghraj v Abdullah,* (1914) 12 All LJ 1034 : 25 IC 208.
578. *Muthia Chetty v Sinna Velliam,* (1912) ILR 35 Mad 625 : 10 IC 662; *Durai Swamy v Mohamed Abbas,* AIR 1952 Mad 678; *Official Receiver, Salem v Chinna Goundan,* (1957) 2 Mad LJ 414 : AIR 1957 Mad 630. See also *Fldyer Cocker,* (1805) 12 Ves 25, and other cases cited under note on section 55(4)(a).
579. *Muhammad Siddiq v Muhaiwnad Naslrullah,* (1899) ILR 21 All 223 : 26 IA 45.
580. *Choakklinga Tambiran v Ramanandan,* 97 IC 586 : AIR 1926 Mad 1031.
581. *Hari Ram v Denaput Singh,* (1883) ILR 9 Cal 167; *Mela Ram & Sons v Ram Das Joshi & Sons,* (1942) ILR 24 Lah 17 : AIR 1942 Lah 275 : 44 Punj LR 415 : 203 IC 462.
582. *Moti Lal v Bhagwan Das,* (1909) ILR 31 All 443 : 3 IC 497.

only a charge, it cannot be enforced against a bona fide purchaser for value without notice of the charge.[583]

(30) Limitation

Article 53 in the Limitation Act, 1963, applies only to suits to recover the price from the defendant personally, while suits to enforce the charge against the property are governed by Article 132 of the Act of 1908, which is now re-enacted as Article 62 of the Act of 1963. This was so decided both before and after the amendment of the article.[584] If liability arises by virtue of a registered conveyance, limitation was governed by Article 116 of the Act of 1908;[585] after 1 January 1964, however, there is no article corresponding to Article 116, and Article 53 or Article 62 would apply. Time runs not from the date of the sale, but from the date when the plaintiff is damnified.[586]

(31) Recital of Payment

A false acknowledgement of receipt of price by a recital in a deed does not estop the seller from giving evidence as against the buyer that he has not received payment. The Privy Council in *Shah Lal Chand v Indarjit*[587] said that it was settled law, that notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds. However, such a recital may give rise to a presumption of payment.[588]

(32) Exclusion of Charge

Sale is a transfer for a price paid or promised or part paid or part promised. Therefore, where the consideration is price promised, the promise is itself the consideration, and there is no scope for a charge. So also, when the price is part paid and part promised, and the amount to be paid is fully paid. The distinction between a sale in consideration of covenant to pay a sum of money in the future and a sale in consideration of a sum of money which the buyer covenants to pay, may seem fine, but it is a very real distinction.[589] The former gives rise to a charge, the latter does not. If the sale is in consideration of a sum of money which the buyer covenants to pay, the charge may be excluded by an agreement express or implied which is inconsistent with its continuance.

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583. *Tehilram v Kashibai,* (1909) ILR 33 Bom 53 : 1 IC 614; *Gur Dayal v Karam Singh,* (1916) ILR 38 All 254 : 35 IC 289.
584. *Virchand v Kumaji,* (1894) ILR 18 Bom 48; *Chunilal v Bai Jethi,* (1898) ILR 22 Bom 846; *Har Lal v Muhamdi,* (1899) ILR 21 All 454; *Ramakrishna Ayyar v Subramania,* (1906) ILR 29 Mad 305; *Munir-un-nissa v Akbar Khan,* (1908) ILR 30 All 172; *Meghraj v Abdullah,* (1914) 12 All LJ 1034 : 25 IC 208; *Kallu v Ram Das,* (1928) 26 All LJ 53 : 107 IC 679 : AIR 1929 All 121; *Gulzari Mal v Meghi Mal,* (1933) ILR 14 Lah 380 : 141 IC 435 : AIR 1933 Lah 109.
585. *Ram Raghubir Singh Lal v United Refineries,* 60 IA 183 : 64 Mad LJ 655 : 37 Cal WN 633 : 57 Cal LJ 308 : 35 Bom LR 753 : 1933 All LJ 541 : 142 IC 788 : AIR 1933 PC 143; *Baijnath v Parmeshwari Dayal,* (1934) ILR 10 Luck 26 : 149 IC 529 : AIR 1934 Oudh 240.
586. *Gulzari Mal v Meghi Mal,* (1933) ILR 14 Lah 380 : 141 IC 435 : AIR 1933 Lah 109; dissenting from *Raghubar Rai v Jai Rai,* (1912) ILR 34 All 429.
587. *Shah Lal Chand v Indarjit,* (1900) ILR 22 All 370 : 27 IA 93, p 97; see also *Hukumchand v Hiralal,* (1879) ILR 3 Bom 159; *Vasudeva v Narasamma,* (1882) ILR 5 Mad 6; *Lala Himmat v Llewhellen,* (1885) ILR 11 Cal 486; *Chunni Bibi v Basanti Bibi,* (1914) ILR 36 All 537 : 24 IC 661; *Lodd Govindoss v Muthiah Chetty,* (1925) 48 Mad LJ 721 : AIR 1925 Mad 660; *Irpan Ali v Jogendra,* (1932) ILR 59 Cal 1111 : 143 IC 241 : AIR 1932 Cal 708.
588. *Bai Devmani v Ravishankar,* (1929) ILR 53 Bom 321 : 116 IC 236 : AIR 1929 Bom 147; and see *Raghavendra v Venkatasami,* (1929) Mad WN 752 : 124 IC 277 : AIR 1930 Mad 251; *Goli Ramaswami v Naria Jagannadha Rao,* AIR 1962 AP 94.
589. *Webb v Macpherson,* (1904) ILR 31 Cal 57, p 73 : 30 IA 238.

In *Webb v Macpherson,*[590] the Privy Council said:

> In their Lordships' opinion there is no ground whatever for saying that the charge is excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase money by installments, nor is it in their Lordships' opinion, excluded by any contract, covenant, or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge.

A direction to the buyer to pay the price to the creditor of the seller or to a third party does not exclude the charge.[591] If part of the purchase money is left with the buyer to pay off creditors of the seller, the seller is entitled to a charge for the amount left with the buyer, if the latter omits to pay the creditors.[592] Nor is the charge lost if the seller takes a security for the amount unpaid such as a memorandum of agreement,[593] or a bond,[594] or a mortgage,[595] or a promissory note.[596] However, if there is an agreement which puts the buyer under an enforceable liability to a third party as to the unpaid price, there is a contract to the contrary and the charge is lost. Thus, the seller has no charge if the buyer by his direction executes a promissory note to a third party, for the right to recover the unpaid price cannot reside in one party, and the right to enforce the security in another.[597] So also, if the direction to pay a third party is the result of a novation by which the seller's liability to the third party is extinguished, and the buyer becomes liable to the third party instead of the seller.[598] In cases where it was held that the promissory note or mortgage was not collateral security for the price, but the price itself, the charge was excluded.[599] Where the vendor leaves a part of the price with the vendee to be paid to his illegitimate son on attaining majority, the vendor is not entitled to have a lien on the property sold.[600]

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590. *Webb v Macpherson,* (1908) ILR 31 Cal 57 : 30 IA 238, p 245.
591. *Sivasubramania Ayyar v Subramania Ayyar,* (1916) ILR 39 Mad 997 : 37 IC 429; overruling *Abdulla Beary v Mamhali Beary,* (1910) ILR 33 Mad 446 : 5 IC 87 and *Subramania Mudaliar v Gnana Sambanda,* (1911) 21 Mad LJ 359 : 10 IC 98; *Meghraj v Abdulla,* (1914) 12 All LJ 1034 : 25 IC 208; *Har Chand v Kishori Singh,* 7 IC 639; *Kunchithapatham v Palamalai,* (1917) 32 Mad LJ 347 : 39 IC 405; *Alwar Chetty v Jagannatha,* (1928) 54 Mad LJ 109 : 108 IC 291; *Kesho Das v Jiwan* AIR 1941 Lah 10 : (1941) ILR Lah 568 : 43 Punj LR 450 : 195 IC 980; *Mela Ram & Sons v Ram Das Joshi & Sons,* ILR (1942) 24 Lah 17 : AIR 1942 Lah 275 : 44 Punj LR 415 : 203 IC 462; *Shankar Bala v Gotiram Pandurang* (1941) 43 Bom LR 1014 : 199 IC 481 : AIR 1942 Bom 67.
592. *Daulat Ram v Inderjeet,* (1933) ILR 8 Luck 185 : 141 IC 468 : AIR 1933 Oudh 33; *Gangaram v Raghubans,* (1948) ILR 27 Pat 898.
593. *Webb v Macpherson,* (1908) ILR 31 Cal 57; *Karuppiah Pillai v T B Hari Row,* (1911) 21 Mad LJ 849 : 11 IC 890.
594. *Virchand v Kumaji,* (1894) ILR 18 Bom 48; *Bashir Ahmad v Nazir,* (1921) ILR 43 All 544 : 63 IC 495 : AIR 1921 All 74; *Ranganayaki v Parthasarathy,* 54 IC 503; *Munayya v Krishnayya,* (1925) 47 Mad LJ 737 : 84 IC 949 : AIR 1925 Mad 215.
595. *Lakshmana Iyer v Sankaramoorthi,* (1913) 25 Mad LJ 245 : 18 IC 199; *Naima Khatun v Basant Singh,* (1934) ILR 56 All 766 : (1934) All LJ 318 : 149 IC 781 : AIR 1934 All 406; *Ahmad Ali v Raihan Raza,* (1934) All LJ 682 : 148 IC 639 : AIR 1934 All 525.
596. *Vellayappa Chettiar v Narayana,* 18 IC 81; *Dayal Das v Harkishan Singh,* (1930) ILR 11 Lah 587; 125 IC 330 : AIR 1930 Lah 568; *Krishnaswami v Vijayaraghava,* AIR 1939 Mad 590 : (1939) 1 Mad LJ 344 : 49 Mad LW 597 : (1939) Mad WN 284; *Somu Achari v Singara Achari,* AIR 1945 Mad 407; *Dhanikachala Pillai v Raghava Reddiar* AIR 1962 Mad 423; *Sundaraja v Sakthi Talkies,* (1966) 2 Mad LJ 161 : AIR 1967 Mad 127.
597. *Swaminatha v Subbarama,* (1927) ILR 50 Mad 548 : 100 IC 10 : AIR 1927 Mad 219.
598. *Theyagaraja v Seshappier,* 54 IC 458; *Ramkrishna v Panchanmal,* AIR 1939 Mad 876.
599. *Krishnawami Iyengar v Subramania,* (1918) 35 Mad LJ 304 : 44 IC 523; *RMARS Chettyar Firm v Daw Ngwe,* 153 IC 1026 : AIR 1934 Rang 190.
600. *Chandra Kesavalu v Perumal Chettiar,* (1939) ILR Mad 437 : (1939) 1 Mad LJ 820 : 49 Mad LW 605 : AIR 1939 Mad 722.

ILLUSTRATIONS

(1) *A* sells property to *B* on the 10 February 1905 for ₹ 790. At the time of the conveyance, ₹ 300 are paid and ₹ 490 remain unpaid. For this amount *B* on the 13 February 1905 executes a registered bond promising to pay the amount in installments of ₹ 50 per mensem. *B* fails to pay and on the 10 February 1917. *A* sues to recover the unpaid price and to enforce his charge on the property sold. The remedy on the bond was time barred at the date of suit. But the bond was only a collateral security for the price. *A* had therefore a charge for the unpaid price. Limitation to enforce the charge was 12 years under Article 132. The suit on the charge was in time and was decreed.[601]

(2) *A* is a minor and his guardian on his behalf sells *A's* share of a house for ₹ 2,886 to *B*. *B* pays half the price and as security for the unpaid balance executes a bond promising to pay *A* the sum of ₹ 1,443 with interest at 6 per cent when he attained majority. *A's* charge for unpaid price is not lost.[602]

(3) *A* sells property to *B* for ₹ 28,000. Of this amount ₹ 8,200 are paid on the date of the conveyance, ₹ 19,800 are left with *B* to discharge a mortgage by *A* on the same and two other properties. *B* on the same date executes a security bond hypothecating his property as security for the payment of the mortgage, and covenanting to pay ₹ 15,000 damages in case he defaults in making the payment by a fixed date. *B* dies not paying off the mortgage. *A* is entitled to a charge for ₹ 19,800, being the unpaid price, but as to the ₹ 15,000, he is entitled only to damages actually incurred.[603]

(4) *A* sells property to *B* for ₹ 2,000 of which ₹ 1,000 is not paid. *A* owes ₹ 1,000 to *C*. *C* agrees to release *A* from liability for the debt and to recover the amount from *B* who promises to pay *C* instead of *A*. The arrangement is a contract to the contrary and the charge is lost.

(33) Waiver

The charge as explained in the preceding paragraph is not waived on equitable considerations which would apply to the unpaid vendor's equitable lien in English law. It can only be waived by an express contract to the contrary or by an implied contract, i.e., some conduct inconsistent with the continuance of the charge.

The case is overruled by the Madras High Court in *Sivasubramania Ayyar v Subramania Ayyar*[604] which proceeded on the ground of waiver, despite the warning given by the Privy Council in *Webb v Macpherson*[605] that a statutory charge cannot be waived on equitable grounds. In Punjab where the TP Act is not in force, the English rule was followed in a case where the seller agreed to accept shares in lieu of cash for the balance of the price.[606]

(34) Assignment

If the seller assigns the debt for the unpaid price, the assignee gets the benefit of the charge if the assignment is registered, but not otherwise.[607]

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601. *Bashir Ahmad v Nazir*, (1921) ILR 43 All 544 : 63 IC 495 : AIR 1921 All 74.
602. *Munayya v Krishnayya* (1925) 47 Mad LJ 737 : 84 IC 949 : AIR 1925 Mad 215.
603. *Naima Khatun v Basant Singh*, (1934) ILR 56 All 766 : 1934 All LJ 318 : 149 IC 781 : AIR 1934 All 406; *Swaminatha Pillai v Parameswaram*, AIR 1967 Ker 195.
604. *Sivasubramania Ayyar v Subramania Ayyar*, (1916) ILR 39 Mad 997 : 37 IC 429.
605. *Webb v Macpherson*, (1908) ILR 31 Cal 57 : 30 IA 238.
606. *Morton v Woodfall*, (1927) ILR 8 Lah 257 : 90 IC 770 : AIR 1927 Lah 103; *Re Brentwood Brick and Coal Co*, (1876) 4 Ch D 562.
607. *Rajagopala v Ranganatha*, 152 IC 375 : AIR 1934 Mad 615; affirming *Ranganatha v Rajagopala* 142 IC 730 : AIR 1933 Mad 181. See also note under section 8, "Debt Secured by a Charge".

(35) Leases

The charge under this section cannot be extended to leases. There is no charge on the leasehold for unpaid premium even though the lease be in perpetuity.[608]

(36) Owelty of Partition

An owelty of partition is the difference paid in money in order to equalise shares in corporeal property which are incapable of a precise division, and in such a case, there is an implied lien or charge created on the land taken under partition for the payment of the owelty.[609] In a decision of the Kerala High Court,[610] the majority held that section 55(4)(b) applies to cases where the owelty is unpaid. It is respectfully submitted, however, that the majority view is erroneous, and the view of J Raghavan dissenting, that owelty is a part of the property being partitioned and cannot be equated to the purchase price, is correct.

(37) Section 55(5)(a)—Buyer's Duty of Disclosure

The seller is by section 55(l)(a) under a duty to disclose latent defects. There is no doubt that the buyer is under no duty to disclose latent advantages, although he may not make a statement which is misleading. This is also the law in England as stated in the following passage from the judgment of Lord Selborne in *Coaks v Boswell*:[611]

> Every such purchaser is bound to observe good faith in all that he says or does, with a view to the contract, and (of course) to abstain from all deceit, whether by suppression of truth or by suggestion of falsehood. But inasmuch as a purchaser is (generally speaking) under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of those facts, would be necessarily or naturally and probably misleading.

Thus a buyer need not disclose the existence of a coal mine of which the seller is unaware.[612]

However, to this rule matters of title constitute an exception. Although the seller's title is ordinarily a matter exclusively within his knowledge, yet there may be cases where the buyer has information which the seller lacks. In such a case, he must not make an unfair use of it. He must give the information to the seller under the penalty of the contract being voidable for fraud both under section 17(5) of the Indian Contract Act, 1872, and the last clause of this section. An English illustration is the case of *Summers v Griffiths*[613] where an old woman sold property at an undervalue believing that she could not make out a good title to it, while the purchaser knew that she could. The purchaser was held to have committed a *suppressio veri* and the sale was set aside as fraudulent. Another is *Ellard v Landaff (Lord)*[614] where a lessee obtained a renewal of a lease, in consideration of a surrender of the old lease, suppressing the fact that the person on whose life the old lease depended was on his death

608. *Venkatacharyulu v Venkatasubba,* (1925) ILR 48 Mad 821 : 90 IC 725 : AIR 1926 Mad 55.
609. *Swaminathaudayar v Official Receiver of West Tanjore,* [1957] SCR 775 : AIR 1957 SC 577 : [1957] SCJ 501.
610. *Parvathi Amma v Makki Amma,* (1961) ILR 2 Ker 613 : AIR 1962 Ker 85.
611. *Coaks v Boswell,* (1886) 11 App Cas 232, p 235.
612. *Fox v Mackreth; Pitt v Mackreth,* (1788) 2 Bro CC 400; *Turner v Harvey,* (1821) Jac 169, p 178.
613. *Summers v Griffiths,* (1866) 35 Beav 27.
614. *Ellard v Landaff (Lord),* (1810) 1 Ball & B 241.

bed. This case has been adversely criticised,[615] but it would be good law under TP Act, and had been adopted in illustration (a) to section 22 of the Specific Relief Act, 1877. The corresponding section in the Specific Relief Act, 1963 (section 20), does not however, contain that illustration.

There are no cases in India under the sub-section, but it has been described in *Haji Essa v Dayabhai*[616] as casting upon the buyer the duty of communicating facts about the seller's title.

(38) Section 55(5)(b)—Payment of Price

This sub-section is the corollary of section 55(l)(d), for the execution of the conveyance by the seller, and the payment of price by the buyer are reciprocal duties to be performed simultaneously. The buyer is bound to tender a conveyance for execution,[617] but the buyer is not bound to part with the price except on a complete conveyance to himself of the whole interest that he has purchased. This sub-section imposes a personal liability on the buyer, apart from the liability imposed by section 55(4)(b) on the property.[618]

Section 55(5)(b) does not require the buyer to deposit the purchase money in court when his tender is refused by the seller, and the tender does not become invalid for non-deposit in court.[619]

(39) Free from Encumbrances

It follows that if the property is sold free from encumbrances and they are not discharged at the time of conveyance, the buyer is not bound to pay. He may under section 13(l)(c) of the Specific Relief Act, 1963, compel the vendor to discharge the encumbrance; or he may, under this sub-section, discharge it himself and set off the amount against the purchase money,[620] or recover it by a subsequent suit against the vendor.[621] If the amount due on the encumbrance is greater than the purchase money, he may retain the latter as security for the seller discharging it; and in such a case, he will not be liable for interest on the purchase money until after the seller has shown himself ready and willing to pay the difference and discharge the encumbrance.[622] If the seller has deposited a sum with the buyer for the discharge of the encumbrance and the sum proves to be greater than what is due, the excess belongs to the seller as part of his price.[623]

ILLUSTRATION

A mortgages property to her son-in-law *B*. *A* dies and her son *C* and daughter *D*, the wife of *B*, succeed to the property under Mahomedan law. *C* sells his share to *E* free from encumbrances

615. See *Turner v Green*, (1895) 2 Ch 205.
616. *Haji Essa v Dayabhai*, (1896) ILR 20 Bom 522, p 532.
617. *Ma Hnit v Maung Po Pu*, (1920) 31 Cal LJ 87 : 55 IC 791 (PC).
618. *Raghukul Tilak v Pitam Singh*, (1931) ILR 52 All 901 : 130 IC 198 : AIR 1931 All 99.
619. *Shiva Narain Sah v Baidya Nath Prasad Tiwary*, AIR 1973 Pat 386.
620. *Munir-un-nissa v Akbar Khan*, (1908) ILR 30 All 172, p 175; *Ranganaya Kamma v SR Subudthi*, AIR 1955 Ori 20.
621. *Mahtab Singh v Collector of Saharanpur*, (1932) 30 All LJ 556 : 142 IC 83 : AIR 1932 All 454.
622. *Muhammad Siddiq v Muhammad Nasirullah*, (1899) ILR 21 All 223 : 26 IA 45; *Badri Das v Jivan*, (1912) 10 All LJ 480 : 15 IC 854; *Veerabhadrayya v Subbarayudu*, AIR 1942 Mad 650.
623. *Ram Ratan Lal v Abdul Wahid*, 81 IC 503; *Subba Row v Varadiah*, (1943) ILR Mad 885 : 56 Mad LW 199 : (1943) 1 Mad LJ 279 : AIR 1943 Mad 482; *Satyanarayan Murthi v Sathiraju*, AIR 1942 Mad 525; *Ram Lal v Harihar Prasad*, AIR 1955 Pat 254.

and deposits ₹ 426 with *E* for the discharge of the mortgage to his brother-in-law *B*. *B* remits half the amount due on the mortgage. *C* is entitled to the amount remitted as part of his price.[624]

(40) Section 55(5)(c)—After Completion Buyer Bears Losses

After completion by conveyance, the ownership of the property having passed to the buyer, the buyer is the owner, and the property is at his risk. If the seller has committed waste, he is liable, but for all accidental destruction or deterioration after conveyance, the loss falls on the buyer.

It is clear both from this sub-section as well as sub-section (1)(e) that in the interval between the contract and conveyance, the seller bears the loss. Illustration (a) to section 13 of the Specific Relief Act, 1877, would suggest the opposite. However, that illustration is based on English law, and could not be applied where TP Act is in force,[625] and has not been re-enacted in the Specific Relief Act, 1963.

If the seller has insured the property against fire, the buyer may require the seller to apply the insurance money in restoring the premises.[626]

(41) Section 55(5)(d)—Outgoings After Completion

Under section 55(l)(g) the seller pays public charges and rents which have accrued due upto the date of the sale. After the sale, this liability is transferred to the buyer. The liability is a statutory and not a contractual liability and, therefore, it is binding on a minor vendor on whose behalf the property is sold.[627]

If the property is sold free from encumbrances, i.e., if absolute ownership is to be conveyed, the seller must discharge the encumbrances. If a mortgagee brings to sale the mortgaged property free from encumbrances, the amount of municipal taxes accrued due before the sale must be deducted from the sale proceeds payable to him.[628] If the property is sold subject to encumbrances, the seller must pay interest on the encumbrances up to date of sale and after the completion, the buyer is liable to discharge the encumbrances.[629]

The liability enacted in this sub-section is between the seller and the buyer. If after a sale subject to encumbrances, the seller is made personally liable for an encumbrance, he has a right of indemnity against the buyer. If the encumbrance proves to be invalid, the seller has nothing to complain of, for his indemnity is complete. He cannot pick up the burden of which the land is relieved, and claims it as his. The seller cannot participate in any benefit the buyer may derive from his purchase after the conveyance.[630]

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624. *Ram Ratan Lal v Abdul Wahid,* 18 IC 503.
625. See *Pollock and Mulla's Contract Act,* 8th Edn, p 767.
626. See note "Insured property" under section 49.
627. *Gangi v Govinda,* (1924) 46 Mad LJ 464 : 84 IC 626 : AIR 1924 Mad 544.
628. *Bibhuti Bhushan Majmudar v Mujihar Rahmwi,* (1934) ILR 61 Cal 956 : 38 Cal WN 971 : 153 IC 247 : AIR 1934 Cal 842.
629. See *Waman Martand v Commr,* CD (1925) ILR 49 Bom 73 : 26 Bom LR 942 : 84 IC 421 : AIR 1924 Bom 524 where the rights and liabilities of the seller and buyer in a sale subject to encumbrances and in a sale free from encumbrances, were contrasted; cf as to court sales —*Mangalathammal v Narayanaswamy,* (1906) ILR 30 Mad 461.
630. *Izzat-un-nissa Begam v Kunwar Pertab Singh,* (1909) ILR 31 All 583 : 36 IA 203 : 3 IC 793; *Kunjikavu Amma v Janaki Amma,* (1957) ILR Ker 321 : AIR 1957 Ker 98.

ILLUSTRATION

A sells property to *B* for ₹ 5,000. The sale is subject to a mortgage encumbrance which was believed to be of ₹ 2,000. After the sale it is discovered that the mortgage is invalid; so that *B* has got complete ownership for ₹ 5,000. *A* then sues to recover ₹ 2,000 as part of his purchase money. *A's* suit falls for after conveyance. The seller cannot participate in any benefit derived by the buyer from his purchase.

It is pertinent to note that this illustration is the converse of the illustration in the note *"Free from encumbrances"* under section 55(5)(b).

Public charges would be payable by the seller or by the buyer accordingly as they accrue before or after the sale.[631] The liability of the seller and the buyer inter se is no concern of the authority levying the charge.[632] If the charge is levied upon the seller after transfer of ownership, he has a right of indemnity against the buyer.[633] Interest accrues due from day to day and would be apportioned accordingly; the seller paying interest upto the date of sale, and the buyer paying subsequent interest. The buyer is bound to pay rents accruing due after the conveyance, just as the seller is under section 55(l)(g) bound to pay rents accruing due upto the date of sale. The sub-section assumes that the liability to pay rent is apportionable.

(42) Section 55 (6)(a)—Benefits After Completion

After completion, the transfer passes to the buyer all rights of ownership, and such rights as are under section 8 the legal incidents thereof. As to rents and profits, section 55(4)(a) gives these to the seller until completion, and this sub-section gives them to the buyer after completion. If any repairs are made by the seller to the property sold, the buyer is entitled to the benefit of such repairs, and the seller cannot claim any compensation for the same.[634]

(43) Section 55(6)(b)—Buyer's Charge for Price Prepaid

In the absence of a contract to the contrary, the buyer will have a charge on the seller's interest in the property which is the subject matter of the sale agreement insofar as the purchase money and interest on such amount are concerned, unless the buyer has improperly declined to accept delivery. The charge is available against the seller and all persons claiming under him.[635] This charge in favour of the buyer is the converse of the seller's charge under section 55(4)(b). The principle underlying this provision is a trite principle of justice, equity and good conscience.[636] It arises in favour of the buyer, the moment he pays the purchase money or any part of it and cannot be subsequently lost unless the buyer commits a default. A subsequent compromise entered into between the seller and the buyer that too at the time when the seller had lost title would not efface this statutory charge available to the buyer.[637]

Since this charge is statutory charge in favour of a buyer, and is different from a contractual charge to which the buyer may become entitled to under the terms of the contract, consequently, the buyer is entitled to enforce the said charge against the property and for that purpose trace the property in the hands of the third parties, and even when the property is converted into another form by proceeding against the substituted security, since

631. *Izzat-un-nissa Begam v Kunwar Pertab Singh,* (1909) ILR 31 All 583.
632. *Nollore Municipality v Dwarapally Kotamma,* (1907) ILR 30 Mad 423.
633. *Arunachella v Rangiah,* (1906) ILR 29 Mad 519.
634. *Achuthan v Parameshwara,* AIR 1951 Tr & Coch 195.
635. *Delhi Development Authority v Skipper Construction Co Pvt Ltd,* (2000) 10 SCC 130 : AIR 2000 SC 573; see also *Chettiar Firm v Chettiar,* AIR 1941 PC 47 : (1941) 11 AWR (PC) 664 : (1941) 54 LW 237.
636. *Videocon Properties Ltd v Bhalchandra Laboratories,* (2004) 3 SCC 711 : AIR 2004 SC 1787.
637. *Molly Ajithkumar v Vimala Sasidharan,* AIR 2012 Ker 87.

none claiming under the seller including a third party purchaser can take advantage of any plea based even on want of notice of the charge. The said statutory charge gets attracted and gets attached to the property for the benefit of the buyer the moment he pays any part of the purchase money,[638] and is only lost in case of purchaser's own default or his improper refusal to accept delivery.[639]

The buyer has a charge for price prepaid, i.e., for price that he has paid in anticipation of completion. Interest on price prepaid would run from the date of payment to the date of delivery of possession.[640] After the conveyance is executed and possession is given, this clause has no application.[641] The buyer's charge would never be lost to the vendor even though he has not filed a suit for specific performance on the basis of agreement of sale. Subsequent compromise entered into between seller and buyer and that too at time when seller had lost title would not efface statutory charge available to the buyer under section 55 (6) (b).[642]

A charge would not be created if the parties expressly stipulate that the purchase money will not form the charge on the property, or it will be released from the charge on certain circumstances, or that earnest would be forfeited under certain circumstances.[643] If the seller has no personal interest in the property, there can be no charge under this sub-section. This was so held in a case where a *mutawalli* (who is a mere custodian) sold *wakf* property without the sanction of the court.[644] Where a guardian of a minor contracts to sell a property and such transfer is for legal necessity, the purchaser has a charge for the price paid on the minor's interest in the property.[645] No charge is available where the sale is not genuine.[646]

Where the agreement for sale is invalid or void, no charge would attach to the property;[647] this would be so, for instance, where a landlord agrees to sell land to a stranger, even though a tenant was in possession, contrary to section 64 of the Bombay Tenancy and Agricultural Lands Act, 1948.[648]

There is a reference to the buyer's charge in an Oudh case,[649] which is difficult to understand. The shares of a father and sons were brought to sale in execution of a money decree and bought by *A*. Before the sale was confirmed, the property was mortgaged to *B* by a mortgage which was valid as to the father's share only. *B* paid off *A*, and the sale was set aside. Subsequently, the son's share was sold subject to *B*'s mortgage, to *C*. *B* sued to enforce his mortgage, and it was held that *B* was entitled to recover the amount he had paid to *A* to set aside the sale. This is good law, for *B*'s payment was not efficious and he had paid the money for the preservation of his security. However, the judgment seems to proceed on the ground that *B* was subrogated to the charge of the purchaser *A* whose sale was set aside. It is difficult to understand how *A*'s charge could continue after the sale had been set aside, and

638. *Videocon Properties Ltd v Bhalchandra Laboratories,* (2004) 3 SCC 711 : AIR 2004 SC 1787.
639. *Asgar G Patel v UOI,* (2000) 5 SCC 311 : AIR 2000 SC 2222.
640. *Juggo v Harihar Prasad,* (1940) ILR All 52 : (1939) All LJ 1107 : 187 IC 509 : AIR 1940 All 41.
641. *Kapadvanj Municipality v Ochhavlal,* (1928) 30 Bom LR 920 : 113 IC 161 : AIR 1928 Bom 328; *Sundaramier v Krishnamachary,* (1965) 2 Mad LJ 478 : AIR 1966 Mad 330.
642. *Molly Ajithkumar v Vimala Sasidharan,* AIR 2012 Ker 87 : LNIND 2012 KER 16 : 2012 (1) Ker LJ 499.
643. *Asgar G Patel v UOI,* (2000) 5 SCC 311 : AIR 2000 SC 2222 approving *Saidun Nessa Hoque v Calcutta Vyapar Pratishan Ltd,* AIR 1978 Cal 285.
644. *Shailendranath v Hede Kaza Mane,* (1932) ILR 59 Cal 586 : 36 Cal WN 193 : 54 Cal LJ 328 : 137 IC 500 : AIR 1932 Cal 356.
645. *Tukaram v Mumbaji,* 183 IC 456 : AIR 1939 Nag 209.
646. *TN Hardas v Babulal,* AIR 1973 SC 1363.
647. *Panchan Pal v Nirode Kumar,* AIR 1962 Cal 12; see also *Ewing v Osbaldiston,* (1837) 2 My & Cr 53 88.
648. *Dhanu Baba v Gulab Eknath,* (1960) 62 Bom LR 940.
649. *Sheo Dulare v Jagannath,* (1932) ILR 7 Luck 405 : 136 IC 222 : AIR 1932 Oudh 88.

the price refunded to him. The judgment refers to section 55(4)(b), but that again seems to be a mistake for section 55(6)(b). The principle underlying section 55(6)(b) is a principle of justice, equity and good conscience, and applies to Punjab.[650] The buyer's charge, under the section is a statutory charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract.[651] A buyer can enforce his statutory charge against the property, and the plea of want of notice on the part of a third person would be of no avail.[652] A buyer's charge exists even in cases where the buyer is in possession of the property intended to be sold, and is not lost by his accepting the delivery of possession.[653] The creation of a charge under the section is not at all difficult when the buyer comes into possession of the property intended to be sold. It arises immediately when the purchase price is paid by the buyer to the seller.[654]

When the contract goes off by reason of the default of the seller and without the default of the buyer, the buyer does not lose the charge. The buyer can claim return of the purchase money under section 55(2) even if he was aware of the defect in the title of the same at the time of the contract. After the amendment of 1929, the charge can be enforced, according to the Madras High Court, even against persons claiming through the seller, irrespective of notice.[655]

(44) All Persons Claiming under him

The charge on the property is enforceable not only against the seller, but against all persons claiming under him. It can be enforced by the buyer against the property and even against a subsequent transferee without notice.[656] Before the amending Act of 1929, the words "with notice of payment" occurred after the words "all the persons claiming under him". These words were omitted as they allowed a transferee without notice to escape. After the amendment of 1929, notice to the purchaser has become irrelevant.[657] Therefore, a transferee for consideration and without notice is also bound by the charge.[658] A gratuitous transferee, or a transferee for value with notice would in any event be liable under the second para of section 40.

Where the vendor has been declared an evacuee, the purchaser can claim against the property, but cannot bring to sale the property sold by the competent authority to a third party.[659] Thus, a tenant purchasing his landlord's property under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, is not a person claiming under the landlord, as the transaction is involuntary.[660]

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650. *Shankri v Milkha Singh,* (1941) 43 Punj LR 656 : AIR 1941 Lah 407.
651. *Chettiar Firm v Chettar,* AIR 1941 PC 47.
652. *Hari Bupuji v Bhagu Sadhu,* (1936) 38 Bom LR 1200 : AIR 1937 Bom 142; *Abdul Hamid v Mahomed Ali,* (1951) 53 Bom LR 817 : AIR 1952 Bom 67; But see *Pushkarnarayan v Kubrabai,* (1969) 71 Bom LR 769; *Meppallipoyil Ibravi v Poolakkadiyil Pokkari,* AIR 1990 Ker 169, p 170; *Mammad Koya v Ismayil,* (1979) Ker LT 9; *Madhava Kamathi v Gopala Pai,* (1965) Ker LT 877.
653. *Jibhaoo Harising v Ajabsing,* (1953) ILR Bom 253 : 54 Bom LR 971 : AIR 1953 Bom 145.
654. *Jibhaoo Harising v Ajabsing,* (1953) ILR Bom 253 : 54 Bom LR 971 AIR 1953 Bom 145.
655. *Nagammal v Ayyavu Thevar,* AIR 1973 Mad 353; (1973) 1 Mad LJ 273.
656. *Videocon Properties Ltd v Bhalchandra Laboratories,* (2004) 3 SCC 711 : AIR 2004 SC 1787.
657. *Delhi Development Authority v Skipper Construction Co Pvt Ltd,* (2000) 10 SCC 130 : AIR 2000 SC 573.
658. *K A Sebastian v Bipin O Nair,* AIR 2004 Ker 265, p 266.
659. *Mahomed Ebrahim v Essak Haji Ali-mahommed,* (1961) 63 Bom LR 798 : AIR 1962 Bom 169.
660. *Dhanu Baba v Gulab Eknath,* (1960) 62 Bom LR 940.

(45) Improperly Declines to Accept Delivery

The buyer has a charge for all sums that he pays towards the purchase money, and for interest thereon. This charge attaches from the moment the buyer pays any part of the purchase money, and is only lost in case of his own subsequent default.[661] If the buyer improperly refuses to accept delivery, he loses his charge. However, when the property is compulsorily purchased by the Central Government under chapter XX-C of the Income Tax Act, 1961, there is no occasion for the buyer to have improperly declined to accept delivery of the property. Where, the amount of purchase money was properly paid by the buyer, in anticipation of the fulfillment of the contract which would include delivery of the property, the order of compulsory purchase having intervened, the transferees were excluded from accepting delivery of property.[662]

Although the buyer loses his charge the seller has no right to retain any installments of price that have been paid, unless they have been paid as deposit or earnest. In a suit against the buyer, whether for specific performance or for damages, the seller would have to give credit for moneys prepaid not as earnest, but as installments of price.[663]

In a Madras case, the intending buyer revoked his right to have the sale executed in his favour, only because the official assignee (in whom the property had in the meantime vested on the insolvency of the seller) insisted on bringing the property to sale in the interest of creditors, and the insolvency court so directed. It was held that the buyer can insist upon a charge on the property being created for the amount paid as purchase money and can secure a charge for the price pre-paid, that is to say, the price paid by him in anticipation of completion of a sale.[664]

(46) Earnest

The characteristic of earnest is that it serves two purposes. It goes in part payment of the purchase money for which it is deposited, but primarily it is security for the performance of the contract.[665] In *Kunwar Chiranjit v Har Swamp*[666] Lord Shaw said:

> Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.

This definition of earnest has been approved and adopted by the Supreme Court in *Maula Bux v UOI.*[667] Supreme Court has also held that the charge created under section 55(6)(b) would extend to earnest money paid before the title passes.[668] Where the contract goes off by default of the buyer, the seller is entitled to retain the earnest money as forfeited.[669] However, if the seller is in default, the buyer refusing to complete is entitled to a

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661. *Balvanta v Bira,* (1899) ILR 23 Bom 56, p 61; *Kesar v Munna,* (1917) 13 Nag LR 19 : 39 IC 50; *Adari Sanyasi v Nookalamma,* (1931) ILR 54 Mad 708 : 131 IC 487 : AIR 1931 Mad 592. See also *Anchi v Maida Ram,* AIR 1987 Raj 11, p 13.
662. *Asgar G Patel v UOI,* (2000) 5 SCC 311 : AIR 2000 SC 2222.
663. *Cornwall v Henson,* (1900) 2 Ch 298, pp 302, 305.
664. *Income-tax Officer v K A Goundawamy,* AIR 1978 Mad 186; 113 LTR 596.
665. *Re Parnell, Ex Parte Barrell,* (1875) 10 Ch App 512; *Howe v Smith,* (1884) 27 Ch D 89, pp 95, 98; *Soper v Arnold,* (1889) 14 App Cas 429; *Hall v Burnell,* (1911) 2 Ch 551 : [1911-13] All ER Rep 631; *Krishna Chundra v Khan Mamud,* AIR 1936 Cal 51; *Narendra v Nipendra,* AIR 1948 Cal 208.
666. *Kunwar Chiranjit v Har Swamp,* (1926) 24 All LJ 248, p 249 : 94 IC 782 : AIR 1926 PC 1.
667. *Maula Bux v UOI,* [1970] I SCR 928 : AIR 1970 SC 1955 : [1970] 2 SCJ 249.
668. *Videocon Properties Ltd v Bhalchandra Laboratories,* (2004) 3 SCC 711 : AIR 2004 SC 1787.
669. *Bishan Chand v Radha,* (1897) ILR 19 All 489; *Natesa Aiyar v Appavu,* (1915) ILR 38 Mad 178 : 19 IC 462; *Veerayya v Sivayya* (1914) 27 Mad LJ 482 : 26 IC 121; *Kunwar Chiranjit v Har Swarup,* (1926) 24 All LJ 248 : 94 IC 782 : AIR 1926 PC 1.

refund of the earnest money.[670] The fact that after a judicial investigation, the title of the vendor is ultimately found to be clear does not disentitle the vendee to claim a refund of the earnest money.[671]

The provisions of section 55(6) relating to the purchaser's charge are subject to a contract to the contrary, but mere use of the word "earnest" is not enough to constitute a contract to the contrary.[672]

It has been held, relying on the language of the clause, and on the decision in *Ibrahim Bhai v Fletcher*[673] that in such a case the purchaser is not entitled to any interest on the earnest amount till he files the suit.[674]

Where the buyer has accepted title and the seller has rescinded the contract and forfeited the deposit by reason of the buyer's failure to pay the balance of the price, the buyer cannot afterwards recover his deposit on discovering that the title is defective.[675] If the buyer's conduct does not amount to a repudiation, mere delay or such circumstances as would suffice to deprive him of the equitable remedy of specific performance would not justify a forfeiture of the deposit.[676] If it was intended to embody the terms of the contract in a written agreement, the mere payment of earnest money will not preclude the purchaser from pleading that there was no concluded contract.[677]

It is necessary, however, to distinguish between earnest and advance; there is no right to forfeit an advance.[678] Whether it is an advance or earnest, has to be ascertained from all the facts; a part-payment described as advance is earnest, and would be forfeited if it is paid as security for the performance of the contract, and the very fact, it has been said, that it is paid on the date of the agreement raises a presumption that it was paid as a security.[679] Again, the right to forfeit earnest does not apply to a quantum of earnest agreed to, but not in fact paid by the buyer; the seller cannot claim to recover such amount.[680] The justification of the forfeiture of advance money being a part of "earnest money" should be clear and explicit in the contract as the forfeiture of money paid as part payment of purchase price and not as earnest money is impermissible in law.[681]

(47) Interest

So far as payment of interest is concerned, the section specifically envisages payment of interest upon the purchase-money/price prepaid, though not so specifically on the earnest money deposit, apparently for the reason that an amount paid as earnest money simplicitor, as mere security for due performance does not become repayable till the contract or

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670. *Ibrahimbhai v Fletcher,* (1897) ILR 21 Bom 827, p 853; *U Tho Nyo v Chettyar,* 178 IC 822 : AIR 1938 Rang 367; *Habib Ali v Rafikuddin,* (1964) ILR Assam 513 : AIR 1968 Ass & N 26.
671. *Tulsidas v Prahlad,* (1942) ILR Kar 543 : 208 IC 101 : AIR 1943 Sau 92.
672. *Saidun Nessa Hoque v Calcutta Vyapar Pratishthan Ltd* AIR 1978 Cal 285.
673. *Ibrahimbhai v Fletcher* (1897) ILR 21 Bom 827.
674. *Shankarji v Ratilal* AIR 1956 Bom 443.
675. *Soper v Arnold,* (1887) 37 Ch D 96; on app (1889) 14 App Cas 429.
676. *Howe v Smith,* (1884) 27 Ch D 89; *Levy v Stogden,* (1898) 1 Ch 478; *Alokeshi Dassi v Harachand,* (1897) ILR 24 Cal 897; *Ibrahimbhai v Fletcher,* (1897) ILR 21 Bom 827; *Balvanta v Bira,* (1899) ILR 23 Bom 56.
677. *Hyam v Gubbay,* (1916) 20 Cal WN 66 : 32 IC 53.
678. *Sardarilal v Shakuntla Devi,* (1961) 63 Punj LR 362 : AIR 1961 Punj 378.
679. *Gowda (KCN) v Molakram,* AIR 1958 Mys 10; *Letitia Castelino v Jerome D'Silva,* AIR 1972 Mys 28. And see *Naresh Chandra v Ramchandra,* (1952) 55 Cal WN 765 : AIR 1952 Cal 93.
680. *Lowe v Hope,* (1970) Ch 94 : [1969] 3 All ER 605; *Contra Dewar v Montofi,* (1912) 2 KB 373.
681. *Satish Batra v Sudhir Rawal,* (2013) 1 SCC 345 : LNIND 2012 SC 665 : 2012 (10) SCALE 393.

agreement got terminated and it is shown that the purchaser has not failed to carry out his part of the contract, and the termination was brought about not due to his fault, the claim of the purchaser for refund of earnest money deposit will not arise for being asserted.[682]

(48) Properly Declines to Accept Delivery

This may occur when the sale goes off by default of the seller, or without default of either party. If the seller is in default, he is not entitled to forfeit the earnest.[683] When the buyer by reason of such default properly declines to take delivery, his charge extends not only to prepaid price including earnest and interest thereon, but also to the costs of the suit for specific performance or for rescission. There is a similar provision in section 13(l)(d) of the Specific Relief Act, 1963. Expenses incurred in pursuance of the contract have also been allowed.[684] An instance of a sale not being concluded owing to the default of the seller is *Rose v Watson*.[685] The buyer agreed to buy a part of a large plot, on the seller representing that it would be laid out in buildings. The seller failed to carry out his representation and the buyer rescinded the contract owing to the seller's default. Lord Westbury said—

> The purchaser would have been willing to perform the contract if the vendor had performed those things which, in good faith, he was bound to do.

and held that the purchaser's charge was not lost.

Other instances of a seller being in default are when a seller is unable to make out a good title;[686] or when a seller fails to obtain the renewal of certain leases in time, such renewal within the stipulated time, being one of the conditions of the contract of sale.[687] Similarly, where a sale was subject to the vendor obtaining planning permission, he must do so within a reasonable time even if no time is specified, and if he fails to do so, the purchaser may properly decline to complete the transaction.[688] However, in absence of a clause in the contract requiring the seller to obtain a certificate from the Endowment department before effecting the purchase, his liability under section 55 would not be attracted and there would be no obligation on his part to get the clearance of permission or exemption from such department for purchase or transferring the title of the property.[689]

Illustrations

(1) *A* agrees to sell property to *B*, and undertakes that a part owner *C* will join in the conveyance. But in breach of the agreements *A* and *C* convey the property to *D*. *B* sues for specific performance and *D* offers to convey *A*'s half share if *B* will pay the full price. *B* refuses this offer, as he was entitled to do under section 15 of the Specific Relief Act, 1877(now section 12(3) of the Specific Relief Act, 1963). *B* has properly declined to accept delivery and has a charge for part of the price that he had prepaid.[690]

(2) *A* agrees to sell a house to *B* and puts *B* in possession. A sale deed is executed, but is not registered. *B* sues for specific performance but his suit is dismissed. *A* sues to evict *B*.

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682. *Videocon Properties Ltd v Bhalchandra Laboratories,* (2004) 3 SCC 711 : AIR 2004 SC 1787.
683. *Ibrahimbhai v Fletcher* (1897) ILR 21 Bom 827.
684. *Karsandas v Gopaldas,* (1923) 25 Bom LR 1144 : 85 IC 491 : AIR 1924 Bom 282; *Kitton v Hewitt,* (1904) WN 21.
685. *Rose v Watson,* (1864) 10 HLC 672, p 679.
686. *Dwarkaprasad v Kathleen Florence,* (1955) ILR Nag 538 : AIR 1955 Nag 38.
687. *Aberfoyle Plantations Ltd v Cheng,* (1960) AC 115 : [1959] 3 All ER 915 (PC).
688. *Re Longlands Farm,* [1968] 3 All ER 552.
689. *A K Lakshmipathy v Rai Saheb Pannalal H Lahoti Charitable Trust,* AIR 2010 SC 577 : (2010) 1 SCC 287.
690. *Sultan Kani Rowthan v Mahomed,* 115 IC 251 : AIR 1929 Mad 189.

> Property has not passed under the unregistered deed, and the case being before the enactment of section 53A, the agreement is no defence to the ejectment. *B* is only entitled to a charge for price prepaid.[691]

Section 55(6)(b) applies only where it is possible for the vendor to give delivery, and yet he fails to do so. Where the contract depends for its performance upon the vendor recovering possession from the tenant who is protected under tenancy law and the purchaser is aware of the contingency, the statutory lien under section 55(6)(b) is not created until the vendor secures possession from the tenant, and is himself in a position to give delivery.[692] If, without default of either party, the sale is not completed, the buyer does not lose his charge. An instance of such a case is *Whitbread & Co Ltd v Watt.*[693] In that case, the agreement was to purchase as soon as three hundred houses were built on the estate. The purchaser rescinded after three years, as the houses had not been built. The court held that the charge of the vendee remained operative, although there had been no default on the part of the vendor.

(49) Sub-purchaser

In case the buyer before completion re-sells to a sub-purchaser, the latter has in English law a charge on the buyer's equitable interest.[694] This statement of the law is accepted by Shephard and Brown as being applicable in India. However, the judgment of Lord Cairns in the case cited proceeds on the ground that the buyer who has by virtue of his contract an equitable estate becomes, on part payment, owner of the property to the extent of his payment. This line of reasoning has no application under the TP Act where no right in rem passes under the contract. When the case arises, it will probably be held that the sub-purchase operated as an assignment *pro tanto* of the buyer's charge.

(50) Enforcement

The charge is enforced by suit for sale. It is enforceable against all persons claiming under the seller, irrespective of whether they have notice of the payment.

(51) Non-disclosure Fraudulent

The last paragraph of the section enacts that the omission of disclosure, whether by the seller under section 55(l)(a) or by the buyer under section 55(5)(a), is fraudulent. In the absence of this provision such non-disclosure would be a misrepresentation under section 18(2) of the Indian Contract Act, 1872, and render the contract voidable. It is well settled that where a purchaser discovers defects in the property before conveyance, he can either rescind the contract, or successfully resist a suit for specific performance.[695] However, the effect of this provision is that the party who suffers by the non-disclosure has the right not only to rescind the contract, but to set aside the conveyance. This is necessary as the non-disclosure may only be discovered after the conveyance.

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691. *Lalchand v Lakshman,* (1904) ILR 28 Bom 466.
692. *Ganpati Ram v Baliram Raghunath,* AIR 1974 Bom 155; 76 Bom LR 58.
693. *Whitbread & Co Ltd v Watt,* (1902) 1 Ch 885.
694. *Aberaman Ironworks v Wickens,* (1868) 4 Ch App 101.
695. *Reeve v Berridge,* (1888) 20 QBD 523; *Caballero v Henty,* (1874) 9 Ch D 447; *Eastern Mortgage etc v Muhammad Fuzlul,* (1925) ILR 52 Cal 914 : 90 IC 851 : AIR 1926 Cal 385; *Jhamaklal v Mishrilal,* AIR 1957 Mad Bh 23.

(52) Remedies After Completion

Remedies after completion are much more limited than those before completion because most contractual rights merge in the conveyance. In a judgment of the Madras High Court,[696] Justice Venkatarama Ayyar (as he then was) has reviewed both English,[697] and Indian[698] authorities, and stated the position thus:

> If the contract has been completed by the execution of the sale deed, then the purchaser can claim compensation if he establishes fraud; or if there is a special agreement for making compensation for errors in quantity or if there is a warranty that the extent conveyed by the sale deed is correct. Apart from such cases he has no right to compensation.

Compensation can be claimed in cases of fraud,[699] or if there is an express contract to that effect in the agreement for sale,[700] or if the court finds on a true construction that such a warranty was necessarily implied in the agreement;[701] such a warranty cannot, however, be established by oral evidence;[702] There can, of course, be no fraud if the purchaser had actual or constructive notice of the defect.[703] It is, however, open to a purchaser to renounce his position as such, and to fall back upon his previous relationship with the seller.[704]

Remedies after completion are (1) Rescission; or (2) Rectification.

Rescission

Rescission may be on the ground either (a) of fraud; or (b) common mistake; or (c) incapacity, legal or equitable; or (d) coercion or undue influence.

The first two grounds, fraud and common mistake, follow the common law rule that except on these grounds, an executed conveyance cannot be rescinded after it has been substantially performed.[705] Non-disclosure infringing section 55(l)(a) or section 55(5)(a) is declared to be fraud and would, therefore, give a right to set aside the conveyance, and to a refund of the purchase money. A Bombay case[706] is an instance of a deed set aside for fraud, while *Bingham v Bingham*[707] is an instance of a common mistake where the buyer purchased land which both parties thought belonged to the seller, but which really belonged to the buyer himself. A seller is under a legal incapacity to sell if he is a minor or a lunatic, and a

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696. *Delli Gramani v Ramachandran,* (1952) ILR Mad 682 : (1951) 2 Mad LJ 611 : AIR 1953 Mad 769.
697. *Besley v Besley,* (1878) 9 Ch D 103; *Brett v Clower,* (1850) 5 CPD 376; *Joliffe v Baker,* (1883) 11 QBD 255, p 267; *Alien v Richardson,* (1879) 13 Ch D 524; *Clayton v Leech,* (1889) 41 Ch D 103.
698. *Abdullah Khan v Abdur Rahman Beg,* (1896) ILR 18 All 322; *Permanand Bhojraj v Matumal Phatumal,* 144 IC 371 : AIR 1933 Sau 144.
699. *Brownlie v Campbell,* (1880) 5 App Cas 937; *Eastern Mortgage etc v Muhammad Fazlul* (1925) ILR 52 Cal 914 : 90 IC 851 : AIR 1926 Cal 385; *Udho Das v Mehr Bakhsh,* 144 IC 340 : AIR 1933 Lah 262; *Champalal v Roopa,* AIR 1963 Raj 38.
700. *Re Turner and Skelton,* (1879) 13 Ch D 130; *Palmer v Johnson,* (1884) 13 QBD 351; *Desikhacharyulu v Narasimhacharyulu,* AIR 1958 AP 278.
701. *Suleman Vadu v Trikamji Velji,* (1875) 12 Bom HCR 10; *Janga Venkata Reddy v Jamal Ahmed Saheb,* (1915) 29 Mad LJ 122; *Delli Gramani v Ramachandran,* (1952) ILR Mad 682 : (1951) 2 Mad LJ 611 : AIR 1953 Mad 769.
702. *Kondal Rao Naidu v Dhanakoti,* (1936) 46 LW 797 : AIR 1938 Mad 81; *Delli Gramani v Ramachandran,* (1952) ILR Mad 682.
703. *Ramasubbu v Muthiah,* 85 IC 999 : AIR 1925 Mad 968; *Harilal v Mulchand,* (1928) ILR 52 Bom 883 : 113 IC 27 : AIR 1928 Bom 427.
704. *Bisweswar v Abdul Dewan,* AIR 1947 Cal 328.
705. *Seddon v North Eastern Salt Co,* (1905) 1 Ch 326 : [1904-7] All ER Rep 817.
706. *Sadashiv v Dhakubai,* (1881) ILR 5 Bom 451, p 459; *foll Clark v Malpas,* (1862) 4 De G F & J 401; *Sheo Ram v Thakur Mahton,* 58 IC 529; *Moula Buksh v Dharamchand,* (1960) 65 Cal WN 881.
707. *Bingham v Bingham,* (1748) 1 Ves Sen 126.

suit would lie to set aside the sale. A fiduciary relationship between the parties may also render the contract voidable after completion.[708]

Rectification

When the sale deed either on account of fraud or of common mistake does not truly express the intention of the parties, the court will rectify it in conformity with the contract.[709]

(53) Enforcement of Obligation not Merged in the Conveyance

The buyer may under section 55(l)(f) sue to recover possession;[710] or under section 55(3) for the delivery of title deeds;[711] or under section 55(2) for compensation for breach of the covenant for title;[712] or under section 55(l)(e) for compensation for breach of the duty to take care of the property;[713] or under section 55(l)(g) for an indemnity against encumbrances discharged in case of sale of land free from encumbrances,[714] or under section 55(6)(b) to enforce his charge for the price prepaid.[715] On the other hand, the seller may sue under section 55(4)(b) to enforce his lien for unpaid purchase money;[716] or for an indemnity against encumbrances in case of a sale of land subject to encumbrances.[717] There would also be a right of suit for compensation for breach of express covenants such as for quiet enjoyment;[718] or to give vacant possession;[719] or for compensation for errors of description where the contract provides for such compensation;[720] or for breach of collateral warranty.[721]

(54) Remedies Before Completion

Remedies before completion depend upon the law of contract, and of specific performance. The contract may be rescinded not only for fraud, common mistake[722] or the disability of the party, but also for misrepresentation when there is no intention to deceive or to state a falsehood.[723] The right to repudiate a contract for defect of title must be exercised immediately when the defect is discovered. If after ascertaining the defect, the purchaser treats the contract as subsisting, he does not retain the right to repudiate at any subsequent

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708. Indian Trusts Act, 1882, sections 62 and 88.
709. *Dagdu v Bhana,* (1904) ILR 28 Bom 420; *Natha v Hamid Ali,* 93 IC 7 : AIR 1926 Oudh 344.
710. *Sundara v Sivalingam,* (1924) ILR 47 Mad 150 : 77 IC 542 : AIR 1924 Mad 360; *Krishnamma v Mali,* (1920) ILR 43 Mad 712 : 56 IC 530.
711. *Re Williams and Newcastle's (Duchess)* Contract, (1897) 2 Ch 144; *Bhavani v Devrao,* (1887) ILR 11 Bom 485.
712. *Basaraddi Sheikh v Enajaddi,* (1898) ILR 25 Cal 298; *Harilal v Mulchand,* (1928) ILR 52 Bom 883 : 113 IC 27 : AIR 1928 Bom 427.
713. *Clarke v Ramuz,* (1891) 2 QB 456 (CA).
714. *Nathu Khan v Burtonath,* (1922) 24 Bom LR 571 : 66 IC 107 : AIR 1922 PC 176; *Manishanker v Ramkrishna,* (1904) 6 Bom LR 832.
715. *Ibrahimbhai v Fletcher,* (1897) ILR 21 Bom 827; *Balvanta v Bira,* (1899) ILR 23 Bom 56; *Sultan Kani v Mahomed,* (1929) 56 Mad LJ 99 : 115 IC 251 : AIR 1929 Mad 189.
716. *Webb v Macpherson,* (1904) ILR 31 Cal 57 : 30 IA 238.
717. *Izzat-un-nissa Begam v Kunwar Pertab Singh,* (1909) ILR 31 All 583 : 36 IA 203 : 3 IC 793.
718. *Nottidge v Darring,* (1909) 2 Ch 647; *Raghava v Samachariar,* (1914) Mad WN 57 : 22 IC 42.
719. *Hissett v Reading Roofing Co Ltd,* [1970] 1 All ER 122 : (1969) 1 WLR 1757.
720. *Re Turner and Skelton,* (1879) 13 Ch D 130; *Palmer v Johnson,* (1883) 12 QBD 32; *Desikhacharyulu v Narasimhacharyulu,* AIR 1958 AP 278.
721. *Vishvanath v Bala,* (1916) 18 Bom LR 292 : 34 IC 147.
722. *Meghji v Tyeballi,* (1924) 26 Bom LR 1019 : 90 IC 189 : AIR 1925 Bom 64.
723. Indian Contract Act, 1872, section 18.

moment he chooses, but must give the vendor a reasonable time to remedy the defect.[724] No question of giving time arises, of course, when the vendor has refused to remove the defect.[725] On the breach of any essential terms of the contract, the other party may rescind and sue for damages,[726] and in that case, must restore any benefit that he has received.[727] If the buyer has gone into possession, he is accountable for the rents and profits that he has received. If the seller has received the price, he must return it. If the seller rightfully rescinds, he is entitled to forfeit the deposit or earnest. He is under no obligation to return the deposit because it is not a benefit he has received under the contract, but a collateral security.[728] However, if he recovers damages as well, he must give credit for the deposit against the damages.[729]

If the aggrieved party does not elect to rescind, he may still sue for damages for the breach. The best remedy is, however, a suit for specific performance of the contract. A vendor in such a suit may compel the purchaser to take the property in spite of trivial defects, and to receive compensation for the deficiency.[730] This relief is discretionary and the court has regard not only to the legal rights of the parties, but to the conduct and the circumstances of the case. Specific performance will be refused under section 20 of the Specific Relief Act, 1963, on the ground of unfair advantage or of hardship.

(55) Damages

Damages are claimable under the law as enacted in section 73 of the Indian Contract Act, 1872. This would be the difference in the market value at the time of the contract, and at the time of the breach. The rule is the same as in English law, except where the default of the vendor is due to a defect in his title. In this case, damages are limited to the expenses the buyer has incurred.[731] This exception does not apply where the default of the seller is wilful;[732] and it has no application to a breach of covenant for title in a conveyance.[733] The English law was once assumed to be the law in India,[734] but it is now settled that the law in India is different, and that there is the same measure of damages in the case of goods as in the case of land, and that both are governed by section 73 of the Indian Contract Act, 1872.[735] For a further exposition of the law on this subject, the reader is referred to Pollock and Mulla's

724. *Bai Dosibai v Bai Dhanbai,* (1925) ILR 49 Bom 325 : 85 IC 597 : AIR 1925 Bom 85; *Halkett v Dudley* (Earl), (1907) 1 Ch 590, p 596 : (1904-7) All KR Rep 465; *Elliott v Pierson,* (1948) Ch 452 : [1948] 1 All ER 939.
725. *Manning v Turner,* [1956] 3 All ER 641 : (1957) 1 WLR 91.
726. Indian Contract Act, 1872, sections 39 and 75.
727. Ibid, section 64.
728. *Natesa Aiyar v Appavu,* (1913) ILR 38 Mad 178 : 19 IC 462.
729. *Vellore Taluk Board v Gopalaswami,* (1913) ILR 38 Mad 801 : 26 IC 226; *Natesa Aiyar v Appavu,* (1913) ILR 38 Mad 178; *Ockenden v Henly,* (1858) EB & E 485; *Shuttleworth v Claws,* (1910) 1 Ch 176.
730. *Hussonally v Tribhowandas,* (1921) 25 Cal WN 385 : 61 IC 361 : AIR 1921 PC 40.
731. *Flureau v Thornhill,* (1776) 2 Wm Bl 1078; *Bain v Fothergill,* (1874) LR 7 HL 158.
732. *Engell v Fitch,* (1869) LR 4 QB 659 (Ex Ch); *Jaques v Miller,* (1877) 6 Ch D 153; *Royal Bristol Permanent Building Society v Bomash,* (1887) 35 Ch D 390; *Day v Singleton,* (1899) 2 Ch D 320 (CA).
733. *Loch v Furze,* (1866) LR 1 CP 441.
734. *Pitambar v Cassibai,* (1886) ILR 11 Bom 272.
735. *Nagardas v Ahmedkhan,* (1895) ILR 21 Bom 175, p 185; *Ranchhod v Manmohandas,* (1907) ILR 32 Bom 165; *Nabinchandra v Krishna,* (1911) ILR 38 Cal 458, p 465 : 9 IC 525; *Bupu v Kashiram,* (1929) 31 Bom LR 658 : 119 IC 659 : AIR 1929 Bom 361; *Jai Kishen Das v Arya Priti,* (1920) ILR 1 Lah 380 : 58 IC 757; *Adikesavan v Gurunatha,* (1917) ILR 40 Mad 338 : 39 IC 358; *Parmanand v Ghulam Hussain,* 116 IC 449.

Indian Contract Act.[736] Damages for eviction in breach of an express covenant for quiet enjoyment is the value of the land calculated at the date of the breach,[737] and if the land has increased in value, the purchaser will be entitled to recover the higher value.[738]

(56) In the Absence of a Contract to the Contrary

The implied conditions enumerated in this section are supplemented or varied in actual practice by numerous particular conditions. Such conditions are strictly construed in favour of the party whose rights are restricted. In *Seaton v Mapp*,[739] Vice-Chancellor Knight Bruce stated the principle of construction as follows:

> I think, and have always thought that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself.

This rule applies especially to conditions restricting investigation of title.

It has been observed by the Andhra High Court that a contract to the contrary must be strictly construed because such a contract is in restraint of legal rights.[740] It is submitted that this is not correct, for section 55 merely lays down general rules, and in terms contemplates a departure from those rules in particular cases. Where the contract to the contrary departs from the usual terms and puts either the vendor or the purchaser in an unfairly advantageous position, the court can, of course, construe any ambiguity or vagueness in such a contract against the party in such a position. The general principles contained in section 55 regarding rights and liabilities of the buyer and seller can only apply in the absence of a contract to the contrary, and not in a case where the parties consciously negotiated, but failed in respect of any terms or conditions—as a result of which the agreement itself could not be settled or concluded.[741]

(1) Restricting requisitions

The conditions in contracts for sale frequently impose restrictions on the buyer's right to make requisitions as to title. These generally fall into the following classes:

(a) Requiring requisitions to be made in a specified time.

(b) Restricting the period for which title is to be shown.

(c) Requiring the existence of a fact to be assumed.

(d) Requiring the buyer to accept title as it is.

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736. See Pollack & Mulla, *The Indian Contract and Specific Relief Acts*, Vol II, LexisNexis Butterworths Wadhwa Nagpur, 14th Edn, 2012, pp 1232-1237.
737. *Nagardas v Ahmedkhan*, (1895) ILR 21 Bom 175.
738. *Dhanrajgiri v Tata Sons Ltd*, (1924) ILR 49 Bom 1 : 92 IC 225 : AIR 1924 Bom 473; *Dhadha Suhib v Muhammad Sultan*, (1921) ILR 44 Mad 167 : 59 IC 311 : AIR 1921 Mad 384; *Ramayya v Kotayya*, (1930) Mad WN 135 : 127 IC 617 : AIR 1930 Mad 748.
739. *Seaton v Mapp*, (1846) 2 Coll 556, p 562, cited with approval and followed by CJ Sargent in *Motivahoo v Vinayak*, (1888) ILR 2 Bom 1, p 17 and in *Mahomed Ali v Venkatapathi*, (1920) 39 Mad LJ 449 : 60 IC 235. See also *Wadell v Wolfe*, (1874) LR 9 QB 515.
740. *Subayya v Garikapati*, (1955) ILR AP 170 : AIR 1957 AP 307, per CJ Reddy (as he then was).
741. *Brij Mohan v Sugra Begum*, (1990) 4 SCC 147, p 161.

(a) *Requiring requisitions to be made in a specified time.*—Conditions of sale may stipulate that requisitions shall be made in a specified time of the delivery of the abstract of title or otherwise, the buyer shall be deemed to have accepted title. This is construed as meaning a time from the delivery of a perfect abstract, i.e., an abstract as perfect as the seller can make it,[742] and an abstract which shows all the documents, and gives all the facts upon which the vendor's title is based.[743] If the contract provides that time is to be of the essence of the contract, it operates as a waiver if a requisition is not made in time. However, the condition does not apply if the seller has no title at all,[744] and it cannot be used to thrust upon a purchaser, a property to which there is no title.[745]

(b) *Restricting the period.*—There is no statutory period in India. Apart from the statutory limit, the period for which title has to be shown may be fixed by the contract. The condition may require that a particular deed be taken as the root of title, and in that case requisitions cannot be made with regard to a time before that deed. However, both with reference to the statutory period (in England) and the period (if any) fixed by contract, it is well settled that such limitation does not affect the main rule that the seller should show a good title, but only the subordinate rule that title for the period fixed by contract or by statute shall be prima facie evidence of a good title; in other words, the purchaser may object that the title shown for the period is defective. A condition restricting the period of investigation does not prevent the buyer from making inquiries *aliunde,* and if he discovers a defect, he is entitled to call for evidence to cure the defect;[746] so also, if the seller allows inspection of a prior title deed which enables the buyer to discover the defect.[747]

On the other hand, the seller may by appropriate stipulation exclude even independent investigation of title. The leading case on this point is *Hume v Bentley,*[748] where lease-holds were sold on condition that "the lessor's title will not be shown, and shall not be inquired into." The buyer discovered facts, which he contended showed that the lessor, a canal company, had under its incorporating statute no power to grant the lease, but his objection was disallowed. A similar case is Re *National Provincial Bank of England and Marsh,*[749] where the condition was that the root of title should be a conveyance of 1869, and that "the prior title shall not be required, investigated or objected to." The buyer discovered *aliunde* facts which showed that it was doubtful whether a former grantor had a fee simple or merely a life estate, but he was not allowed to rescind. In such cases, the buyer cannot rescind as there has been no fraud or misrepresentation by the seller, but the seller would probably not be able to enforce specific performance if the title were shown to be bad, as the court would exercise in favour of the buyer the discretion that it has under section 20 of the Specific Relief Act, 1963. Specific performance was enforced in *Hume v Bentley;*[750] as the court refused to decide the question whether the lease was valid, and the buyer apparently got what is called a good holding title, i.e., a title not likely to be challenged; but Re *National Provincial Bank of*

742. *Blackburn v Smith,* (1848) 2 Exch 785.
743. *Nilimani Addy v Dinendranath Das,* (1930) ILR 57 Cal 1115 : 126 IC 775 : AIR 1930 Cal 428; *Hobson v Bell* (1839) 2 Beav 17; *Blacklow v Laws,* (1842) 2 Hare 40; *Pryce–Jones v Williams,* (1902) 2 Ch 517.
744. *Want v Stallibrasse,* (1873) LR 8 Exch 175.
745. *Nilmani Addy v Dinendranath Das,* AIR 1930 Cal 428.
746. *Nottingham Brick & Tile Co v Butler,* (1886) 16 QBD 778; *Sellick v Trevor,* (1843) 11 M & W 722; *Darlington v Hamilton,* (1854) Kay 550; *Mancharji v Narayan,* (1870) 1 Bom HC 77.
747. *Smith v Robinson,* (1879) 13 Ch D 148; and see *Waddell v Wolfe,* (1873) LR 9 QB 515.
748. *Hume v Bentley,* (1852) 5 De G & Sm 520.
749. *National Provincial Bank of England and Marsh,* (1895)1 Ch 190.
750. *Hume v Bentley,* (1852) 5 De G & Sm 520.

England and Marsh[751] J North, said that he was not deciding that the purchaser was bound to accept the vendor's title, if it should turn out to be a bad one.

(c) *Requiring the existence of a fact to be assumed.*—Such a condition will be enforced if the seller himself believes the statement of fact to be correct.[752] However, if the seller knows it to be false, the condition gives the seller an unfair advantage over the buyer, and the contract will not be enforced in a suit for specific performance. Thus, Re *Banister, Broad v Munton,*[753] the condition stated that it was not accurately known how a predecessor in title acquired the property, and required the buyer to assume that he was seized in fee-simple, free from encumbrances. The seller, who was a solicitor, knew accurately how the predecessor had acquired the property, and that she was not seized in fee-simple. MR Jessel said that the utmost that can be asked of a purchaser is that he shall assume something of which the seller knows nothing, and refused specific performance.

(d) *Requiring the buyer to accept title as it is.*—If the seller stipulates that the buyer shall accept the title as it is, the buyer has notice that the title is questionable and if he chooses to buy, he will be held to his bargain.[754] However, this condition does not relieve the seller of the obligation under section 55(l)(a) of disclosure,[755] or of giving as good a title as he can, i.e., by paying off a mortgage.[756] Nor will the condition be enforceable if he has no title at all,[757] and *a fortiori* if he knows that he has no title.[758]

ILLUSTRATION

A, a mortgagee, acting under a power of sale, agreed to sell the property mortgaged and *B* agreed to purchase it. *B* then discovered that *A* had no title because his mortgagor had stolen the title deeds and the real owner was in possession. The sale contained a condition that "the purchaser shall take the premises sold with such title only as the vendor can give him." *A* was nevertheless not entitled to require *B* to complete his purchase; for the condition necessarily implied that *A* had some title, however defective it might be.[759]

When a mortgagee assigned the debt and his interest with a condition that he was not liable for any defect in the claim transferred, and the mortgage proved to be invalid as it was attested by only one witness, the assignment was nevertheless held to be valid because it included a personal claim.[760]

(2) Title to the satisfaction of the buyer's solicitors

The contract sometimes provides that the seller should show a title satisfactory to the buyer's solicitors. The seller must then show either that the solicitor did approve of the title, or that there was such a title tendered as made it unreasonable not to approve of it.[761]

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751. *National Provincial Bank of England and Marsh,* (1895)1 Ch190.
752. *Re Sandbach A Edmonsons Contract,* (1891) 1 Ch 99; *Blaiberg v Reeves,* (1906) 2 Ch 175.
753. *Banister, Broad v Munton,* (1879) 12 Ch D 131.
754. *Freme v Wright,* (1819) ILR 4 Mad 364; *Tweed v Mills,* (1865) LR 1 CP 39; *Motivahoo v Vinayak,* (1888) ILR 12 Bom 1; *Hiranand v Mahia,* (1876) PR 90; *Indra Narain v Badan Chandra Das* 47 IC 340.
755. *Hume v Pocock,* (1866) 1 Ch App 379; and see *Becker v Partridge,* (1966) 2 QB 155 : [1966] 2 All ER 266 (CA).
756. *Goold v Birmingham Banking Co,* (1888) 4 TLR 413.
757. *Motivahoo v Vinayak,* (1888) ILR 12 Bom 1, p 3.
758. Specific Relief Act, 1963, section 17.
759. *Motivahoo v Vinayak,* (1888) ILR 12 Bom 1.
760. *Sada Kavur v Tadepally,* (1907) ILR 30 Mad 284.
761. *Trencher & Co v Mahomedally,* (1911) ILR 35 Bom 110 : 7 IC 669; *Abro v Promotho,* (1914) 18 Cal WN 568 : 24 IC 452.

The reasonable meaning of this condition is not to make the possibly arbitrary opinion of a certain or uncertain solicitor final, but to claim the purchaser's right of investigating title with professional assistance, and of refusing to complete if the title proved to be bad.[762] This is a usual condition in contracts of sale in Bombay.

(3) Deposit

The seller invariably insists on a provision for the payment of a deposit. This is advantageous to him as the deposit is not only part payment, but security for performance, and may be forfeited if the sale goes off owing to the buyer's default.[763] However, the buyer should pay it to the seller's solicitor as stake-holder, for if he pays it to the solicitor as the agent of the seller, and the seller becomes insolvent, he will be unable to recover it from the solicitor.[764] There is sometimes an express provision for forfeiture of deposit on the buyer's default, with liberty to the seller to resell, and recover the deficiency and the costs of re-sale from the original buyer.

(4) *Vendor's* right of rescission

This provision is that, on the buyer making, or the buyer insisting upon any requisition with which the seller is unwilling or unable to comply, the seller may rescind the contract returning the deposit without interest, and without costs of investigating the title. This right must be exercised reasonably and in good faith;[765] the vendor will not be allowed to rescind where he has been guilty of a shortcoming which, though falling short of fraud or dishonesty, might be described as recklessness.[766] Thus, a vendor who had agreed to sell land subject to a mortgage free of encumbrances, was held not entitled to rescind under such a condition as he had made no proper inquiries with the mortgagees as to whether they would concur in the sale.[767] However, though a vendor has to be reasonable, he does not have to be beyond criticism before he can exercise his right of rescission; where a vendor had failed to warn the purchaser of certain evidential gaps in his title, but had made a serious attempt to meet the requisitions, he was held entitled to rescind.[768] The seller cannot, of course, exercise the right if he has been guilty of misrepresentation,[769] or if he has no title;[770] nor does such a clause empower the seller to override reasonable requisitions.[771] A vendor may rescind where the purchaser insists on an objection as to an undisclosed right of way.[772]

(5) Purchaser's right of rescission

It is also a common condition that the buyer may rescind if any notice affecting the property is received from the municipality, or if the property or any part of it is notified for acquisition under the Land Acquisition Act.

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762. *Hussey v Horne-Payne,* (1879) 3 App Cas 311, p 322.
763. *Howe v Smith,* (1884) 27 Ch D 89; *Kunwar Chiranjit v Har Swarup,* (1926) 24 All LJ 248 : 94 IC 782 : AIR 1926 PC 1; *Natesa Aiyar v Appavu,* (1915) ILR 38 Mad 178 : 19 IC 462; *Veerayya v Sivayya,* (1914) 27 Mad LJ 482 : 26 IC 121.
764. *Ellis v Goulton,* (1893) 1 QB 350.
765. *Re Dames and Wood's* Contract, (1885) 29 Ch D 625.
766. *Re Jackson ana Haden's* Contract, (1906) 1 Ch 412 (CA).
767. *Baines v Tweedle,* (1959) Ch 679 : [1959] 2 All ER 724 (CA).
768. *Selkirk v Romar Investments Ltd,* (1963) 1 WLR 1415 : [1963] 1 All ER 353 (IC).
769. *Re Jackson and Haden's* Contract, (1906) 1 Ch 412 (CA).
770. *Re Deighton and Harris's* Contract, (1898) 1 Ch 458.
771. *Lakhmidas & Co v DJ Tata,* (1927) 29 Bom LR 19 : 101 IC 229 : AIR 1927 Bom 195; *Quinion v Home,* (1906) 1 Ch 596.
772. *Ashburner v Sewell,* (1891) 3 Ch 405, p 410.

(6) Identity of the property

It is usually stipulated that no other evidence of the identity of the property should be required than that afforded by a comparison of the description in the contract with that in the documents. However, this condition is not effective if such comparison affords no evidence of identity;[773] or if the description in the document is discrepant.[774]

In the event of ambiguity, a plan attached to the conveyance can be looked as to ascertain the identity of the property even if such a plan is not referred to in the conveyance.[775]

(7) Compensation for errors of description

It is usually provided that errors of description will not annul the sale, and either that compensation should be allowed, or that compensation should not be allowed. If the condition is that compensation should not be allowed it will probably exclude the purchaser's right to enforce specific performance with compensation. However, such a condition will not enable a seller to force upon a buyer a substantially different property.[776]

If the condition allows compensation, English cases[777] apply the rule in *Flight v Booth,*[778] that the condition will cover even a considerable discrepancy if the property is substantially the same. This would probably be followed in India, for the terms of the condition would be regarded rather than the somewhat restrictive provision of section 12(2) of the Specific Relief Act, 1963. Under this condition, compensation may be claimed even after completion.[779] However, a warranty against encumbrances does not entitle the seller to compensation for a discrepancy in the area.[780] Whether the condition includes or excludes compensation, it applies of course only to innocent errors, and not to cases of intentional misrepresentation.[781] If the condition applies to any error, misstatement or omission discovered in the particulars of sale, it refers to matters of title, as well as the subject matter of the contract.[782] If it refers to the description of the property, it does not extend to defects of title.[783]

(8) Time for completion

A time for completion is usually fixed, but where no time is fixed, the Privy Council have adopted the English rule that time is not of the essence of the contract, unless it can be so inferred from the circumstances of the case.[784] If there has been an unreasonable delay, either party can make time of the essence by giving a notice to complete in a reasonable time;[785] but

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773. *Curling v Austin,* (1862) 2 Drew & Sm 129; *Re Bramwell's* Contract, (1969) 1 WLR 1659.
774. *Flower v Hartopp,* (1843) 6 Beav 475.
775. *Leachman v L & K Richardson Ltd,* (1969) 3 All LR 20 : (1969) 1 WLR 1129.
776. *Whittemore v Whittemore,* (1869) LR 8 Eq 603; *Re Terry White's* Contract, (1886) 32 Ch D 14; *Jacob v Revell,* (1900) 2 Ch 858.
777. *Re Fawcett & Holmes'* Contract, (1889) 42 Ch D 150.
778. *Flight v Booth,* (1834) 1 Bing (NC) 370.
779. *Palmer v Johnson,* (1883) 12 QBD 32.
780. *Chacko Joseph v Varghese Markose,* (1957) ILR Ker 475 : AIR 1957 Ker 181.
781. *Clermont (Viscount) v Tasburgh,* (1819) 1 Jac & W 112.
782. *Re Fawcett & Holmes* Contract, (1889) 42 Ch D 150.
783. *Re Beyfus and Masters* Contract, (1888) 39 Ch D 110.
784. *Jamshed v Burjorji,* (1916) ILR 40 Bom 289 : 43 IA 26 : 32 IC 246; *Mahadeo v Narain,* (1920) 24 Cal WN 330 : 57 IC 121; *Suryanarayanamurthi v Satyanarayanamurthi,* (1925) 48 Mad LJ 150 : 85 IC 521 : AIR 1925 Mad 211.
785. *King v Wilson,* (1843) 6 Beav 124; *Compton v Bagley,* (1892) 1 Ch 313; *Stickney v Keeble,* (1915) AC 386 : [1914-5] All ER Rep 73.

the time fixed must be reasonable.[786] What is reasonable time has to be ascertained after considering all the circumstances including the ability of the purchaser to find the money, and not merely conveyancing difficulties; a period of 28 days is not reasonable where the vendor knows of the purchaser's difficulties of finding the money because a proposed sub-sale had fallen through.[787] Where, however, time has been fixed, and made the essence, reasonableness of the notice to complete is immaterial.[788] The stipulation as to time for making requisitions, referred to in condition (1) above, is a useful means of expediting completion.

(9) Interest on unpaid price

It is usual to provide that the buyer shall pay interest from the date fixed for completion on the balance of the price. This may be either absolute, or conditional on non-completion due to wilful default of the purchaser, or any cause other than wilful default of the seller. If it is absolute, ie, where the delay occurs "for any cause whatever," these words will not allow a vendor to take advantage of his own wrong.[789] However, if the seller has not been guilty of misconduct, lapse of time occasioned by a defect in the seller's title not known to him at the time of the contract, and which he has taken steps to remove will not relieve the purchaser of his liability for interest under the condition.[790]

ILLUSTRATION

A contracted to sell half an estate to *B*, the purchase to be completed on 24 June 1854, and if "for any cause whatever" the purchaser should not be completed on that day, *B* was to pay interest. The other part owner claimed the whole estate and refused to part with the deeds. *A* sued for partition and a decree was made in July 1862. *B* had not elected to rescind and in spite of the delay of eight years he was liable to pay interest because there had been no misconduct by *A*.[791]

(10) Wilful default

What is wilful default is a question of fact. Wilful default implies that the default is intentional,[792] ie, the party knows that what he is doing or omitting is something which it was wrong for him to do or omit.[793] Wilful default implies that the party was a free agent, and that what he has done arises from the spontaneous operation of his will; while default means nothing more and nothing less than not doing what is reasonable in the circumstances.[794] If both parties are in the wrong, it is not a case of cause other than wilful default of the seller so as to exempt the purchaser from liability for interest.[795]

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786. *Green v Sevin,* (1879) 13 Ch D 589; *Smith v Hamilton,* (1951) Ch 174 : [1950] 2 All ER 928; *Ajit v Sammy,* (1967) 1 AC 255 (PC).
787. *Re Barr's Contract,* [1956] 2 All ER 853 : (1956) 1 WLR 918. See also Indian Contract Act, 1872, section 55.
788. *Cumberland Court (Brighton) Ltd v Taylor,* (1964) Ch 29 : [1963] 2 All ER 536.
789. *Williams v Glenton,* (1866) LR 1 Ch 200; *Re Woods and Lewis's Contract,* (1898) 2 Ch 211; *Subhadrabai v Mahomedbhai,* (1923) 25 Bom LR 931 : 77 IC 247 : AIR 1924 Bom 187.
790. *Williams v Glenton,* (1866) LR 1 Ch 200; *Subhadrabai v Mahomedbhai,* AIR 1924 Bom 187.
791. *Williams v Glenton,* (1866) LR 1 Ch 200.
792. *Re Young and Harston's Contract,* (1885) 31 Ch D 168.
793. *Re City Equitable Fire Insurance Co,* (1925) Ch 407, pp 435–438 : [1924] All ER Rep 485.
794. *Re Young and Harston's Contract,* (1885) 31 Ch D 168.
795. *Re Mayor of London and Tubb's Contract,* (1894) 2 Ch 524; *Subhadrabai v Mahomedbhai,* AIR 1924 Bom 187.

(11) Cost of conveyance

The conditions of sale generally throw the cost of conveyance as much as possible on the buyer. However, a condition that each party should pay half and half including the stamp and registration charges is not usual in India. The seller is liable for the cost not only of perusing and executing the draft tendered by the buyer, but also of execution by any other necessary party and of getting in an outstanding legal estate and completing the title; but the latter expenses are sometimes thrown on the buyer.[796] In an open contract, the seller must bear the expense of procuring and making an abstract of any deed forming part of the title, although such deed be not in his possession.[797]

(12) Property sold free from encumbrance

The direction given in the sale deed that the amount retained by the vendee was to be paid to a simple money creditor and a covenant on the part of the vendor to pay off an outstanding mortgage and giving liberty to the vendee to pay the same in case the vendor failed to pay, was not a contract to the contrary and the vendee was not precluded from retaining the sum reserved for payment to the simple creditor.[798]

(13) Insurance

The condition as to insurance provides that on payment of a proportionate part of the premium, and subject to the consent of the insurance office, the benefit of the policy shall be assigned to the buyer from the date of completion.

[799][**56. Marshalling by subsequent purchaser.**—If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.]

Synopsis

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(1) Amendment

This section has been substituted by the amending Act of 1929.

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796. In England the expense of getting in an outstanding legal estate must now be borne by the seller. See Law of Property Act, 1925, section 42(3).
797. *Re Johnson and Tustin,* (1885) 30 Ch D 42.
798. *Janki v Ambalavasi,* AIR 1942 Mad 583.
799. Subs. by Act 20 of 1929, sec. 18, for section 56.

The scope of the section has been widened so that it now provides for cases where there are more than two properties. The section uses the word "mortgages" instead of the word "charge". This is because in the amended Act the word charge is used in the sense defined in section 100, and does not include a mortgage. The words "as against the seller" have been dropped to show, that the right can be enforced against the mortgagee. The section may apply to charges.[800] The section confers a statutory right on the vendee of one property sold to him out of several mortgaged along with that property. Such a right cannot be defeated, unless it is proved that the intention was to extinguish the entire mortgage.[801]

Under section 56 of the TP Act, the mortgage debt is a charge on the property and therefore, the charge remains subsisting on the property so long as it has not been duly discharged.[802]

(2) Marshalling by Purchaser

This section deals with the right of a subsequent purchaser to claim marshalling. It should be contrasted with section 81 which refers to marshalling by a subsequent mortgagee. Marshalling is the converse of contribution, for while marshalling requires that a mortgagee who has the means of satisfying his debt out of several properties shall exercise his right so as not to prejudice the purchaser of one of them, contribution requires that if several properties are liable to a mortgage and the mortgagee has been paid out of one, the others shall not escape. Marshalling arises under this section where property has been sold free from encumbrances, while contribution is applicable where the property has been sold subject to the mortgage.[803]

ILLUSTRATIONS

(1) Properties *X*, *Y* and *Z* are subject to a mortgage. The mortgagor sells *X* to *A* free from encumbrances. Marshalling enables *A* to require that the mortgagee shall satisfy his mortgage as far as possible out of properties *Y* and *Z*.

(2) Properties *X*, *Y* and *Z* are subject to a mortgage. The mortgagor sells the equity of redemption of *Z* to *A*, of *Y* to *B*, and of *Z* to *C*. If the mortgagee satisfies his mortgage out of *X*, then *A* may require *B* and *C* to contribute *pro-rata* to the discharge of the mortgage debt.

The rule of marshalling is expressed by Dart as follows:

> If two estates *X* and *Y* are subject to a common charge and estate *X* be sold to *A*, *A* will as against his vendor and his representatives have a prima facie equity in the absence of express agreement and whether or not he had notice of the charge, to throw it primarily on estate *Y* in exoneration of estate *X*.

In *Aldrich v Cooper*,[804] Lord Eldon had stated the equitable principle to be that:

> a person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him, who has two funds, upon that, which can be affected to him only; to the intent that the only fund, to which the other has access, may remain clear to him.

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800. *Mohamed Yunus Khan v Court of Wards, Balrampur Estate*, 167 IC 962 : AIR 1937 Oudh 307. But see *Nilkanthrao Laxmanrao v Satyabhamabai*, AIR 1944 Nag 25.
801. *Tulsi Ram v Mankulal*, AIR 1952 All 153.
802. *VP Mahambre v Maria Alcina De Menezes E Gonsalves*, AIR 1995 SC 973 : 1995 Supp (2) SCC 142 : 1994 Supp (4) SCC 472.
803. *Rama Shankar v Ghulam Husain*, (1921) ILR 43 All 589 : 63 IC 209 : AIR 1921 All 323.
804. *Aldrich v Cooper*, (1803) 8 Ves 382, p 395; *Barnes v Racster*, (1842) 1 Y & C Ch Cas 401; *Flint v Howard*, (1893) 2 Ch 54.

No question of marshalling can arise unless there is a common debtor.[805] In *Muhammad Rafeeq v Bank of Baroda*,[806] *A*, borrowed money from the Bank, *B* by securing some items of the property. *C* was a stranger to this loan transaction between *A* and the bank. He later purchased one item of property from *A* over which security interest was created. It was held that he would not be eligible to have the property spared under section 56 of the Transfer of Property Act as the provisions of SARFAESI Act, would override the provisions of Transfer of Property Act.

(3) Omission of the Words "as Against the Seller"

The rule as stated by Dart and as enacted in this section before the amendment, conferred a right only as against the seller. Accordingly, as the mortgagee had a right to proceed against whatever property he chooses and could not be compelled to split his security, the right could not be enforced against the mortgagee.[807] *Tara Prasanna v Nilmoni*[808] was an exception to this rule, but in that case the mortgagee had foreclosed, and was treated as representing the seller. The section was, therefore, practically a dead letter for the purchaser had a remedy against the seller under section 55(1)(g). The court in execution in the exercise of the discretion under O 34, rule 5 of the Code of Civil Procedure 1908 adjusted the equities by requiring the mortgagee to proceed first against the unsold property.[809] However, under the amended section the purchaser can insist upon this as of right.

(4) Independent of Notice

The right given to the purchaser by this section is independent of notice. Section 81 has been amended to make it clear that the right to have securities marshalled is independent of notice.[810] This is in accord with the principle that it should not depend upon the will of one creditor to disappoint another. In some cases not falling under the TP Act it was suggested that the purchaser is not entitled to call for marshalling, unless he is a bona fide purchaser for value without notice.[811] However, no such distinction has actually been made, for the rule as to notice as it stood in section 81 before its amendment, was held not to apply to mortgages before the TP Act,[812] and this was followed by CJ Farran, in the case of a purchaser.[813]

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805. *Kosuri Kotewara Rao v K V Rao*, AIR 1973 AP 46.
806. *Muhammad Rafeeq v Bank of Baroda*, AIR 2010 Ker 149 : LNIND 2010 KER 139 : 2010 (2) Ker LT 905 : 2010 (1) KLJ 605.
807. *Narayansami v Vellaya*, (1924) ILR 47 Mad 688 : 83 IC 852 : AIR 1924 Mad 366; *Lala Dilawar v Dewan Bolakiram*, (1885) ILR 11 Cal 258; *Bhikari Das v Dalip Singh*, (1895) ILR 17 All 434; *Appayya v Rangayya*, (1908) ILR 31 Mad 419 explaining *Krishna Ayyar v Muthukumaraswamiya*, (1906) ILR 29 Mad 217; *Subraya v Ganpa*, (1911) ILR 35 Bom 395 : 11 IC 989; cf *Manks v Whiteley*, (1911) 2 Ch 448; on app (1912) 1 Ch 735.
808. *Tara Prasanna v Nilmoni*, (1914) ILR 41 Cal 418 : 25 IC 118.
809. *Appayya v Rangayya*, (1908) ILR 31 Mad 419; *Subraya v Ganpa*, (1911) ILR 35 Bom 395; *Rajkeshwar Prasad v Mohammad*, (1924) ILR 3 Pat 522 : 78 IC 796; *Ram Dhun Dhur v Mohesh Chunder*, (1883) ILR 9 Cal 406; *Raghavachariar v Krishna*, (1924) 46 Mad LJ 32 : 83 IC 918 : AIR 1924 Mad 509; *Sambandam v Ramaswami*, AIR 1964 Mad 547.
810. *Sain Dittamal v Bulaqui Mal*, AIR 1947 Lah 230; *Karam Singh v Shukla Bedi*, (1962) ILR AP 477.
811. *Rodh Mal v Ram Harakh*, (1885) ILR 7 All 711 citing *Toolsi Ram v Munno Lall*, (1864) 1 WRCR 353; *Bishonath Mookerjee v Kisto*, (1867) 7 WR 483.
812. *Chunilal v Fulchand*, (1894) ILR 18 Bom 160.
813. *Lakhmidas v Jamnadas*, (1898) ILR 22 Bom 304.

(5) Marshalling between purchaser and purchaser

If the mortgagee in the illustration given by Dart realised his mortgage by sale of *X*, then the buyer *A* will be entitled to a charge on *Y* for the value of *X*. Thus, if *Y* is worth ₹ 2,000, and *X* is worth ₹ 1,000, and the mortgagee realises his security by the sale of *X*, *A* will have a charge on *Y* for ₹ 1,000. In case both properties are sold, the buyer of the first has no charge against the buyer of the second. Dart states that if after *X* is sold to *A*, the owner sells *Y* to *B* who has notice of the prior sale to *X*, and of *A*'s charge, then the charge will be enforceable against *B*.[814] The correctness of this proposition is doubtful, and the courts in India do not apply the rule of marshalling between purchaser and purchaser, and require both purchasers to contribute ratably to the satisfaction of the original charge.[815]

It is obvious that a purchaser of an equity of redemption cannot claim the right to marshal because he has purchased subject to the mortgage. However, supposing of the two properties *X* and *Y* which are subject to a mortgage, *X* is sold to *A* free from the mortgage and then *Y* is sold to *B*, subject to the mortgage, *X* would be entitled to marshal and to require the mortgage to be realised out of *Y*. Such a case occurred in Patna.[816] Of the two mortgaged properties, *X* was sold to *A* free from encumbrances, and then *Y* was sold to *B*, and money to discharge the mortgage was left by the seller with *B*. But *B* failed to pay off the mortgage, and the court held that *B* was not entitled to contribution, but that *A* was entitled to marshal against *B*.

(6) Lessee

A lessee is not entitled to the right of marshalling under this section.[817]

(7) Contract to the Contrary

The charge on the unsold property may be excluded by a contract to the contrary. Thus, if *X* and *Y* are subject to a mortgage and the mortgagor sells *X* to *A* and deposits with *A* a sum of money to discharge the mortgage and agrees that if the sum is not sufficient he will pay the excess with interest, that is a contract to the contrary, which excludes *A*'s charge on *Y* and makes the seller personally liable.[818] A contract to the contrary need not be express. It may be implied.[819] The words "a contract to the contrary" are not restricted to a contract between a mortgagor and a mortgagee only. Such contract may be between the mortgagor and the purchaser.[820]

(8) So as Not to Prejudice

The right of marshalling cannot be exercised so as to prejudice the mortgagee or persons claiming under him or any person having an interest in any of the properties. Whether

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814. *Hamilton v Royse,* (1804) 2 Sch & Lef 315.
815. *Magniram v Mehdi Hossein,* (1904) ILR 31 Cal 95; *Din Dayal v Gur Saran Lal,* (1920) ILR 42 All 336 : 59 IC 67; *Ramlochan v Ram Narain,* (1898) 1 Cal LR 296.
816. *Kampta Singh v Chaturbhuj Singh,* (1929) ILR 8 Pat 585 : 120 IC 17; on app 61 IA 185 : 66 Mad LJ 662 : (1934) All LJ 462 : 36 Bom LR 547 : 38 Cal WN 575 : 59 CLJ 277 : 148 IC 468 : AIR 1934 PC 98 (where this point was not considered).
817. *Low & Co v Hazarimull,* (1926) 30 Cal WN 183 : 94 IC 786 : AIR 1926 Cal 525.
818. *Pirthiraj v Rukmin,* (1926) 24 All LJ 527 : 95 IC 343 : AIR 1926 All 415.
819. *Achanta Venkata v Manna Venkayamma,* AIR 1946 Mad 59.
820. *Mangayya v Achchaymma,* AIR 1954 Mad 224.

prejudice would be caused is a question of fact, and it is for the person who invokes the clause to establish such facts; the question of prejudice is linked with the value of the properties involved.[821] There is a similar proviso to section 81. Marshalling would not be allowed where it would impair the security of a subsequent mortgagee. In this connection, see note "No prejudice to other encumbrancers" under section 81.

(9) Execution Sales

The doctrine of marshalling has been considered with reference to purchasers at execution sales, and it has been said that an execution purchaser cannot claim marshalling.[822] The doctrine has no application at all to execution sales.[823] However, the equitable principle embodied in the section can be evoked in cases of involuntary sales.[824]

Discharge of Encumbrances on Sale

57. Provision by court for encumbrances and sale freed therefrom.— (a) Where immovable property subject to any encumbrance, whether immediately payable or not, is sold by the court or in execution of a decree, or out of Court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the Central Government, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the encumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a large additional amount.

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821. *Brahm Prakash v Manbir Singh,* [1964] 2 SCR 324.
822. *Timmappa v Lakshmamma,* (1882) ILR 5 Mad 385; *Rama Raju v Subbarayudu,* (1882) ILR 5 Mad 387; *Banwari Das v Muhammad,* (1887) ILR 9 All 690.
823. *Rama Shankar v Ghulam Husain,* (1921) ILR 43 All 589 : 63 IC 209 : AIR 1921 All 323; *Naubat Lal v Mahadeo Prasad,* (1929) ILR 51 All 606 : 116 IC 297 : AIR 1929 All 309; *Upendra Nath v Kali Charon,* (1930) 28 All LJ 1472 : 128 IC 439 : AIR 1930 All 634. But see *Wasdev v Dhirumal,* AIR 1940 Lah 291 : 42 Punj LR 321 : 190 IC 525.
824. *Lachminarayan v Janmaijai,* (1953) ILR AP 193.

(b) Thereupon the Court may, if it thinks fit, and after notice to the encumbrance unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the encumbrance, and make any order for conveyance, or vesting order, proper for giving effect of the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High court in the exercise of the ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the State Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

Synopsis

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(2) Procedure 479
(3) One-tenth 480
(4) Direct or allow 480

(1) Freedom from Encumbrances

The object of this section is to facilitate the sale of encumbered estates by taking the encumbrance off the title before sale. This procedure also avoids the necessity of joining the encumbrances as parties to the sale.

The section will not apply when a mortgagee's decree for sale has been adjusted out of court. In Mallikarjuna *Sastri v Narasimha,*[825] a mortgagee obtained a decree in enforcement of his mortgage. The petitioner negotiated for the purchase of the property. The mortgagee agreed to accept a certain sum in discharge of his decree. The petitioner then purchased the property from the mortgagor, and tendered the agreed sum to the mortgagee. The mortgagee refused to accept it. The petitioner then applied for leave to pay the money into court, and to obtain a declaration that the property was freed from the mortgage. The court held that the section had no application to the case as it involved a question of an adjustment of a decree out of court.

(2) Procedure

The court will not act *suo motu*. There must be an application by a party to the sale. The power is discretionary and in cases of hardship, eg when the capitalised value of the

825. Mallikarjuna *Sastri v Narasimha,* (1901) ILR 24 Mad 412.

encumbrance is considerably in excess of the price and the seller prefers to exercise his right of rescission, the court will not make an order for payment into court.[826] Service of notice is not obligatory, and it is believed that an order would be made in a proper case even if the encumbrancer could not be found; but notice should ordinarily be given in order to ascertain the amount due on the encumbrance and for that purpose, the court will construe a will and make a declaration as to future rights.[827] An order under this section is necessary although a fund has been set apart in the administration action.[828]

The English section has been applied to sales by mortgagors.[829] There is a similar provision in O 34, rule 12 of the Code of Civil Procedure 1908 enabling a puisne mortgagee to bring the mortgaged property to sale free from the prior mortgage.[830]

(3) One-tenth

The maximum of one-tenth for future contingencies may be exceeded for special reasons.

(4) Direct or allow

The word "direct" refers to a sale by the court, and the word "allow" refers to a private sale out of court.[831]

826. *Re Great Northern Rly Co and Sanderson,* (1884) 25 Ch D 788. As to the effect of payment into court, see *Re Wilberforce's Trusts,* (1915) 1 Ch 94.
827. *Re Freme's Contract,* (1895) 2 Ch 778.
828. *Re Evan's and Bettell's Contract,* (1910) 2 Ch 438 : [1908-10] All ER Rep 202.
829. *Milford Haven & Co v Mowatt,* (1884) 28 Ch D 40.
830. *Cf Jagernath Singh v Mohra,* (1917) 2 Pat LJ 118 : 39 IC 76.
831. *Re Great Northern Rly Co and Sanderson,* (1884) 25 Ch D 788, p 794.

CHAPTER 4

Of Mortgages of Immovable Property and Charges

Sections 58 – 104, Transfer of Property Act, 1882

58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.—(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage.—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.—Where the mortgagor ostensibly sells the mortgaged property—

on a condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on a condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee, a mortgagee by conditional sale:

[1][Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]

(d) Usufructuary mortgage.—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property [2][or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, [3][or] partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) English mortgage.—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

[4][**(f) Mortgage by deposit of title-deeds.**—Where a person in any of the following towns, namely, the towns of Calcutta, Madras [5][and Bombay] [6][***] and in any other town which the [8][State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.]

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1. Ins. by Act 20 of 1929, sec. 19.
2. Subs. by Act 20 of 1929, sec. 19, for "and to appropriate them".
3. Subs. by Act 20 of 1929, sec. 19, for "and".
4. Added by Act 20 of 1929, sec. 19.
5. Subs. by the A.O. 1948, for "Bombay and Karachi". The word "and" had been ins. bythe A.O. 1937.
6. The words "Rangoon, Moulmein, Bassein and Akyab" omitted by the A.O. 1937.
7. For notifications relating to the towns of—Ahmedabad, see Gazette of India, 1935,Pt. I, p. 936, Bandra, Kurla and Ghathkoper Kirol, see Gazette of India, 1924, Pt.I,p. 1064, Cawnpore, Allahabad and Lucknow, see Gazette of India, 1938, Pt. I, p. 158.Coimbatore, Madura, Cocanada and Cochin, see Gazette of India, 1935, Pt. I, p. 526.
8. The words "Governor General in Council", successively amended by the A.O. 1937 andthe A.O. 1950 to read as above.

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(1) History of Mortgages

In an ancient systems of law, a mortgage was really a pledge—the property being a gage which was forfeited on default of payment. The transaction was effected either by delivery of possession, or by conditional conveyance. In Roman law, the earliest type of security was the *fiducia,* a conditional conveyance under which the property whatever its value, was forfeited in case of non-payment. This was followed by the *pignus* which was a transfer not of ownership, but of possession without liability to forfeiture. Then the last stage was the *hypotheca,* a form of pledge without delivery of possession under which the creditor acquired a power of sale. In Hindu and Mahomedan law, mortgages underwent a similar process of evolution. A mortgage by conditional sale was a very early form of mortgage among Hindus. The usufructuary mortgage with neither power of sale, nor of foreclosure corresponded to the Roman *pignus,* and the simple mortgage was a later development corresponding to the Roman *hypotheca.*[9] Among Mahomedans, the mortgage by conditional sale was a device to evade the Islamic prohibition of interest. This was the *bye-bil-wafa,* literally a sale with a promise, so that the mortgagee enjoyed the rents and profits in lieu of interest and became

9. *Sib Chunder Ghose v Russick Chunder,* (1842) Fult 36.

absolute owner of the property if the debt was not paid. However, the earliest form of Mahomedan security was the *rahn* or pledge with possession corresponding to the Roman *pignus*. This developed by slow degrees into the recognition of a pledge without possession with a power of sale.[10] The development was slower than in Hindu law because interest not being added, the security was always sufficient. In England it seems certain that the original mortgage at common law was rather a pledge than a mortgage.[11]The transfer was not of title, but of possession. When the creditor took the profits in discharge of both principal and interest, the transaction was said to be a *vivum vadium* or living pledge since it worked out its own redemption. When the creditor took the profits merely in satisfaction of interest, it was called a *mortuum vadium* or a dead pledge. This form of mortgage was similar to the usufructuary mortgage of TP Act. At a later time which cannot be exactly ascertained, the English mortgage took the modern form of a conditional conveyance. The condition was originally one of defeasance, that on repayment, the grant determined and the land reverted to the mortgagor who was entitled to re-enter.[12] Subsequently, the condition became one of reconveyance on repayment as defined in clause (e) of this section. After the common law, mortgage became a mortgage by conditional conveyance, and was modified by three principles of equity.

These are—

1. that equity looks to the essence of the transaction, and that a mortgage is in essence a borrowing transaction;
2. that the borrower is in need of protection, and that a condition that penalizes him is void;
3. that a condition of forfeiture in default of payment on the due date is a penalty.

These same equitable principles have been applied to the law of mortgages in India.

CLAUSE (A)

(2) Definition—Clause as the Essentials

Justice Mahmood in *Gopal v Parsotam*[13] says of the definition of mortgage in this section:

> Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in section 58of the Transfer of Property Act (IV of 1882). That definition has not in any way altered the law, but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of textbooks on Indian mortgages. Every word of the definition is borne out by the decisions of Indian Courts of Justice. .

The definition of simple mortgage would appear to be taken from Macpherson's *Law of Mortgages*.[14] It is almost the same as the classic definition given by MR Lindley, in *Santley v Wilde:*[15]

> A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given.

With reference to the definition of mortgage by conditional sale under clause (c), the Privy Council said that it may be assumed that the framers of the TP Act in section 58, clause (c) intended to state the existing law and practice in India.[16]

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10. *Hamilton's Hedaya,* vol 4, p 203.
11. *Glanv Lib,* 10c 6-8.
12. *Co Litt,* 205 (a).
13. *Gopal v Parsotam,* (1883) ILR 5 All 121, p 137.
14. 6th edn, p 10; *Nabin v Raj Coomar,* (1905) 9 Cal WN 1001.
15. *Santley v Wilde,* (1899) 2 Ch 474.
16. *Balkishen v Legge,* (1899) ILR 22 All 149: 27 IA 58, p 66.

The three forms of mortgage in section 58(b), (c) and (d) were well-known in Hindu and Mahomedan law. Simple mortgages were called in Bengal—*Bhandhaki-khat;* in the United Provinces—*Rehan, Arh, Mustagraq*;[17] in Bombay—*Taran Gahan* or *Nazar Gahan*;[18] in Madras—*Dhrista Bhandaka* or *Adaimana pattram*[19] or *Tanaka*[20] or *Panayam.*[21] Mortgages by conditional sale were called in Bengal—*Khatkabala* or *Bye-bil-Wafa*;[22] in the United Provinces—*Bye-bil-Wafa*;[23] in Bombay—*Gahan Lahan*;[24] in Madras—*Muddata Kriyam*[25] *or Peruarthum.*[26] Usufructuary mortgages were called in Bengal—*Khai Khalasi* or *Bhagbandak* or *Bandaknama*;[27] in Madras—*Duggubhogyam* or *Swadhin Adha-manam* or *Kanom*[28] or *Otti.*[29] English mortgages were limited to the Presidency towns, and to Europeans in the *Mofussil.*

The Supreme Court in *Kedar Lal v Hari Lal,*[30] has observed that the whole law of mortgage in India including the law of contribution arising out of a transaction of mortgage, is now statutory and is embodied in the TP Act read with the Code of Civil Procedure. The court cannot travel beyond these statutory provisions.

(3) Mortgage

A mortgage is a transfer of an interest in specific immovable property as security for the repayment of a debt.[31] But such interest itself is immovable property.[32] The nature of the right transferred depends upon the form of the mortgage. In a simple mortgage, what is transferred is a power of sale, which is one of the component rights that make up the aggregate of ownership. In a usufructuary mortgage, what is transferred is a right of possession and enjoyment of the usufruct.[33] In a conditional mortgage and in an English mortgage, the right transferred is, in form, a transfer of a right of ownership subject to a condition. In each case, whatever be the form of the mortgage, there is a transfer of some interest only, and not a transfer of the whole interest of the mortgagor.[34]

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17. *Kishan Lal v Ganga Ram,* (1891) ILR 13 All 28; *Dalip Singh v Bahadur Ram,* (1912) ILR 34 All 446 :15 IC 435.
18. *Motiram v Vitai,* (1889) ILR 13 Bom 90; *Onkar Ramshet v Govardhan,* (1890) ILR 14 Bom 577; *Datto v Vaithu,* (1896) ILR 20 Bom 408.
19. *Rangasami v Muttukumarappa,* (1887) ILR 10 Mad 509.
20. *Dakkata v Sasnapari,* (1914) Mad WN 270 : 22 IC 524.
21. *Ryrappan v Raman,* (1917) 33 Mad LJ 679 : 42 IC 349.
22. Preamble to Reg 1 of 1878.
23. *Ali Ahmad v Rahamatullah,* (1892) ILR 14 All 195.
24. *Shankarbhai v Kassibhai,* (1872) 9 Bom HCR 69; *Krishnaji v Ravji,* (1872) 9 Bom HCR 79.
25. *Lakshmi v Krishna,* (1871) 7 Mad HC 6.
26. *Shekari v Mangalom,* (1876) ILR 1 Mad 57.
27. *Ishan Chunder v Sujan Bibi,* (1871) 7 Beng LR 14.
28. *Keshava v Keshava,* (1878) ILR 2 Mad 45.
29. *Sridevi v Virarayan,* (1899) ILR 22 Mad 350.
30. *Kedar Lal v Hari Lal,* AIR 1952 SC 47, p 50: 1952 SCR 179.
31. *Madan Lal Sobti v Rajasthan State Industrial Development & Investment Corporation,* AIR 2007 (NOC) 638 (Del).
32. *Ali Husain v Nilla Kanden,* (1864) 1 Mad HC 356.
33. *Prahlad v Maganlal,* (1952) ILR Bom 1090: AIR 1952 Bom 454: 54 Bom LR 519; *Indar Sin v Naubat Singh,* (1885) ILR 7 All 553, pp 557-8 (FB). (The view taken in the dissenting judgment of CJ Sir Comer Petheram that the usufructuary mortgagee is a proprietor and followed in *Nemi Chand v Ganesh,* (1910) 7 All LJ 270: 5 IC 503, is erroneous).
34. *Ram Kinkar v Satya Charan,* 66 IC 50: (1939) ILR 1 Cal 283: 41 Bom LR 672 : 43 Cal WN 281: (1939) 1 Mad LJ 544: 179 IC 328: AIR 1939 PC 14; *Jagadamba Loan Co v Raja Shiba Prasad Singh,* 68 IC 67 : 43 Bom LR 789: 45 Cal WN 644: (1941) 2 Mad LJ 53: AIR 1941 PC 36.

The characteristic feature of mortgages is that the right in the property created by the transfer is accessory to the right to recover the debt.[35] The debt subsists in a mortgage, while a transaction by which, a debt is extinguished is not a mortgage, but a sale. This is well illustrated by the case of *Nidha Sah v Murli Dhar,*[36] where the deed was purported to be a deed of mortgage with possession of certain villages for a period of 14 years. The deed provided that at the expiry of the term, the mortgagors were to come into possession of the mortgaged villages without settlement of accounts, and that the mortgagee should then have no power whatsoever in respect of the said estate, but should return the mortgage deed to the mortgagors without their repaying the mortgage money. The mortgagee refused to return such villages as he had, on the ground that he had not received the full number of villages, and had not been able to recoup himself. The Privy Council said that the deed was not a security for the payment of any money and that the transaction was not a mortgage but a grant of land for a fixed term free of rent and that, as the suit was not on contract but on title, the so-called mortgagors were entitled to recover possession. A sale deed passed by a mortgagor in favour of the mortgagee containing a recital that in case the mortgagee is dispossessed on account of some defect in title of the mortgagor, the mortgagee would be entitled to renew his debt, does not amount to a mortgage as no specific immovable property was charged.[37] Where the suit land was mortgaged for a sum advanced to the mortgagors and later while raising the additional debt a co-mortgagee was inducted, it was held that increase in mortgage money, induction of a co-mortgagee and non-defining of their shares did not alter the situation that the original mortgagee continued as before the mortgagee of the suit land.[38] A mortgage and lease are species of the same genus, viz, the transfer of property, but the principal object of mortgage is to provide security for the repayment of loan whereas in lease the owner permits another to use his property on payment of rent. Except in case of usufructuary mortgage and mortgage through conditional sale, possession of the mortgaged property remains with the mortgagor. The right of the mortgagor to redeem his property is also different from the lessee's right to sue for recovery of property and if the transaction is one of lease, it is improper to ask for deficit stamp duty from the transferor treating it as a mortgage deed.[39] In assessing whether the document create a lease or a mortgage , the intention of the parties has to be gathered from the document. Where *A* handed over his shop to *B* under a transaction entered through registered document containing a specific relief that in the event of failure of the mortgagor to redeem the mortgage by paying mortgage money, mortgagee can sue the mortgagor and in such cases he can realise the amount from the suit shop, it was held that the document creates a mortgage and not a lease.[40]

When a mortgagor mortgages the land with possession, he does not cease to be its owner. The equity of redemption still vests in him and on redemption, he gets back possession of the mortgaged land.[41]

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35. *Chetti Gaundan v Sundaram Pillai,* (1864) 2 Mad HCR 51, p 54. And see *Rajkumari Kaushalya Devi v Bawa Pritam Singh,* [1960] 3 SCR 570, p 573: AIR 1960 SC 1030: [1961] 1 SCJ 125.
36. *Nidha Sah v Murli Dhar,* (1903) ILR 25 All 115: 30 IC 54; cf *Abdulbhai v Kashi,* (1887) ILR 11 Bom 462; *Manikchand v Baldeo;* (1951) ILR AP 327.
37. *Ram Khelawan v Ramnandan Prasad,* (1949) ILR AP 505.
38. *Narayan Pillai Raghavan Pillai v Narayani Amma Ponnamma,* AIR 1992 SC 146, p 147: 1992 Supp (3) SCC 29.
39. *Gita Cotton Trading Company v The Chief Controlling Revenue Authority and Commissioner and Inspector General of Regulation of Stamp,* AIR 2013 AP 129 : LNIND 2012 AP 367 : 2012 (5) ALT 206 : 2012 (119) All Ind Cas 797.
40. *P Pushparajan v Parambath Moidu,* AIR 2017 Ker 206.
41. *State of Punjab v Labh Singh,* (1985) 4 SCC 52, p 58.

(4) Construction of Mortgage Deed

No particular form of words is necessary for the creation of a mortgage. It is sufficient that the transfer should be originally intended as security for the debt. The court will ascertain the intention by looking at the substance and essence of the transaction, and not the mere form of the deeds. Even if the deed calls itself a mortgage, its nature will be determined not by the name the parties give it, but by the jural relationship constituted by it. The guidelines for deciding whether a transaction is a lease or mortgage, contemplate that the name given to the document is not conclusive. The question has to be decided with reference to the predominant intention of the parties as gathered from the recitals and the terms of the documents, and the surrounding circumstances including conduct of the parties. In the case of a mortgage, there is a transfer of interest to secure payment of debt and in the case of a lease, there is a transfer of right to enjoy the property.[42] An agreement to sell and resale executed on the same day for grant and payment of loan amount would be a mortgage transaction.[43] Where three documents i.e., sale deed, rent note and agreement to repurchase are executed on the same day the transaction is a mortgage and no relationship of a landlord and tenant is created.[44]

Thus, in a Bombay case,[45] the deed was called *karzrokha* (or debt note), but was held not to be mortgage. On the other hand, in an Allahabad case[46] the deed was construed as a mortgage, although the word mortgage did not occur in it. Similarly, in another Bombay case[47] the creditor was in possession under a previous mortgage and by the new deed was entitled to receive the profits in lieu of interest "so far as they would go" and to hold as a purchaser, and the debtor would not be liable to repay unless he adopted a son. The deed was called a mortgage, but was construed to be a sale liable to be converted into a mortgage, but the name given by the parties is not to be lost sight of especially if the deed is ambiguous.[48] In a Madras case, a debtor who was not able to repay the amount of the debt granted to the creditor, a right to occupy and enjoy certain land for a period of 20 years; it was held that the transaction was not a mortgage, but a lease.[49] In a Delhi case, though a stipulation in the letter confirming equitable mortgage restricted the liability to ₹ 24 lakhs, on a reading of the document as a whole, it was held that the liability of the mortgagor was restricted not only to an amount of ₹ 24 lakhs, but would also cover interest thereon and all other costs, charges and commission.[50]

The terms and conditions contained in the document are necessary to adjudicate upon the nature and the character of the document as to whether it is a mortgage by a conditional sale, or a sale with a condition of re-transfer.[51]

(5) Covenant Not to Alienate

A covenant not to alienate does not amount to a mortgage. If the debtor promises to repay the debt and covenants that until payment he will not alienate any property, the

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42. *Kaveripatnam Subbaraya Setty Annaiah Setty Charities Trust v SK Viswanatha Setty,* (2004) 8 SCC 717 : AIR 2004 SC 3829.
43. *Mishri Lal v Sukhram,* AIR 2011 MP 143.
44. *Gulabchand v Babulal,* 1998 (1) JLJ 1; *Murarilal Jain v Rukhsana,* (2006) 3 MPLJ 562.
45. *Abdulbhai v Kashi,* (1887) ILR 11 Bom 462.
46. *Jawahir Mal v Indomati,* (1914) ILR 36 All 201: 22 IC 973.
47. *Subhabhat v Vasudevbhat,* (1878) ILR 2 Bom 113.
48. *Tukaram v Ramchand,* (1902) ILR 26 Bom 252, p 258; *Kalabhai v Secretary of State,* (1905) ILR 29 Bom 19, p 28.
49. *Kotayya v Annapurnamma,* AIR 1945 Mad 189.
50. *Gun Malla Rajgarahia v Canara Bank,* AIR 1999 Del 243: (1999) 79 DLT 546: 1999 RLR 359.
51. *Natesa Pathar v Pakkirisamy Pathar,* AIR 1997 Mad 105: (1996) 1 CTC 337.

transaction does not amount to a mortgage, for there is no transfer of an interest in the property.[52] In *Mohan Lal v Indomati*,[53] a Full Bench of the Allahabad High Court held that:

> A covenant against alienation may be said to be a covenant divesting the executant of a document of a portion of his interest in the property in question, but it does not vest that interest in anyone else,

and accordingly, a bond in which the obligor covenanted not to transfer certain property and added the words "if I shall do so, then such transfer shall be invalid" was held not to be a mortgage. A covenant not to transfer, however, may be associated with words expressly making the property a security for the debt.[54]

(6) Sale with a Condition of Retransfer

A sale with a condition of retransfer is not a mortgage, for the relationship of debtor and creditor does not subsist, and there is no debt for which the transfer is a security. It is not a partial transfer, but a transfer of all rights in the property reserving only a personal right of repurchase or pre-emption, which is lost if not exercised within the stipulated time. This distinction was made in the case of *Alderson v White*,[55] and it was accepted by the Privy Council in *Bhagwan Sahai v Bhagwan Din*.[56] Their Lordships quoted with approval the following passage from *Alderson v White*:

> The rule of law on this subject is one dictated by common sense that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties do not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase.

In *Vithal Tukaram Kadam v Vamanrao Sawalaram Bhosale*,[57] A borrowed money from *B* and upon failure to repay the money, sold the land for Rs 3500, as against the borrowed money of Rs 700. The agreement of sale continued a clause for re-conveyance. *B* demanded interest for re-conveyance which the court held, reflected the relationship of creditor and debtor. *B*/buyer was aware of the limited nature of the right agreeing to sale with obligation to return land if amount taken by *A* repaid. It was held that the transaction in question was a mortgage by conditional sale and not a sale with an option of repurchase. Where the document was executed by the owner of the property for security as a loan, and he had the right to re-convey the land in his favour at his own cost on return of the loan amount of Rs 1500 within a period of ten years, the mortgagee was entitled to enjoy the property by taking crops on the land for ten years and the deed also stipulated that upon the failure of the mortgagor to repay the loan amount in ten years, the sale would be absolute, the transaction would amount to be a mortgage by conditional sale and not an absolute sale.[58] Where the terms of the deed indicated a right of redemption in the event of return of the amount within five years and it did not disclose any creation of mortgage or debtor -creditor relationship between the parties , it was held that the document executed is a sale deed with option to repurchase and not mortgage by conditional sale.[59]

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52. *Gunoo Singh v Latafut*, (1878) ILR 3 Cal 336; *Najibulla v Nusir*, (1881) ILR 7 Cal 196 (the case also proceeded on the ground that the property was not specifically described); *Bhupal v Jag Ram*, (1879) ILR 2 All 449.
53. *Mohan Lal v Indomati*, (1917) ILR 39 All 244, p 250 : 39 IC 18.
54. *Surju Prasad v Bhowani*, (1899) ILR 2 All 481; *Sheoratan v Mahipal*, (1885) ILR 7 All 258; *Anand Ram v Dhanpat Singh*, (1916) 1 Pat LJ 563 : 38 IC 37 : AIR 1916 Pat 11; *Ponnuranga v Thandavarya*, (1915) Mad WN 21 : 26 IC 274.
55. *Alderson v White*, (1858) 2 De G and J 97; *Hans Raj v Mat Ram*, AIR 1952 Punj 181.
56. *Bhagwan Sahai v Bhagwan Din*, (1890) ILR 12 All 387 : 17 IC 98.
57. *Vithal Tukaram Kadam v Vamanrao Sawalaram Bhosale*, AIR 2017 SC 3853 : 2017 (8) SCALE 627 : 2017 (9) SCJ 139.
58. *Chhabu Punja Gaikwad v Vishnu Nana Chavan*, AIR 2017 Bom 232.
59. *Suraj Narain Kapoor v Pradeep Kumar*, AIR 2017 SC 5046 : 2018 (127) ALR 743 : 2017 (12) SCALE 728.

(7) Extrinsic Evidence

Although the difference in the legal effect of a sale with a condition of repurchase and a mortgage by conditional sale is clear, it is often a matter of extreme difficulty to decide which of these two transactions a particular document, or set of documents discloses.[60] The distinction is purely one of intention—whether it was intended that the relation of debtor and creditor should subsist,[61] and the question is what evidence is relevant to prove that intention.

The Indian Evidence Act,1872 by section 92 excludes evidence of an inconsistent oral agreement, and provides only for cases of fraud invalidating a document. The section does not provide for the case where there is no fraud at the time of execution of the deed, but the grantee subsequently insists that an ostensible sale is a real sale. This principle has been followed by the Supreme Court in *Pandit Chunchun Zha v Sheikh Ebadat Ali,*[62] and in *Bhaskar Waman Joshi v Narayan Rambilas Agarwal.*[63] In the latter case, J Shah as he then was, delivering the judgment of the court, observed:

> If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the document may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible.[64]

(8) Section 92, (Sixth proviso) Indian Evidence Act

The reference to extrinsic evidence showing in what way the language of the document is related to existing facts is the same exception as proviso (6) of section 92. That proviso is in these terms:

"Any fact may be proved which shows in what manner the language of the document is related to existing facts."

The question of admissibility of evidence must, therefore, be decided solely on the terms of section 92. The section, however, does not preclude oral evidence to contradict a recital of fact in a written contract. Thus, it may be shown that no consideration was paid

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60. *Thakar Dass v Tekchand,* AIR 1944 Lah 175.
61. *Lakshmi v Krishna,* (1871) 7 Mad HC 6; *Bapuji v Senavaraji,* (1878) ILR 2 Bom 231; *Bhao v Sidu,* (1883) PJ 258; *Verikappa v Akku,* (1875) 7 Mad HC 219; *Ayyavayyar v Rahimansa,* (1891) ILR 14 Mad 170; *Bhup Kuar v Muhammadi,* (1884) ILR 6 All 37; *Abdulbhai v Kashi,* (1887) ILR 11 Bom 462; *Vasudeo v Bhau* (1896) ILR 21 Bom 528; *Muhammad v Fakir,* (1920) ILR 42 All 437 : 18 All LJ 478 : 58 IC 717; *Ranchod v Bhikabai,* (1897) ILR 21 Bom 704, p 708; *Maruti v Balaji,* (1900) 2 Bom LR 1058, p 1068; *Kasturchand v Jakhia,* (1916) ILR 40 Bom 74 : 31 IC 388; *Mohindra Man v Maharaj Singh,* (1923) ILR 45 All 72 : 70 IC 132 : AIR 1923 All 48; *Mathura Kurmi v Jagdeo Singh,* (1927) ILR 49 All 405 : 104 IC 504 : AIR 1927 All 321 : (1928) ILR 50 All 208 : 107 IC 33 : AIR 1928 All 61; *Mumtaz Begam v Lachmi* 116 IC 807 : AIR 1929 All 174; *Abdul Latif v Abdul Gani,* AIR 1939 Cal 730 : 43 Cal WN 1221 : 185 IC 393; *Bidha Ram v Chhidda,* AIR 1950 All 430; *Mohamed Ibrahim v Sugrabi,* (1955) ILR Nag 942 : AIR 1955 Nag 272; *Raj Mohini Debi v Harihar Mahton,* (1958) ILR AP 67; *Koteswara Rao v Sambiah,* AIR 1966 AP 252.
62. *Pandit Chunchun Zha v Sheikh Ebadat Ali,* [1955] 1 SCR 174 : AIR 1954 SC 345 : [1954] SCJ 469.
63. *Bhaskar Waman Joshi v Narayan Rambilas Agarwal,* [1960] 2 SCR 117 : AIR 1960 SC 301 : [1960] SCJ 327. See also *Tamboli Ramanlal Motilal v Ghanchi Chimanlal Keshavlal,* AIR 1992 SC 1236, p 1239 distinguishing *Pandit Chunchun Jha's case.*
64. [1960] 2 SCR 123; *Dal Bahadur Lama v Ratna Kumari Basnet,* AIR 1986 Sikkim 10, p 12.

though payment may have been recited in the document.[65] Again, the contemporaneous conduct of parties may be proved if it is relevant under proviso (b) to section 92, and even in *Balkishen v Legge,* the fact that the parties ascertained the so-called price by calculating the amount due on a separate account between the parties, and adding it to the balance due on a former mortgage, was held to indicate that the transaction was a mortgage. However, the subsequent conduct of the parties cannot be considered; for evidence of such conduct would only be relevant on the ground that it leads to the inference that there was a contemporaneous oral agreement that the sale deed should operate as a mortgage.[66] In *Maung Kyin v Ma Shwe La,*[67] the Privy Council explained that though as between the parties to an absolute conveyance oral evidence was not admissible to prove that the transaction was a mortgage, yet it was open to a third party to produce evidence to show the real nature of a transaction. The courts were, therefore, practically limited to the document itself, and devised various criteria for determining whether the intention was to mortgage or to sell. A number of these tests, based on a passage in Butler's preface to *Coke on Littleton,* are set out in the under-noted cases.[68] In *Pandit Chunchun Jha v Sheikh Ebada Ali,*[69] the Supreme Court observed that much industry had been expended in some of the High Courts in collecting and analysing decisions on these points, and proceeded:

> We think that this is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances, the imponderable variables which that brings in its train make it impossible to compare one case with another. Each case must be decided on its own facts.

The following tests have, however, been applied:[70]

(1) the existence of a debt;[71]

(2) the period of repayment, a short period being indicative of a sale, and a long period of a mortgage;[72] but the fact that time was made the essence of the contract to repurchase is not decisive;[73]

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65. *Sah Lal Chand v Indarjit,* (1900) ILR 22 All 370 : 27 IA 93.
66. *Achutaramaraju v Subbaraju,* (1902) ILR 25 Mad 7 dissenting from *Khankar v Ali Hafez,* (1901) ILR 28 Cal 256 and *Mahomed Ali v Nazar,* (1901) ILR 28 Cal 289; *Hans Raj v Mat Ram,* AIR 1952 Punj181.
67. *Maung Kyin v Ma Shwe La,* (1918) ILR 45 Cal 320 : 44 IC 236 : 42 IC 642.
68. *Madhu Sudan v Rhidoy Moni,* (1901) 6 Cal WN 192; *Ram Das v Brindaban,* (1931) 29 All LJ 571 :129 IC 791 : AIR 1931 All 113; *Kuppa v Mhasti,* (1931) 33 Bom LR 633 : 134 IC 337 : AIR 1931 Bom 371.
69. *Pandit Chunchun Jha v Sheikh Ebada Ali* [1955] 1 SCR 174 : AIR 1954 SC 345 : [1954] SCJ 469; *Bapuswami v P Gounder,* [1966] 2 SCR 918 : AIR 1966 SC 902; [1967] 1 SCJ 842 : [1966] 1 SCA 431. See also *Tamboli Ramanlal Motilal v Ghanchi Chimanlal Keshavlal,* AIR 1992 SC 1236, p 1239 distinguishing *Pandit Chunchun Jha's* case [1955] 1 SCR 174.
70. *Abdul Rahman v Bisimillah Begum* , AIR 1939 All 539; *Mohammad Ismail v Hakim Sayed* , AIR 1952 Punj 398.
71. *Jhanda Singh v Sheikh Wahiduddin,* (1916) ILR 38 All 570 : 36 IC 38; *Ayyavayyar v Rahimansa,* (1891) ILR 14 Mad 170; *Wajid Ali Khan v Shafakat,* (1911) ILR 33 All 122 : 7 IC 911; *Gurunath v Yamanava* (1911) ILR 35 Bom 258 : 10 IC 814; *Maruthai v Dasappa,* (1916) 31 Mad LJ 375 : 36 IC 393; *Gnanesa v Gnanasikhamani,* (1924) 47 Mad LJ 385 : 84 IC 505 : AIR 1925 Mad 37; *Veeravunni Haji v Koyammu* AIR 1957 Ker 169; but see *Thukkojappa v Sannahuchappa,* AIR 1962 Mys 238.
72. *Venkappa v Akku,* (1875) 7 Mad HC 219; *Ram Saran v Amirta,* (1880) ILR 3 All 369; *Bhajan v Mushtak Ahmed,* (1883) ILR 5 All 324; *Bhup Kaur v Muhammadi,* (1884) ILR 6 All 37; *Situl v Luchmi,* (1883) ILR 10 Cal 30 : 10 IC 129; *Mohindra Man v Maharaj Singh,* (1923) ILR 45 All 72 : 70 IC 132 : AIR 1923 All 48; *Ma Tok v Maung Cheik* 101 IC 204 : AIR 1927 Rang 132; *P Obayya v AC Venkatappa* AIR 1974 AP 232; *Kemeswar Singh v Kaichow Singh* , AIR 1973 Gau 43.
73. *Bhaskar Waman Joshi v Narayan Rambilas Agarwal* [1960] 2 SCR 117 : AIR 1960 SC 301 : [1960] SCJ 327.

(3) the continuance of the grantor in possession indicates a mortgage;[74]

(4) a stipulation for the payment of interest on repayment indicates a mortgage;[75]

(5) a price below the true value indicates a mortgage;[76] a fair market value is strong evidence that the transaction is a sale;[77]

(6) the fact that no application for transfer of name was made till long after the sale, indicates a mortgage;[78]

(7) the right of redemption and foreclosure are co-extensive. The absence of such a right of mortgagee could only mean that it is a conditional sale.[79]

A document described the transaction as one of sale, and further provided that the transferee would become an absolute owner if the amount paid by the transferee was not returned by the transferor within 21 years. It was held that the fact that such a long period was provided for exercising the right of re-purchase showed that the transaction was a mortgage by conditional sale, and not a sale with the condition for repurchase,[80] but even a shorter period would indicate the transaction to be a mortgage. Thus where A borrowed money from B by executing a sale deed that incorporated a condition that property would be reconveyed to A provided he repaid the money within 2 years, the court held the transaction to be a mortgage and not sale despite the fact that A had given possession to B.[81] Mere description of a document would not be sufficient to hold it to be a sale, when in substance it is a document of mortgage by conditional sale.[82]

In a Madras case, in the document, the condition of sale and resale were engrafted in the same document, wherein the purchaser was specifically prohibited from encumbering the property within a period of five years stipulated for repurchase. There were also substantial differences between the actual value of the property and consideration as stipulated in the

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74. *Patel Ranchod v Bhikhabhai*, (1897) ILR 21 Bom 704; *Kasturchand v Jakhia*, (1916) ILR 40 Bom 74 : 31 IC 388; *Kuppa v Mhasti*, (1931) 33 Bom LR 633 : 134 IC 337 : AIR 1931 Bom 371; and see *Ramamurthi v Dinbandhu*, (1967) ILR Cut 32 : AIR 1967 Ori 191; *Bai Kanku v Victorbhai*, (1969) 10 Guj LR 811 : AIR 1969 Guj 239.
75. *Modhu Sudan v Rhidoy Moni*, (1901) 6 Cal WN 192; *Maruti v Balaji*, (1900) 2 Bom LR 1058, p 1068; *Muhammad v Fakir Chand*, (1920) ILR 42 All 437 : 18 All LJ 478 : 58 IC 717; *Lalta Prasad v Jagdish Narain*, (1927) ILR 48 All 787 : 98 IC 961 : AIR 1927 All 137; *Jaggarnath Singh v Butto Krishto Ray* AIR 1947 Pat 345; *Bhaskar Waman Joshi v Narayan Rambilas Agarwal* [1960] 2 SCR 117.
76. *Bapuswami v P Gounder*, [1966] 2 SCR 918; *Maruti v Balaji*, (1900) 2 Bom LR 1058; *Madhavrao v Sahebrao*, (1915) ILR 39 Bom 119 : 26 IC 751; *Narasingerji v Panuganti*, (1924) ILR 47 Mad 729 : 51 IC 305 : 82 IC 993 : AIR 1924 PC 226; *Usman v Abdul Rahaman*, (1925) 42 Cal LJ 74 : 90 IC 100 : AIR 1925 Cal 1151; *Fatima v Abdul Ghaffar*, 78 IC 171 : AIR 1924 All 743 (full price but reconveyance to only one of the vendors — not a mortgage); *Pandit v Sheikh Ebadat Ali*, AIR 1954 SC 345 : [1955] 1 SCR 174; *Mohd Amin v Bajrangi Singh*, AIR 1949 All 335; *Nilamoni v Mrutunjaya Pradhan*, AIR 1951 Ori 335 : AIR 1952 Cut 286; *Pandit Chunchun Jha v Sheikh Ebadat Ali*, [1955] 1 SCR 174 : AIR 1954 SC 345 : [1954] SCJ 469; *Mohammed Amin v Bajrangi Singh*, AIR 1949 All 335; *Nilamoni v Mrutunjaya Pradhan*, (1952) ILR Cut 286 : AIR 1951 Ori 335; *Bhaskar Waman Joshi v Narayan Rambilas Agarwal*, [1960] 2 SCR 117. And see *Kulathu Iyer v Manickvasagam Pillai*, (1956) 1 Mad LJ 385; *Bahadur Ali Khan v Nawaz Khan*, (1956) 1 Mad LJ 388; *Daitari Dalal v Jagannath*, AIR1968 Ori 65; *Prakasam v Rajambal*, (1974) 2 Mad LJ360; *Quda Mir v Mona Bhat*, AIR 1972 J & K 81.
77. *Bhoju Mandal v Debnath Bhagat*, [1963] 2 SCR 82 (Supp) : AIR 1963 SC 1906 : [1963] 2 SCJ 676.
78. *Prakasam v Rajambal*, (1974) 2 Mad LJ 360.
79. *Tamboli Ramanlal Motilal v Ghanchi Chimanlal Keshavlal*, AIR 1992 SC 1236, p 1239 : 1993 Supp (1) SCC 295.
80. *Patel Atmaran Nathudas v Patel Babubhai Kashavlal*, AIR 1975 Guj 120 : 16 Guj LR 509.
81. *Ram Nath v Brij Nath*, AIR 2005 MP 229 : (2005) 3 MPHT 332 : (2006) 1 MPJR 256 : (2005) 4 MPLJ 72.
82. *Balubhai Jethabhai Shah v Chhaganbhai Bamanbhai*, AIR 1991 Guj 85, p 89.

deed. It was held that it was a mortgage by conditional sale, and not a sale with a condition for retransfer.[83]

A deed transferred possession of property worth rupees one lakh in favour of *X* for a consideration of ₹ 45,000. The deed referred to a cash loan of ₹ 45,000 and provided that upon payment of ₹ 45,000 by the executant, *X* would return the property to the executant. The transaction was held to be a mortgage by conditional sale.[84]

If the words of a document are clear, effect must be given to them and any extraneous inquiry into what the parties thought or intended, must be ruled out.[85] In deciding whether the transaction is a mortgage or a sale, the intention as gathered from the document is the determining factor.[86] According to the Orissa High Court, section 92 of the Indian Evidence Act, 1872 does not bar the admission of oral evidence to prove that a document was not intended to operate as a sale deed, but as a mortgage. However, in the particular case, on the facts, the document was held to be a sale.[87] According to the Madras High Court, for ascertaining the intention, it is permissible to refer to surrounding circumstances, for which oral evidence is admissible.[88] Where by a document, the executant conveys certain property absolutely to the purchaser without imposing any obligation on the part of the vendor to recover the property on payment of price, but gives the vendor only an option to do so, the document does not create any relationship of debtor and creditor, and where there is no stipulation of payment of interest or an indication that the property was given by way of security for loan, the transaction is an outright sale, and not a mortgage by conditional sale.[89] In an Assam case, there was no debt in existence at the time of execution of the document. The period of reconveyance stipulated was only one year, and the purchaser had been in possession since the purchase. There was no stipulation for interest. All these circumstances showed that the transaction was an outright sale, with the condition of repurchase within a stipulated period.[90] In an Allahabad case, the landlord executed a sale deed in favour of the tenant, on receiving consideration money in respect of tenanted premises. No agreement to reconvey the property was proved. No mention was made in the sale deed that the relationship of landlord and tenant subsisted, even after the execution of document. It was held that the document was an absolute sale, and not a mortgage. Tenancy over the shop merged with the right of ownership of the tenant, and it could not be revived on the execution of subsequent sale deed by the tenant in favour of the landlord's wife.[91] In a Madhya Pradesh case, it was held that where a condition of repurchase is embodied in the document which effects the sale, the presumption is that it is a mortgage.[92] In a Bombay case, a period of five years was stipulated as the period within which the transferor may re-purchase the land. If the amount was not paid within the stipulated period, the deed was to be treated as a permanent sale deed. No charge was created, nor any interest provided for. The deed was held not to be a mortgage, but a sale with a condition of re-purchase.[93] The Rajsthan High Court in *Askaran v Madan Lal*,[94] relying upon the

83. *Natesha Pathar v Pakkirisamy Pathar*, AIR 1997 Mad 105.
84. *Janki v Ganesh*, *AIR*1984 All 219.
85. *CMadhajiv PMagandas*AIR1973Guj190;*IsmailNathabhaiKhatri vMuljibhaiShankerbhai Bhramabhatt*, AIR1994 Guj 8, p 12.
86. *Kameswar Singh v Khaichow Singh*, AIR1973 Gau 43.
87. *Mahendra Malik v Brundaban Das*, AIR1984 Ori 62, p 64, para 8.
88. *Palani Gounder v Thrumalai Gounder*, (1981) 2 Mad LJ 122.
89. *Shyam Lal v Shyam Narain*, AIR 1973 All 234.
90. *Kameswar Singh v Khaichow Singh*, AIR 1973 Gau 43.
91. *Santosh Kumar v Chameli Devi*, AIR 1983 All 195 : (AIR 1964 All 542 relied on).
92. *Amirchand Meghraj v Devidas Bhogaram*, AIR 1973 MP 15 : (1972) MP LJ 1001.
93. *Nana Tukaram v Sonabai*, AIR 1982 Bom 437.
94. *Askaran v Madan Lal*, AIR 1995 Raj 130.

judgement of *Chunchun Jha v Ebadat Ali*[95] held that if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage irrespective of whether the documents are contemporaneously executed, but the converse does not hold good, that is to say the mere fact that there is only one document, does not necessarily mean that it must be a mortgage, and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for the construction which was meant.

In applying these tests, the courts put the onus on to the party alleging that an ostensible sale deed was a mortgage;[96] but this is now, after 1929, subject to the rule that a transaction embodied in one document is prima facie a mortgage.[97] In case of ambiguity, the courts lean to the construction of a mortgage.[98] The above tests are not exhaustive, but illustrative.[99] The test is whether the agreement to reconvey was part of the consideration of the transfer.[100] In order to constitute a mortgage by conditional sale, there must be an ostensible and not a real sale, and it must comply with the three conditions mentioned in section 58(c).[101]

(9) Breach of Condition

A deed of re-conveyance contained a clause that on failure to perform certain conditions, the re-conveyance shall stand cancelled. The person bound by the condition committed a breach, but sought to invoke section 74, Indian Contract Act, 1872 Act for relief from the consequences of the breach. It was held that section 74 could not be invoked for the purpose.[102]

(10) Ejectment of Mortgagee

In case of a mortgage, the mortgagor has no right in law to eject a mortgagee until the mortgage is redeemed. Even though a mortgage was not by a registered instrument, if the entry of the mortgagee into the property was as a mortgagee, nature of his possession would continue to be as mortgagee, unless there is evidence to show that, at any point of time, he asserted his adverse title, by repudiating his possession as mortgagee[103]

(11) Onus of Proof

Where the question is whether a document which squarely falls within the definition of mortgage by conditional sale, is a sale, within condition of repurchase, the presumption may be that the document is a mortgage by conditional sale, and the onus will be upon the defendant to displace the presumption.[104]

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95. *Bhaskar Waman Joshi v Narayan Rambilas Agarwal,* AIR 1954 SC 345 : [1955] 1 SCR 174.
96. *Ram Din v Rang Lal,* (1895) ILR 17 All 451; *Ayyavayyar v Rahimansa,* (1891) ILR 14 Mad 170, p 172; *Ghulam Nabi v Niazunnissa,* (1911) ILR 33 All 337 : 9 IC 140; *Muthuvelu v Vyithilinga,* (1919) ILR 42 Mad 407 : 50 IC 205; *Ganesa v Gnanasi Khamani,* (1924) 47 Mad LJ 385 : 84 IC 505 : AIR 1925 Mad 37; *Ahmad Husain v Azar Ali,* AIR1944 Oudh 305.
97. *Pandit Chunchun Jha v Sheikh Ebadat Ali,* [1955] 1 SCR 174 : [1954] SCJ 469 : AIR 1954 SC 345.
98. *Singaram v Kalyanam Subdara,* (1914) Mad WN 735 : 26 IC 1.
99. *Krishnamurthy v Venkateshwaran,* AIR 1951 Mad 11; *Assya Umma v K Kunhoyi,* (1960) ILR Ker 857 : AIR 1960 Ker 198; *Pattay Gounder v Bapuswami,* (1961) ILR Mad 387 : (1961) 1 Mad LJ 445 : AIR 1961 Mad 276.
100. *Lalta Prasad v Jagdish Narain,* (1927) ILR 48 All 787 : 98 IC 961 : AIR 1927 All 137; *Ram Das v Brindaban,* (1931) 29 All LJ 571 : 129 IC 719 : AIR 1931 All 113.
101. *Mahabir Singh v Begum Sahu,* AIR 1949 Pat 568.
102. *Meshbahus Sumud v Tamizan,* (1981) All LJ 1357.
103. *Virendra Nath Through Power of Attorney Holder RR Gupta v Mohd Jamil,* (2004) 6 SCC 140 : AIR 2004 SC 3856.
104. *Madhu Lal Singh v Dhonga Mandal,* AIR 1983 Pat 60.

Striking a note of caution, the Supreme Court has observed that having regard to the niceties of distinctions between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. It, however, added that cases could be referred for the purposes of interpreting a particular clause to gather the intention.[105]

(12) Agreement for Mortgage

An agreement to mortgage may, in English law, amount to an equitable mortgage, which can be enforced according to its terms, but no such mortgage is recognised in Indian law.[106] An agreement to mortgage gives rise only to a personal obligation, which does not constitute either a mortgage, or charge.[107] An agreement to mortgage is not capable of specific performance, for the court will not enforce an agreement to make a loan of money, whether on security or not.[108] In *South African Territories Ltd v Wallington,*[109] Lord Macnaghten said that, "specific performance of a contract to lend money cannot be enforced is so well established and obviously so wholesome a rule, that it would be idle to say a word about it." The remedy for the breach of an agreement to mortgage is damages.[110] The measure of damages is the interest for the time the money is likely to lie idle, plus actual expenses incurred.[111] However, when the lender has advanced the money either in whole or in part on an agreement to mortgage, and the borrower is not willing to repay the same at once, the court will specifically enforce the agreement.[112] In the converse case of a mortgagor who has executed a mortgage, but has not been paid the full amount of the consideration, the mortgagor cannot sue for the balance, but he may sue in damages or sue to redeem.[113] In such a case, the mortgage is valid for the amount advanced.[114] On the other hand, if the mortgage is usufructuary, this rule is not applied, and the mortgagor may sue for the unpaid balance of the mortgage money.[115]

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105. *Tamboli Ramanlal Motilal v Ghanchi Chimanlal Keshavlal*, (1993) 1 SCC 295, pp 298-299.
106. *Maneklal v Saraspur Manufacturing Co*, (1927) 29 Bom LR 253 : 101 IC 144 : AIR 1927 Bom 167.
107. *JK (By) P Ltd v New Kaiser-i-Hind Spg & Wvg Co*, [1969] 2 SCR 866 : AIR 1970 SC 1041 : [1970] 1 SCJ 487; *Hukumchand v Radha Kishen*, (1930) 34 Cal WN 506 : 123 IC 157 : AIR 1930 PC 76; *Ram Het v Pokhar*, (1931) ILR 7 Luck 237 : 134 IC 1093 : AIR 1932 Oudh 54.
108. *Sichel v Mosenthal*, (1862) 30 Beav 371; *Rogers v Challis*, (1859) 27 Beav 175; *Western Waggon and Property Co v West*, (1892) 1 Ch 271. See also section 14(l)(a), Specific Relief Act 1963 and *Pollock and* Mulla's Indian Contract Act, 8th edn, p 791.
109. *South African Territories Ltd v Wallington*, [1898] AC 309, p 318 (PC).
110. *Anakaran v Saidamadath*, (1879) ILR 2 Mad 79; *Seth Jaidayal v Ram Sahe*, (1890) ILR 17 Cal 432 (PC); *Datubhai v Abubaker*, (1888) ILR 12 Bom 242; *Sheikh Galim v Sadarjan*, (1916) ILR 43 Cal 59, 29 IC 621.
111. *Datubhai v Abubaker*, (1888) ILR 12 Bom 242.
112. *Meenakshisundara v Rathnasami*, (1918) ILR 41 Mad 959 : 49 IC 291; *Gregson v Udoy Aditya Deb* (1889) ILR 17 Cal 223 : 16 IC 221; *Hukumchand v Pioneer Mills Co*, (1927) ILR 2 Luck 299 : 99 IC 483 : AIR 1927 Oudh 55. But see the criticism of this case in *Hukumchand v Radha Kishen*, (1930) 34 Cal WN 506 : 123 IC 157 : AIR 1930 PC 76.
113. *Anakaran v Saidamadath*, (1879) ILR 2 Mad 79; *Sreenath v Cally Doss*, (1878) ILR 5 Cal 82; *Sheikh Galim v Sadarajan*, (1916) ILR 43 Cal 59 : 29 IC 621; *Yadavendra v Srinivasa*, (1924) ILR 47 Mad 698 : 80 IC 5; AIR 1925 Mad 62; *Phul Chand v Chand Mal*, (1908) ILR 30 All 252; *South African Territories Ltd v Wallington*, (1898) AC 309; *Rajagopala v Sheikh Davood*, (1918) 34 Mad LJ 342 : 45 IC 161.
114. *Munshi Bajrangi Sahai v Udit Narain*, (1905) 10 Cal WN 932; *Rashik Lal v Ram Narain*, (1912) ILR 34 All 273 : 13 IC 573; *Makhan Lal v Hanuman*, (1917) 2 Pat LJ 168 : 38 IC 877; *Motichand v Sagun* (1905) ILR 29 Bom 46; *RajaniKumar v Gaur Kishore*, (1908) ILR 35 Cal 1051; *Zemindar v Subbaraya*, (1918) Mad WN 146 : 43 IC 871; *Rajai Tirumal v Pandla Muthial*, (1912) ILR 35 Mad 114 : 9 IC 289; contra, *Subba Rau v Devi Shetti*, (1895) ILR 18 Mad 126 and *Gokalchand v Rahiman* (1907) PR 59 are bad law.
115. *Sheopati Singh v Jagdeo Singh*, (1931) ILR 52 All 761 : 126 IC 361 : AIR 1931 All 95; *Thakar Singh v Jagat Singh* 140 IC 495 : AIR 1933 Lah 1.

Clause as to the Transfer

(13) Transfer

The transfer must be to a living person or persons (section 5). Thus, a security bond by which a person charges his property to secure performance of the decree, is not a mortgage, for the court to which it is given is not a juridical person.[116] Where the security bond was executed in favour of the Registrar of the court, for the benefit of the decree holders, it was held to be a mortgage.[117]

(14) Formal Expression of Transfer Not Necessary

It is not necessary that the transfer should be formally expressed. If the transfer is not in express terms, it is sufficient if the instrument taken as a whole operates as a transfer.[118]

(15) Transfer of an Interest

These words stand in contrast with the words "transfer of ownership", occurring in section 54 in the definition of sale. In a sale, all the rights of ownership which the transferor has, pass to the transferee. In a mortgage, some rights are transferred to the mortgagee, and some remain vested in the mortgagor. The transfer of the right to receive rents and profits from tenants for a term of years is a transfer of an interest in land, and may constitute a mortgage.[119]The words "transfer of an interest" also distinguished a mortgage from an agreement to mortgage, and from a charge. In an agreement to mortgage no right in rem is transferred at all, but only a personal obligation is created. Similarly, in a charge no right in rem is created, but the right is something more than a personal obligation; for it is a *jus ad rem*, i.e., a right to payment out of the property specified.[120] There is, therefore, very little difference between a charge and a simple mortgage. The practical difference is that a simple mortgage being a right in rem is good against subsequent transferees, while a charge is only good as against a subsequent transferee for value, with notice or a volunteer, with or without notice.[121] An agreement which gives immovable property as security for the satisfaction of a debt,[122] or for payment of a maintenance allowance without transferring any interest in the property, constitutes a charge on the property, and is not a mortgage.[123] As a mortgage is a transfer of a right in rem, a purchaser is not affected by a subsequent mortgage given by his vendor.[124] In a Patna case[125] J Das said:

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116. *Shyam Sunder v Bajpai*, (1903) ILR 30 Cal 1060; *Raghubar Singh v Jai Indra Bahadur Singh*, (1919) ILR 42 All 158 : 46 IC 228 : 55 IC 550 : AIR 1919 PC 55; *Syed Mehdi Ali v Chunni Lal*, (1929) 27 All LJ 902 : 119 IC 81 : AIR 1929 All 834.
117. *Girindra v Bejoy*, (1899) ILR 26 Cal 246; *Tokhan Singh v Girwar*, (1905) ILR 32 Cal 494.
118. *Kola Venkatanarayana v Vuppala*, (1906) ILR 29 Mad 531; *Balasubramania v Sivaguru*, (1911) 21 Mad LJ 562 : 11 IC 629; *Ram Brahman v Venkatanarasu*, (1912) 23 Mad LJ 131 : 16 IC 209; *Venkatarama Iyer v Suppa Nadan*, (1914) Mad WN 501 : 24 IC 24; *Ryrappan v Raman*, (1917) 33 Mad LJ 679 : 42 IC 349; *Har Prasad v Ram Chandar*, (1921) ILR 44 All 37 : 63 IC 750 : AIR 1922 All 174.
119. *Anatha Iyer v Mittadar*, (1914) Mad WN 891 : 26 IC 71.
120. *Gobinda Chandra v Dwarka Nath*, (1908) ILR 35 Cal 837; *Jawahir Mal v Indomati*, (1914) ILR 36 All 201 : 22 IC 973.
121. *Kishan Lal v Ganga Ram*, (1891) ILR 13 All 28, p 44; *Royzuddi v Kali Nath*, (1906) ILR 33 Cal 985, p
993. See also Transfer of Property Act 1882,section 100.
122. *Sher Singh v Daya Ram*, (1932) ILR 13 Lah 660 : 139 IC 49 : AIR 1932 Lah 465.
123. *Matlub Hasan v Kalawati*, 147 IC 302 : AIR 1933 All 934; *Khatun v Tahira Khatun*, 19 IC 661.
124. *Govindrav v Ravji*, (1888) ILR 12 Bom 33.
125. *Raja Sri Shiva Prasad v Deni Madhab*, (1922) ILR 1 Pat 387, p 392 : 70 IC 24.

> Now the broad distinction between a mortgage and a charge is this: that whereas a charge only gives a right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property.

The interest of the mortgagor and of the mortgagee may each be the subject of another mortgage. The mortgagor may make a second or puisne mortgage of his right of redemption,[126] and the mortgagee may make a sub-mortgage in his own interest in the property.[127]

There is no inconsistency between a possessory mortgage and a "lease back". The two transactions can exist simultaneously. A transaction of possessory mortgage cannot be converted into one of simple mortgage merely by reason of the contemporaneous transaction of lease back, because that will be contrary to section 92 of the Indian Evidence Act, 1872.[128]

Successive suits for redemption of mortgage can be filed till right of redemption is not extinguished. Having regard to the provision of section 60 of the TP Act and O 23, rules 1 and 2 of the Code of Civil Procedure, it will have to be held that dismissal of earlier suit for redemption whether as abated or as withdrawn or in default, would not debar the mortgagor from the filing of a subsequent suit for redemption, and that such second suit for redemption to redeem the same mortgage can be brought so long as the mortgage subsists, and the right of redemption is not extinguished by efflux of time or by a decree of court passed in the prescribed form. This is because the right of redemption is an incident of a subsisting mortgage, and is inseparable from it so that the right is co-extensive with the mortgage itself. Further, if the mortgagee fails to establish that the old decree extinguished the right to redeem, there is no ground for saying that the old decree operates as *res judicata*, and the courts are prevented from trying the second suit under section 11 of the Code of Civil Procedure.[129]

The Property

(16) Specific immovable property

In order to create a mortgage it is necessary to specify the immovable property. The description must at least be sufficient to identify the property according to the requirements of sections 21 and 22 of the Registration Act, 1908. In one case,[130] section 29 of the Indian Contract Act, 1872 and section 93 of the Indian Evidence Act, 1872 were referred to, and in another,[131] the maxim *id certum est quod certum reddi potest* was applied. But the word "specific" shows that the description should not only be free from ambiguity and uncertainty, but also that it should be specific, as distinguished from general. It has the same meaning in the phrase "specifically mortgaged" occurring in section 22 of the Dekkan Agriculturists' Relief Act, 1879.[132] In a Madras case,[133] it was said that it was sufficient if the indication of the *hypotheca* is sufficiently precise to enable the land to be determined even after a lapse of time.

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126. *Khub Chand v Kalian Das*, (1876) ILR 1 All 240, p 247; *Kanti Ram v Kutubuddin*, (1895) ILR 22 Cal 33.
127. *Ram Shankar v Ganesh Prasad*, (1907) ILR 29 All 385, p 391 *Muthu Vijia v Venkatachallam*, (1897) ILR 20 Mad 35.
128. *Babulal Somalal v Kantilal Hargovandas*, AIR 1979 Guj 50.
129. *Vora Aminbai Ibrahim v Vora Taherali Mohmedali*, AIR 1998 Guj 31.
130. *Deojit v Pitambar*, (1876) ILR 1 All 275.
131. *Ramsidh v Balgobind*, (1887) ILR 9 All 158.
132. *Balshet v Dhondo*, (1901) ILR 26 Bom 33.
133. *Dakkata v Sasnapari*, (1914) Mad WN 270 : 22 IC 524.

The following description was held to be sufficiently specific:

- "house situated in Ghaziabad owned and possessed by us";[134]
- "our rights and property in the aforesaid taluka, Rajapur";[135]
- "all the properties appertaining to entire bhag";[136]

although the properties were wrongly described in the particulars "our zamindari property".[137] A description by reference to a specific description in another deed is sufficient. So a mortgage of land and village comprised in the *sanad* of a *talukdari* estate was held by the Privy Council to be sufficiently specific.[138] On the other hand, general descriptions such as:

- "my house and landed property";[139]
- "our property with all rights and interests therein";[140]
- "the whole of my property;"[141]

are bad. But the cases are not consistent, for, in an Allahabad case,[142] a mortgage of "all my wealth and property" was held to be valid. This is erroneous, for the mere fact that the debtor binds his general estate, is not sufficient to create a mortgage.[143] In another case,[144] a mortgage of "our one *biswa* five *biswansi* shares" was held valid, and it was said that oral evidence was admissible to show that it meant the share in the mortgagor's village.

(17) Immovable Property Fixtures, etc

It has been held that machinery in a mortgaged building does not form part of the security, unless it is attached to the building for the permanent beneficial enjoyment thereof.[145]

(18) Purpose

The purpose or object of a mortgage is to secure a debt. A transfer made for the purpose of discharging a debt is not a mortgage.[146] Thus, if *A* transfers land to *B* for a term of years in satisfaction of the debt, this is not a mortgage, but a grant of land for a term free from rent.[147] *A* recovers possession of the land at the end of the term on his title, and not by way of redemption. The words of the definition "for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement that may give rise to a pecuniary liability" are a paraphrase of the words in

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134. *Phul Kaur v Murli Dhar*, (1879) ILR 2 All 527.
135. *Bishen Dayal v Udit Narain*, (1886) ILR 8 All 486.
136. *Tribhovandas v Krishnaram*, (1894) ILR 18 Bom 283.
137. *Shadi Lal v Thakur Das*, (1890) ILR 12 All 175.
138. *Land Mortgage Bank v Abdul Kasim*, (1899) ILR 26 Cal 395; *Kaniha Lal v Muhammad*, (1883) ILR 5 All 11.
139. *Darshan Singh v Hanwanta*, (1877) ILR 1 All 274.
140. *Deojit v Pitambar*, (1876) ILR 1 All 275.
141. *Bheri v Maddipatu*, (1881) ILR 3 Mad 35; *Collector of Etawah v Beti Maharani*, (1892) ILR 14 All 162; *Kamayya v Yerakota*, (1913) 24 Mad LJ 479 : 19 IC 221; *Baldeo Rai v Murli Rai*, (1912) 10 All LJ 120 : 16 IC 638.
142. *Ramsidh v Balgobind*, (1887) ILR 9 All 158.
143. *Norton v Florence Land and Public Works Co*, (1877) 7 Ch D 332; *Jagatdhar v Brown*, (1906) ILR 33 Cal 1133.
144. *Ram Lal v Harrison*, (1880) ILR 2 All 832.
145. *Narayana v Balaguruswami*, (1924) 45 Mad LJ 385 : 79 IC 838 : AIR 1924 Mad 187; *Veerappa v Ma Tin* 88 IC 1011 : AIR 1925 Rang 250; *Indian Insurance & Banking Corpn v Paramasiva Mudaliar*, (1957) 2 Mad LJ : AIR 1957 Mad 610.
146. *Nidha Sah v Murli Dhar*, (1903) ILR 25 All 115 : 30 IC 54; *Abdulbhai v Kashi*, (1887) ILR 11 Bom 462.
147. *Kotayya v Annapumamma*, AIR 1945 Mad 189.

section 2 of the English Conveyancing Act, 1881, now re-enacted in section 205 (1)(XVI) of the Law of Property Act, 1925, "for securing money or money's worth."

(19) Money Advanced or to be Advanced

A mortgage may not be for a specific sum, but to secure a current account between the parties upto a limit named (section 79).

Burden of proof is on the party alleging a running security.[148] It is sufficient if the money is left at the mortgagor's disposal in a bank deposit.[149] Where only part of the mortgage money is advanced, the mortgage is good security for the part advanced.[150] In a Madras case, it was said the mortgagor in such a case had an option to cancel,[151] but this is incorrect and ignores what CJ Farran in *Tatia v Babaji*[152] calls 'the radical distinction between a perfected conveyance and a contract.' In *State of Kerala v Cochin Chemical Refineries,*[153] the Supreme Court, approving *Tatia v Babaji,* has held that a transaction of mortgage does not become void or ineffective merely because the mortgagee fails to advance the amount undertaken to be advanced by him.

ILLUSTRATION

A mortgaged property to *B* by a deed executed on 3 May. *B* advanced the money secured by the mortgage a week later on 10 May. Meanwhile on 7 May *A* sold the property to *C, C* contended that as the consideration had not been paid at the time of his sale, he was not bound by the mortgage. Held that the mortgage was effective from the date of execution, and that *C's* purchase was subject to the mortgage.[154]

The Punjab view that the non-payment of full consideration invalidates the mortgage[155] is incorrect, unless it is restricted to cases where the parties agree that the mortgage shall not be operative till the full amount is paid. If the mortgage money is not advanced in full, the remedy is by way of redemption or damages. He cannot file a suit for specific performance of the agreement to lend the whole amount.[156] If there is no consideration at all, the mortgage is a nullity.[157] If the mortgagee has parted with possession, he cannot claim the return of a proportionate extent of the land, and misuse profits of such proportion.[158] The court can go into the question of consideration. In Supreme Court on the facts, the mortgage was held to be fictitious, and to have been executed with ulterior motive.[159]

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148. Re *Boys, Eades v Boys,* (1870) LR 10 Eq 467.
149. *Ram v Shedial,* (1888) ILR 11 All 136 : 16 IC 12.
150. *Rashik Lal v Ram Narain,* (1912) ILR 34 All 273 : 13 IC 572; *Rajai Tirumal v Pandla Muthial,* (1912) ILR 35 Mad 114: 9 IC 289; *Munshi Bajrangi Sahai v Udit Narain,* (1905) 10 Cal WN 932; *Motichand v Sagun,* (1905) ILR 29 Bom 46; *Rajani Kumar v Gaur Kishore,* (1908) ILR 35 Cal 1051; *Makhan Lal v Hanuman,* (1917) 2 Pat LJ 168: 38 IC 877.
151. *Subba Rau v Devu Shetti,,* (1895) ILR 18 Mad 126.
152. *Tatia v Babaji,* (1898) ILR 22 Bom 176, p 183; *Thomcos Bank v Mathew,* (1956) ILR Tr & Co 167 : AIR 1956 Tr & Co 234; *Ahmedabad People's Co-operative Bank v Pradip,* (1959) ILR Bom 1112 :61 Bom LR 612 : AIR 1959 Bom 482.
153. *Kerala v Cochin Chemical Refineries,* [1968] 3 SCR 556 : AIR 1968 SC 1361 : [1969] 1 SCJ 75. See also *Allah Ditta v Nazir Din,* AIR1916 Lahore 155; *Joto alias Ajit Singhv Swaran Singh,* AIR 1994 P & H 15, p 18.
154. *Raghunath v Amir Baksh,* (1922) ILR 1 Pat 281 : 65 IC 329 : AIR 1922 Pat 299.
155. *Gokalchand v Rahiman,* (1907) Punj LR 59.
156. *Phul Chand v Chand Mal,* (1908) ILR 30 All 252; *South African Territories Ltd v Wallington,* (1898) AC 309; *Anakaran v Saidamadath,* (1879) ILR 2 Mad 79; *Rajagopala v Sheikh Davood,* (1918) 34 Mad LJ 342 : 45 IC 161; *Sheikh Galim v Sadarjan Bibi,* (1916) ILR 43 Cal 59 : 29 IC 621; *Yadavendra v Srinivasa,* (1924) ILR 47 Mad 698 : 80 IC 5 : AIR 1925 Mad 62.
157. *Ramasami v Sundara* 23 IC 805; *Kumarappan v Narayana,* 35 IC 455; *Basanti Lal v Phaphi,* AIR 2008 Raj 72.
158. *Sundaram Aiyar v Valia,* AIR 1947 Mad 197.
159. *Prem Chand v Krishan Chand,* (1973) 2 SCC 366.

(20) Future Debt

The future debt referred to in the section may be a contingent liability, a mortgage to secure the payment of the respondent's costs in an appeal,[160] or to further secure a mortgage against the loss of his existing security.[161]

The Engagement and Parties Thereto

(21) Performance of an Engagement

The word "engagement" means a contract and the limitation to such "as may give rise to pecuniary liability" includes cases in which there is a legal obligation to pay damages,[162] or to pay for the value of improvements due to a person who is to continue to be in possession of the land,[163] or forbearance to sue.[164] This limitation does not occur in the definition of mortgage given in the Indian Stamp Act, 1899.

ILLUSTRATION

A borrows paddy from another cultivator, *B*, and mortgages his field to secure repayment of the paddy and the payment of further paddy by way of interest. The engagement to return paddy is one which may give rise to pecuniary liability and the transaction is a mortgage as defined in this section.[165]

(22) Mortgagor

A mortgagor must be a person competent to contract and capable to transfer the property.[166] The word is explained in section 59A to include a person deriving title under a mortgagor—but even before the enactment of the section it was used in this sense. An absolute owner can mortgage, unless he is under some disability, statutory or personal. One of the several co-owners, whether tenants in common or joint tenants, can mortgage their share,[167] but in the case of a joint tenancy, such a mortgage severs the joint tenancy.[168] Where joint owners mortgage property, they are each jointly and severally liable.[169] A minor being unable to contract, cannot transfer by mortgage.[170] As to whether a minor, who has falsely represented himself to be a major, can be estopped from pleading his minority, the cases were conflicting; some holding that the mortgage is validated by estoppel,[171] others that it is not.[172] The point is now settled by the Privy Council decision in *Sadiq Ali Khan v Jai Kishori,*[173] that a deed executed by a minor being a nullity is incapable of founding a plea of estoppel.

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160. *Girindra v Bejoy*, (1898) ILR 26 Cal 246; *Tokhan Singh v Girwar*, (1905) ILR 32 Cal 494.
161. *Nand Lal v Dharamdeo* 78 IC 457.
162. *Niaz Ahmed v Mangulal*, (1908) 5 All LJ 723 (mortgage to secure a covenant of indemnity); *Natesa Aiyar v Sahasranama*, (1927) 53 Mad LJ 550 : 103 IC 814 : AIR 1927 Mad 773 (to secure payment to subscribers to chit fund); *Kotappa v Vallur*, (1902) ILR 25 Mad 50 (agreement to withdraw an appeal)
163. *Roman Pillai v Gowri Pillai*, AIR 1954 Tr & Coch 7.
164. *Madan Lal Sobti v Rajasthan State Industrial Development & Investment Corporation*, AIR 2007 (NOC) 638 (Del).
165. *Ramchand v Iswar Chandra*, (1921) ILR 48 Cal 625 : 61 IC 539 : AIR 1921 Cal 172.
166. *Mathai Mathai v Joseph Mary*, (2015) 5 SCC 622 : AIR 2014 SC 2277 : 2014 (6) SCALE 41.
167. *Debi Singh v Bhim Singh*, AIR 1971 Del 316.
168. Re *Pollard's Estate*, (1863) 3 De GJ & Sm 541 (CA).
169. *Dhanki v Chandubha*, [1968] 3 SCR 759 : AIR 1969 SC 69 : [1969] 1 SCJ 157.
170. *Mohori Bibee v Dhurmodas Ghose*, (1903) ILR 30 Cal 539 : 30 IA 114; *Balwant Singh v Clancy*, (1912) ILR 34 All 296 : 39 IC 109 : 14 IC 629.
171. *Saral Chand v Mohun*, (1898) ILR 25 Cal 37; *Ganesh v Bapu*, (1895) ILR 21 Bom 198.
172. *Brohmo v Dharmo*, (1898) ILR 26 Cal 381, p 388.
173. *Sadiq Ali Khan v Jai Kishori*, (1928) 30 Bom LR 1346 : 109 IC 387 : AIR 1928 PC 152. See also note 'Minor' undersection 7.

When a mortgage is executed by several persons, some of whom are minors and *pardanashin* ladies who had not executed the deed in accordance with law, the execution is not invalid as regards the rest, and the mortgage is valid and binding on them.[174] A mortgage by a judgment debtor of his property while it is under the management of the collector to whom decrees against the judgment debtor have been transferred for execution is, under para 11 of the third schedule to the Code of Civil Procedure, absolutely void and not merely void as against the collector and those claiming under him,[175] but the personal liability of the mortgagor is not affected.[176] Even if the claim on the personal covenant is abandoned, the mortgagee is entitled to restitution under section 65 of the Indian Contract Act, 1872.[177] Guardians of minors and managers of estates of disqualified persons can mortgage subject to restrictions imposed by personal or statutory law. Thus, the guardian of a minor's property under the Guardians and Wards Act may mortgage with the sanction of the court;[178] though a mortgage without such sanction is voidable, and not void.[179] A Hindu widow under Mitakshara Law cannot mortgage her husband's property so as to bind the reversionary heir except for legal necessity. An executor or administrator can make a valid mortgage, and the mortgagee is not bound to see to the application of the mortgage money.[180]

In a Privy Council case,[181] one of the questions at issue was whether the mortgagees who took a mortgage from the executors had constructive notice of any defect in the proposed exercise of their powers by the executors under the will. It was held that a lender dealing with an executor has no duty to inquire into facts outside the will as those facts existed immediately prior to the testator's death. It was pointed out that much of the usefulness of the statutory power conferred by section 307 of the Indian Succession Act, 1925 on executors in India would be nullified if such a duty of inquiry were to be imposed on a party dealing with executors. Assuming that the executors were not entitled to use the immovable properties for the purposes of the business, the question was:

> did the mortgagees know, or were they so put on their enquiry that constructive knowledge must be imparted to them, that the executors were not so entitled?

The question was answered in the negative. There was no evidence that the mortgagees knew anything outside the terms of the will and the recital in the mortgage, and the Privy Council was unable to hold that the mortgagees had any such notice. Further, the mortgagees had no duty, on the facts, to make such inquiry. Accordingly, they got a good title from the executors.

Under section 19(2)(g) of the Indian Partnership Act, 1932, in the absence of a usage or a custom or trade to the contrary, the implied authority of a partner does not empower him to transfer immovable property belonging to the firm. However, a mortgage by a partner in a commercial firm of immovable property to secure a partnership debt has been recognized by the Judicial Committee.[182] The manager of a joint Hindu family firm can bind the coparceners by a mortgage of family property for the purposes of carrying on the

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174. *Keka v Sirajuddin*, (1951) All LJ 436 : AIR 1951 All 618.
175. *Gourishankar v Chinumaya* 45 IC 219 :, (1918) ILR 46 Cal 183.
176. *Raja Mohan Manucha v Nisar Ahmed*, (1937) ILR 12 Luck 435 : AIR 1937 Oudh 87 : 164 IC 945, on app to PC *Nisar Ahmad Khan v Raja Mohan Manucha*, 67 IC 431 : 191 IC 94 : AIR 1940 PC 204.
177. *Raja Mohan Manucha v Manzoor Ahmad Khan*, 70 IC 1 : 206 IC 457 : AIR 1943 PC 29.
178. *Dattaram v Gangaram*, (1898) ILR 23 Bom 287; *Sinaya v Munisami*, (1899) ILR 22 Mad 289.
179. *Sadashiv v Trimbak*, (1898) ILR 23 Bom 146.
180. *Seale v Brown*, (1878) ILR 1 All 710; Indian Succession Act 1925,section 307.
181. *Sunil Kumar Kerr v Sisir Kumar Kerr*, 67 IA 102 : (1940) All LJ 66 : 42 Bom LR 394 : 44 Cal WN 289 : (1940) 1 Mad LJ 795 : 185 IC 575 : AIR 1940 PC 30.
182. *Jugjeewandas v Ramdas*, (1841) 2 MIC 487.

family business.[183] The requirements insisted upon by courts in upholding mortgages by *pardanishin* ladies has been dealt with in several cases.[184]

(23) Who may be a Mortgagee

The word "mortgagee" is explained in section 59A to include a person deriving title under a mortgagee; and was so used even before the insertion of this section. Any person capable of holding property may be a mortgagee. The disability of a minor to contract does not disqualify him from being a transferee.[185] A minor may, therefore, be a mortgagee.[186] Although a corporation may act ultra vires in accepting a mortgage, the corporation may be entitled to recover the money lent, though the charter of the corporation may be liable to forfeiture.[187] If no person is named as mortgagee, the instrument cannot be a mortgage. A security bond given to the court cannot be enforced as a mortgage, for the court is not a juridical person.[188]

Mortgage Money

The expression is defined in section 58(A) as the principal money and the interest, the payment of which is secured for the time being. There were conflicting decisions as to whether the interest referred to in this section included interest after due date awarded by way of damages, or under the Interest Act. Some courts held that it did,[189] while others held that it did not, and that interest awarded by way of damages was not recoverable out of the mortgaged property, but was to be treated as a decree for damages.[190] The amended O 34, rule 11 of the Code of Civil Procedure now makes it clear that such interest is included in "mortgage money." But there may be circumstances justifying the court in refusing interest after the date fixed in the decree, as when the mortgagee filed an appeal which was pending for two years.[191] The general rule is that in the absence of a contract to the contrary, the mortgagee is entitled to treat the interest due under the mortgage as a charge on the estate.[192] The mere fact that there is an express reference to interest in the personal covenant, but no

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183. *Bemola v Mohun*, (1880) ILR 5 Cal 792.
184. *Bank of Khulna v Jyoti Prakash Mitra*, 67 IC 377; *Hemchandra Roy Choudhary v Suradhani Debya*, 67 IC 309 : (1940) ILR 2 Cal 436 : 189 IC 599 : AIR 1940 PC 134.
185. See note 'Disqualified to be a transferee' under section 65(h).
186. *Raghava v Srinivasa*, (1917) ILR 40 Mad 308 : 26 IC 921; overruling *Navakotti v Logalinga*, (1910) ILR 33 Mad 312 : 4 IC 383; *Madhab Koeri v Baikuntha*, (1919) 4 Pat LJ 682 : 52 IC 338; *Thakar Das v Putli* (1924) ILR 5 Lah 317 : 82 IC 96 : AIR 1924 Lah 611; *Zafar Ahsan v Zubaida Khatun*, (1929) 27 All LJ 1114 : 121 IC 398 : AIR 1929 All 604.
187. *Hardy v Metropolitan Land Co*, (1872) 7 Ch App 427; Re *Coltman, Coltman v Coltman*, (1881) 19 Ch D 64.
188. *Raghubar Singh v Jai Indra Bahadur Singh*, (1919) ILR 42 All 158 : 46 IC 228 : 55 IC 550 : AIR 1919 PC 55; *Syed Mehdi Ali v Chunni Lal*, (1929) 27 All LJ 902 : 119 IC 81 : AIR 1929 All 834.
189. *Bikramijit Tewari v Durga Dayal*, (1894) ILR 21 Cal 274; *Moti Singh v Ramohari Singh*, (1897) ILR 24 Cal 699; *Rama Reddi v Appaji Reddi*, (1895) ILR 18 Mad 248; *Pawan Kumar v Dulari Kuar*, (1920) 1 Pat LJ 544 : 58 IC 216; *Motan Mal v Muhammad*, (1922) ILR 3 Lah 200 : 66 IC 771 : AIR 1922 Lah 254.
190. *Narindra Bahadur v Khadim Husain*, (1895) ILR 17 All 581; *Rikhi Ram v Sheo Parshan*, (1896) ILR 18 All 316.
191. *Registered Jessore Loan Co v Shailajanath*, (1932) ILR 59 Cal 722 : 139 IC 455 : AIR 1932 Cal 689.
192. *Ganga Ram v Natha Singh*, 51 IC 377 : 80 IC 820 : AIR 1924 PC 183; *Ram Ratan v Babu Aditya*, (1928) ILR 3 Luck 459 : 112 IC 481 : AIR 1927 Oudh 273; on app *Aditya Prasad v Ram Ratan Lal*, 57 IC 173 : 123 IC 191 : AIR 1930 PC 176; *Badhawa Ram v Akbar Ali*, (1927) 9 Lah LJ 428 : 103 IC 752 : AIR 1927 Lah 817; *Manghi v Dial Chand*, (1926) ILR 7 Lah 559 : 96 IC 477 : AIR 1926 Lah 624; *Abbas Khan v Ram Dos*, (1928) ILR 9 Lah 140 : 112 IC 153 : AIR 1928 Lah 342; *Revanna v Sanna Setty*, (1957) ILR Mys 125 : AIR 1958 Mys 32; *Chaganlal Sowgar v Anantaraman*, (1961) 2 Mad LJ 109 : AIR 1961 Mad 415; *Vaman Prabhu Mahambre v Maria Alcina De Menczes E Gonsalves*, AIR 1995 SC 973.

express reference to interest in the hypothecation clause, it was held not to imply a contract to the contrary.[193] Instances of contracts to the contrary excluding interest from the charge will be found in the undernoted cases.[194]

Sub-mortgage

(24) Sub-mortgages

As already explained,[195] the interest of the mortgagor and of the mortgagee may each be the subject of assignment either absolutely, or by way of security. The mortgagor may assign his equity absolutely to a purchaser, or he may make a second or puisne mortgage of his equity of redemption. The mortgagee may also assign his interest absolutely to a purchaser, or may make a sub-mortgage of his mortgagee's interest. The rights and liabilities of puisne mortgagees are dealt with in sections 91 to 94. The TP Act does not, however, deal with sub-mortgages. A sub-mortgagee does not stand in a higher position than the mortgagee. He is bound by the state of accounts between the mortgagor and mortgagee.[196] An assignment of the mortgagee's interest either absolutely, or by way of sub-mortgage is a transfer of immovable property, and requires registration.[197]

A sub-mortgage, being a mortgage, requires attestation.[198]

Under section 3, a mortgage debt is not an actionable claim, and the transfer is not subject to sections 130, 131, or 132 of TP Act.

In England, although a mortgage debt is a chose in action, yet the assignee of a mortgage debt is in a stronger position than the assignee of an unsecured debt. The law on this point by LJ Sterling in this judgment in *Taylor v London and County Banking Co*[199] is:

> Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land" and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personality.

It is stated by Sir Wiliam Grant in *Jones v Gibbons:*[200]

> a mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment"—that is of the mortgage—"is absolute and complete the moment it is made according to the forms of law. Undoubtedly, it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it, but, by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt.

In a Bombay case,[201] the sub-mortgage was in 1896, and the mortgagor without notice of the sub-mortgage made a final payment to the mortgagee, which discharged the mortgage

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193. *Rang Raj Singh v Sheonarain,* 110 IC 594 : AIR 1928 Pat 398.
194. *Manikchand v Rangappa,* (1920) ILR 45 Bom 523 : 59 IC 765; *Nammalwar Chetty v Krishnasamy,* 72 IC 987 : AIR 1923 Mad 71; *Alia Khan v Kanshi Ram,* (1913) PR 45 : 17 IC 677.
195. See note above 'Transfer of an interest'.
196. *Bhagwati Prasad v Dullah Singh,* AIR 1939 All 719.
197. *Perumal v Perumal,* (1921) ILR 44 Mad 196 : 61 IC 461 : AIR 1921 Mad 137; *Official Receiver v Lakshman,* (1921) 41 Mad LJ 453 : 68 IC 752 : AIR 1921 Mad 681; *Bank of Upper India v Fanny Skinner,* (1929) ILR 51 All 494 : 119 IC 241 : AIR 1929 All 161; on app *Fanny Skinner v Bank of Upper India,* 62 IA 115 : 155 IC 743 : AIR 1935 PC 108. Also see note 'Debts' undersection 8.
198. *William Arratoon Lucas v Bank of Bengal,* (1926) 31 Cal WN 179 : 98 IC 925 : AIR 1926 PC 129.
199. *Taylor v London and County Banking Co,* (1901) 2 Ch 231, p 254.
200. *Jones v Gibbons,* (1804) 9 Ves 407, p 410.
201. *Sahadev Ravji v Shekh Papa,* (1905) ILR 29 Bom 199; cf *Norrish v Marshall,* (1821) ILR 5 Mad 475; Re *Lord Southampton's Estate,* (1880) 16 Ch D 178.

in 1900. The payment was held to be valid as against the sub-mortgagee, and the fact that the sub-mortgage was registered did not imply notice. Where a mortgagee sub-mortgages his mortgage to another person without the knowledge of the original mortgagor, and the original mortgagor pays off the amount to the mortgagee, the sub-mortgagee's rights against the land are extinguished. The sub-mortgage is only good to the extent of the amount due on the mortgage, and the payment of the mortgage debt extinguishes the sub-mortgagee's security.[202] However, if the original mortgagor has notice of the sub-mortgage, he cannot dispossess the sub-mortgagee without redeeming him.[203] Similarly, as section 132 does not apply, the assignee of the mortgage debt is not under that section subject to all the equities to which the assignor (the mortgagee) was subject. In a Madras case,[204] the court refused to allow as against the assignee of the mortgage a right of equitable set off which would have been available against the mortgagee.

Assignee Subject to Mortgagee's Liabilities

Although the assignee is not subject to the equities available against the assignor, he still takes subject to the liabilities of the mortgagee and obviously, the transfer by the mortgagee must be subject to the rights of the mortgagor.[205] Justice Cozens Hardy in the case cited below[206] said:

> It is well settled that where mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and the mortgagee at the date of the transfer: *Mathews v Wallwyn*[207]

This rule was applied in a case where the mortgagee retained the mortgage money, and undertook to apply it to the payment of debts of the mortgagor. The mortgagee only utilized part of the money for that purpose, and assigned the mortgage to a third person. The mortgagor was obliged to pay the rest of the debts himself, and then sued the mortgagee in damages for the deficit. The suit was decreed against the mortgagee, and as against the transferee who was a party to the proceedings, the court made a declaration that if the mortgagee does not pay the sum which may be due to the mortgagor on account of the money which the mortgagee failed to pay, the mortgage in the hands of the transferee will be good only for the amount paid for the mortgage with interest.[208] As the transfer is subject to the rights of the mortgagor, it follows that if the mortgage is void, the sub-mortgage is also void. Thus, in an English mortgage when a mortgage was void on account of champerty, the sub-mortgage was also void.[209] However, when a minor obtained a decree setting aside a mortgage by his guardian and did not make the sub-mortgagee a party, it was held that the sub-mortgagee's rights were not affected.[210] As regards the debt, the mortgagee has been said to be very much in the situation of a surety for the sub-mortgagee, because even if he is unable to recover his debt from the mortgagor, he is liable for what may not be recovered, to the sub-mortgagee, and the sub-mortgagee cannot restrain the mortgagee from recovering the

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202. *Maung Shan v U Po*, (1927) ILR 5 Rang 749 : 105 IC 474; *Nga Kye v Nga Po Min*, (1906) UBR 1 (sub-mortgage); *Vishwanatha v Chimmukutti*, (1932) ILR 55 Mad 320 : 62 Mad LJ 272 : 135 IC 535 : AIR 1932 Mad 115; But see *Papala Chakrapani v Latchmi*, (1918) 35 Mad LJ 309 : 45 IC 769.
203. *Ma Myat Gyi v Ma Ma Nyun*, (1924) ILR 2 Rang 561 : 84 IC 984 : AIR 1925 Rang 140; *Narayana v Raghavammal*, (1908) 18 Mad LJ 462; *Nga Kye v Nga Po Min*, (1906) UBR 1 (sub-mortgage).
204. *Subramania Ayyar v Subramania Pattar*, (1917) ILR 40 Mad 683 : 34 IC 859.
205. *Chinnayya Rawutan v Chidambaram Chetti*, (1880) ILR 2 Mad 212. See note "Mortgage Debt" under section 132.
206. *Dixon v Winch*, (1900) 1 Ch 736.
207. *Mathews v Wallwyn*, (1798) 4 Ves 118.
208. *Chinnayya Rawutan v Chidambaram Chetti*, (1880) ILR 2 Mad 212.
209. *Cockell v Taylor*, (1851) 15 Beav 103.
210. *Govindan v Nagayan*, (1932) Mad WN 160 : 138 IC 329 : AIR 1932 Mad 238.

mortgage debt, and at the same time hold him liable for the sub-mortgage debt.[211] The mortgagee may affect an equitable sub-mortgage by deposit of the mortgage deed.[212]

The rights of redemption and sale in the case of successive mortgages are dealt with in section 94, but the case of a sub-mortgage has been omitted.

ILLUSTRATIONS

If *A* mortgages to *B*, and *B* sub-mortgages to *C*, then, as between *B* and *C*, the rights of redemption and of sale or foreclosure are the same as in a mortgage, *B* may redeem *C* and *C* may foreclose or bring to sale *B* without making *A* a party.[213] The subject-matter of this mortgage are the rights of *B* as existing at the time of the sub-mortgage.

If *A* sues to redeem *B*, he must make *C* a party, for *C* is interested in the mortgage security as an assignee of *B*.[214]

If *B* sues to foreclose or brings to sale *A* then he, *B* must make *C* a party for the same reason. Again *C* may foreclose or bring to sale *A*, and if he does, he must make *B* a party, for *B* is interested in the equity of redemption as assignee of *A*. The authority for this in England is *Hobart v Abbot*[215] and the form of decree is given in section 12, Chapter 47 of *Seton on Decrees*. The Indian Form is No 11 of Appendix *D* of the Code of Civil Procedure 1908.

Narayan Vithal v Ganoji[216] is an instance of a suit for redemption of land which has been sub-mortgaged by the mortgagee. Chief Justice Sir Charles Sargent said:

> In the case of a derivative mortgage or sub-mortgage, the judgment directs an account of what is due to the original mortgagee or his assignee, and then of what is due to the derivative or sub-mortgagee; and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of the residue if any, of what is due to the original mortgagee, both of them shall reconvey to the mortgagor.

In a later Bombay case,[217] a suit for redemption of a mortgage which had been sub-mortgaged was rightly dismissed, because the deceased mortgagee's legal representatives had not been made parties. The judgment, however, says that there is no privity between the mortgagor and the sub-mortgagee. This is not correct, for there is privity of estate as they have rights in the same property.[218] The Rangoon High Court has, however, held that the rights given to a sub-mortgagee is in default of payment to sell the interest mortgaged to him and to sell it through the medium of a court. He has no privity of contract or privity of estate with the original mortgagor.[219]

Muthu Vijia Raghunatha v Venkatachallam,[220] is an instance of a sub-mortgagee bringing to sale the interest of the mortgagor. This right was admitted by the Allahabad High Court

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211. *Gurney v Seppings*, (1846) 2 Phil 40; *Mohidin Pichai v Meera Rowther*, AIR 1937 Mad 799.
212. *Gokul Dass v Eastern Mortgage & Agency Company*, (1906) ILR 33 Cal 410; *Maung Thanag v MM Chettyar Firm* 164 IC 724 : AIR 1936 Rang 366.
213. *Someshwar v Naranbhai*, (1911) 13 Bom LR 90 : 9 IC 765; *Ganesh v Vasudeo*, (1922) 24 Bom LR 911 : 68 IC 741 : AIR 1922 Bom 424.
214. *Venkataramani Ayyar v Rangaswami*, 101 IC 728 : AIR 1927 Mad 703; *Lysaght v Westmacott*, (1864) 33 Beav 417; *Sanwal Das v Saiyid Ali*,1924) 22 All LJ 1018 : 8 IC 330 : AIR 1925 All 174.
215. *Hobart v Abbot*, (1731) 2 P Wms 642.
216. *Narayan Vithal v Ganoji*, (1891) ILR 15 Bom 692, p 693 followed in *Gokul Das v Debi Prasad*, (1906) ILR 28 All 638; *Vengannan Chettiar & Sons v Ramaswami*, (1943) 1 Mad LJ 362 : AIR 1943 Mad 498.
217. *Padgaya v Baji*, (1896) ILR 20 Bom 549.
218. See the criticism of this case by J Subramania Ayyar in *Muthu Vijia Raghunatha v Venkatachallam* (1897) ILR 20 Mad 35, p 39.
219. *Maung Po v Ma Ngwe*, 167 IC 449 : AIR 1937 Rang 56.
220. *Muthu Vijia Raghunatha v Venkatachallam*, (1897) ILR 20 Mad 35; *Chela Ram v Walidad*, (1900) PR 31.

in the Full Bench case of *Ram Shankar Lal v Ganesh Prasad.*[221] It had been previously denied by the Allahabad High Court[222] owing to the erroneous interpretation put upon the word "property" as actual physical objects, and not including rights to and in physical objects. Indeed, under this construction there could be no such transaction as a sub-mortgage; but the Allahabad High Court had not carried their doctrine to this extremity, for it had held that when the mortgagee acquired the equity of redemption, such accession endured for the benefit of the sub-mortgagee,[223] and that a sub-mortgagee was entitled to redeem a prior mortgagee.[224]

The nature of a transaction of a sub-mortgage, and the rights of a sub-mortgagee, has been fully reviewed by a Full Bench of the Madras High Court.[225] The court held that a sub-mortgagee had two rights, one based on the personal covenant of the mortgagee, and the other on a derivative title to the mortgage right. These two remedies were alternative, and mutually exclusive; a sub-mortgagee cannot pursue one after he has elected to pursue the other.

Movables

(25) Mortgage of Movable Property

The TP Act refers to mortgages of immovable property,[226] and the Indian Contract Act, 1872 refers to pledges of movable property. But neither Acts deal with mortgages of movable property. A mortgagee of movable property is entitled to a decree for sale, just as much as a mortgagee of immovable property.[227] A mortgagee of movable property, if in possession, has a right to sell the property without the intervention of the court, if after proper notice the mortgagor fails to repay the mortgage money.[228] However, delivery of possession is not necessary to constitute a mortgage of movable property, and a hypothecation of movable property though not accompanied with delivery of possession, is valid and recognized in Indian law.[229] As a transfer of movable property is not complete without delivery of possession, such hypothecations have been described as creating an equitable charge.[230] For

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221. *Ram Shankar Lal v Ganesh Prasad,* (1907) ILR 29 All 385. See also *Venganan Chettiar & Sons v Ramaswami,* (1943) 1 Mad LJ 362.
222. *Ganga Prasad v Chunni Lal,* (1896) ILR 18 All 113; *Misri Lal v Abdul Aziz,* (1902) All WN 216; *Ram Jatan Rai v Ramhit Singh,* (1905) ILR 27 All 511.
223. *Ajudhia Prasad v Man Singh,* (1903) ILR 25 All 46.
224. *Ram Subhag v Nar Singh,* (1905) ILR 27 All 472.
225. *Chinnah Goundan v Subramania Chettiar,* (1959) ILR Mad 369 : (1959) 1 Mad LJ 228 : AIR 1959 Mad 246.
226. *Jati Kar v Mukunda Deb,* (1912) ILR 39 Cal 227, p 230 : 11 IC 884.
227. *Basavireddy v Kamaraju,* (1933) 64 Mad LJ 86 : 142 IC 96 : AIR 1933 Mad 241.
228. Re *Ahmed Alimahomed,* (1932) 34 Bom LR 1398 : 142 IC 56 : AIR 1932 Bom 613; *Deverges v Sandeman Clark & Co,* (1903) 1 Ch 579 : [1900-3] All ER Rep 648 (CA).
229. *Deans v Richardson,* (1871) 3 NWP 54; *Sham Sundar v Cheita,* (1871) 3 NWP 71; *Ko Kywetnee v Ko Koung,* (1866) 5 WR 189 (mortgage of floating logs of timber); *Reference* (1885) ILR 8 Mad 104 (mortgage of a coffee crop); *Shivram v Dhau,* (1902) 4 Bom LR 577 (mortgage of bullocks); *Shrish Chandra v Mungri Bewa,* (1905) 9 Cal WN 14; *Damodar v Atmaram,* (1906) 8 Bom LR 344 (mortgage of a fishing boat); Re *Ko Shway Aung v Strang Steel Co,* (1894) ILR 21 Cal 241 (mortgage of paddy boats); Re *Ambrose Summers* (1896) ILR 23 Cal 592 (mortgage of stock in trade); *Puninthavelu v Bhashyam,* (1902) ILR 25 Mad 406; *Backer Khorasanee v Ahmed Ismail,* (1928) ILR 5 Rang 633 : 106 IC 355 : AIR 1928 Rang 28 (mortgage of stock in trade); *Tahilram v D'Mello,* (1916) 18 Bom LR 587 : 37 IC 231 (a mortgage of a printing press); *Venkatachalam v Venkataraman,* AIR 1940 Mad 929 : (1940) 2 Mad LJ 456 : 52 Mad LW 455 : (1940) Mad WN 455; *United Bank of India v The New Glencoe Tea Co Ltd,* AIR 1987 Cal 143, p 145.
230. Re *Ambrose Summers* (1896) ILR 23 Cal 592. See *also Hindustan Machine Tools Ltd v Nedungadi Bank Ltd,* AIR 1995 Kant 185.

the same reason, a mortgage of movables is liable to be defeated if the mortgagor in possession sells the goods to a bona fide purchaser without notice.[231] In some cases, however, it has been held—it is submitted incorrectly—that the mortgage will prevail against a bona fide purchaser without notice.[232] The preference given to the innocent purchaser is sometimes put on the ground of prevention of fraud, and in *Narasiah v Venkataramiah,*[233] the Madras High Court said:

> When goods are left in the possession of the mortgagor, a wide door is left open for fraud, and when the equities between the innocent purchaser and the mortgagee have to be weighed, the preponderance must be given to the purchaser, for the mortgagee has by his omission to secure possession of the goods facilitated the commission of the fraud.

On the same principle, a mortgagee of movables without possession has been postponed to a subsequent mortgagee with possession, and without notice of the first mortgagee.[234] As between two mortgagees of movables both without possession, the mortgagee who came to court first has been given priority on the principle *qui prior est tempore potior est jure.*[235] As between a mortgagee of movables without possession and a judgment creditor of the mortgagor, it has been held that the judgment creditor does not get priority over such a mortgagee merely by filing his application for attachment, and that if the mortgagee takes possession before actual attachment, the judgment creditor gets no prior rights.[236]

Shares are movable property in Indian law, and may be the subject of a mortgage or a pledge. Whether it is a mortgage or a pledge depends on the nature of the transaction, and the intention of the parties. Where there is a mere deposit of share certificates without any deed of transfer, the transaction is a pledge.[237] However, a deposit of the certificates accompanied by a duly executed blank transfer deed, has been held to be a mortgage,[238] as the transaction clearly authorised the creditor to fill up the blank, and get his name registered.

No particular formality is necessary for the creation of a security on movable property, and a parole mortgage of goods is valid. Order 34 of the Code of Civil Procedure does not apply to a mortgage of movable property, and so O 34, rule 14 does not enable a mortgagee of movable property who has obtained a personal decree for the mortgage money, to sue afterwards on the mortgage.[239]

(26) Mortgage of Movables not in Existence

A mortgage of movable property, which is to come into existence in future, has also been recognized. Such mortgages are equitable assignments fastening on the property when it

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231. *Sreeram v Bammireddi,* (1918) 35 Mad LJ 450 : 47 IC 976; *Nanhuji v Chimna,* (1911) 7 Nag LR 72 : 10 IC 869; *Manekjee Pallanjee v S A Mayappa Chetty,* 28 IC 462; *Backer Khorasanee v Ahmed Ismail,* (1928) ILR 5 Rang 633 : 106 IC 355 : AIR 1928 Rang 28; *Dayalji Pragji v Karachi Electric Supply Corporation,* 190 IC 790 : AIR 1940 Sau 177; *Mallayan v Krishna Pillai,* (1955) ILR Tr & Coch 216 : AIR 1955 Tr & Coch 162.
232. *Sham Sundar v Cheita,* (1871) 3 NWP 71; *Ko Kywetnee v Ko Koung,* (1866) 5 WR 189.
233. *Narasiah v Venkataramiah,* (1919) ILR 42 Mad 59 : 47 IC 976.
234. *Co-operative Hindusthan Bank v Surendra,* (1931) ILR 59 Cal 667 : 36 Cal WN 263 : 138 IC 852 : AIR 1932 Cal 524; *Manmohan Mukherji v Kesrichand,* (1935) ILR 62 Cal 1046; *Moosa Abdul Habib v Maung Tun,* (1931) ILR 2 Rang 182.
235. *Bibhuti Bhusan v Baidya Nath,* (1933) 40 Cal WN 625.
236. *Manmohan Mukherji v Kesrichand,* (1935) ILR 62 Cal 1046.
237. *Kunhunni v Krishna,* (1943) ILR Mad 115; (1942) 2 Mad LJ 120 : 205 IC 210 : AIR 1943 Mad 74.
238. *Arjun Prasad v Central Bank of India,* (1955) ILR 34 Pat 8 : AIR 1956 Rang 32; see, however, *Narasayyamma v Andhra Bank Ltd,* AIR 1960 AP 273.
239. *Official Assignee of Bombay v Chimniram Motilal,* (1933) ILR 57 Bom 346 : 34 Bom LR 1615 : 142 IC 370 : AIR 1933 Bom 51; *United Bank of India v The New Glencoe Tea Co Ltd,* AIR 1987 Cal 143, p 145.

comes into existence under the rule in *Holroyd v Marshall*[240] and *Collyer v Issacs*.[241] Instances of such mortgages are mortgages of future crops,[242] or of indigo cakes to be manufactured,[243] or a future decree,[244] or future dues for work to be done.[245] Such mortgages cannot be enforced against a purchaser for value without notice.[246] It has, however, been held that a mortgage of profits accruing from year to year from immovable property as in profits from a sugar refinery, is not valid as it is neither movable property, nor goods.[247]

(27) Pawn or Pledge of Movables

A pledge is bailment of movable property by way of security. Possession is given, and the transaction involves a transfer of special property in the subject of the security. The distinction between a mortgage and a pledge is explained by *Story* in his book on Bailments as follows:

> A mortgage of goods is at Common Law distinguished from a mere pawn. By a grant or conveyance of goods in gage or mortgage the whole legal title passes conditionally to the mortgagee; and if the goods are not redeemed at the time stipulated, the title becomes absolute at law, although equity will interfere to compel a redemption. But in a pledge a special property only, as we shall presently see, passes to the pledgee the general property remaining in the pledger. There is also another distinction. In the case of a pledge of personal property the right of the pledgee is not consummated except by possession; and ordinarily, when that possession is relinquished, the right of the pledgee is extinguished or waived. But in the case of a mortgagee of personal property the right of property passes by the conveyance to the pledgee and possession is not, or may not, be essential to create or support the title.[248] There can be a mortgage of movables which is different from a pawn. In a mortgage of movables, the remedy by way of redemption would be available to the mortgagor, so also, the remedy of foreclosure to the mortgagee.[249]

The Supreme Court has reiterated that in a contract of pawn/pledge, the pledgee has a special property that vests in him only so far as necessary to secure his debts. Thus the general property remains with the mortgagor as the deed of pledge does not transfer the property to the pledgee and can be attached for being appropriated towards the Provident Fund dues.[250] A pawnee has no right of foreclosure since he never had absolute ownership at law, and his equitable title cannot exceed what is specifically granted by law. In this sense, a pledge differs from a mortgage.[251]

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240. *Holroyd v Marshall*, (1862) 10 HLC 191.
241. *Collyer v Issacs*, (1881) 19 Ch D 342; *Tailby v Official Receiver*, (1888) 13 App Cas 523.
242. *Bansidhar v Sant Lal*, (1888) ILR 10 All 133; *Misri Lal v Mozhar Hossain*, (1886) ILR 13 Cal 262; *Ram Sarup v Mohan Lal*, 75 IC 816 : AIR 1924 All 833; *Babu Ram v Ram Sarup*, 89 IC 410 : AIR 1926 All 164.
243. *Baldeo v Miller*, (1904) ILR 31 Cal 667.
244. *Palaniappa v Lakshmanan*, (1893) ILR 16 Mad 429.
245. *Sonaram v Sitaram*, (1940) 45 Cal WN 50; *Tripura Modern Bank v Nabadwip*, (1945) 49 Cal WN 494.
246. *Co-operative Hindusthan Bank v Surendra*, (1932) ILR 59 Cal 667 : 36 Cal WN 263 : 138 IC 852 : AIR 1932 Cal 524.
247. *Punjab National Bank v Punjab Corporation Bank*, AIR 1939 Lah 15 : 41 Punj LR 239 : 179 IC 968 in which the Privy Council did not decide the point.
248. See *Halsbury's Laws of England*, 3rd edn, vol 27, p 162; *Jammu & Kashmir Bank v Tek Chand*, AIR 1959 J & K 67.
249. *Jagannath v Fatechand*, (1949) ILR Nag 243 : AIR 1949 Nag 369; See also *Pranshanker v Jayagauri*, AIR 1952 Sau 101; See further *Shatzadi Begum v Yiretharilal Sanghi*, AIR 1976 AP 273.
250. *Maharashtra State Co-operative Bank Ltd v Assistant Provident Fund Commissioner*, AIR 2010 SC 868 : (2009) 10 SCC 123.
251. *Balkrishan Gupta v Swadeshi Polytex Ltd*, (1985) 2 SCC 167, p 196.

In a mortgage, there is a conditional transfer of general title, subject to being divested by a subsequent sale by the mortgagor to a bonafide purchaser without notice. In a pledge, the pledgee is in possession and has a special property in the goods which he is entitled to detain to secure repayment. A subsequent pledge will have priority over a previous hypothecation.[252]

(28) Classification

The section enumerates six classes of mortgage:—

1. Simple mortgage.
2. Mortgage by conditional sale.
3. Usufructuary mortgage.
4. English mortgage.
5. Equitable mortgage.
6. Anomalous mortgage.

CLAUSE (B)

(29) Simple Mortgage

A simple mortgage consists of—

(1) a personal obligation, express or implied, to pay; and

(2) the transfer of a right to cause the property to be sold.

The right transferred to the mortgagee is not ownership.[253]

(30) Binds himself Personally to Pay

The personal liability to pay may be either express, or implied, for a promise to pay arises out of the acceptance of a loan.[254]However, the personal liability is excluded when the borrower binds himself to pay out of a particular fund.[255] In *Ram Narayan Singh v Adhindra Nath*[256] Lord Parker gave the following brief, but adequate summary of the law:

(1) The loan prima facie involves a personal liability;

(2) Such liability is not displaced by the mere fact that security is given for the repayment of the loan with interest;

(3) The nature and terms of the security may negate any personal liability on part of the borrower.

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252. *Chumman Khan v Mody*, (1874) PR 70; *Co-operative Hindustan Bank v Surendra Nath*, (1932) ILR 59 Cal 667 : 36 Cal WN 263 : 138 IC 852 : AIR 1932 Cal 524.
253. *Papamma Rao v Pratapa Korkonda*, (1896) ILR 19 Mad 249, p 252.
254. *King v King*, (1735) 3 P Wms 358; *Sutton v Sutton*, (1882) 22 Ch D 511 (CA); *Kalee v Raye Kishoree* (1873) 19 WR 281; *Yashvant v Vithal*, (1897) ILR 21 Bom 267, p 270.
255. *Narotam Das v Sheo Pargash*, (1883) ILR 10 Cal 740 : 11 IC 83; *Kalka Singh v Parasram*, (1895) ILR 22 Cal 434 : 22 IC 68; *Bunseedhur v Sujaat*, (1889) ILR 16 Cal 540; *Singjee v Tiruvengadam*, (1890) ILR 13 Mad 192; *Gopalasami v Arunachella*, (1892) ILR 15 Mad 304; *Kangaya v Kalimuthu*, (1904) ILR 27 Mad 526; *Chennapatnam v Tadakamalla*, (1904) ILR 27 Mad 86; *Anglo-Indian Trading Co v Brierly*, 8 IC 302 (covenant to pay out of sale proceeds of manganese ore).
256. *Ram Narayan Singh v Adhindra Nath*, (1917) ILR 44 Cal 388, p 400 : 44 IA 87 : 38 IC 932 : AIR 1916 PC 119; *Om Prakash v Mukhtar Ahmed*, AIR 1940 Lah 486 : 42 Punj LR 660.

It is accordingly, a matter of construction whether the security is a simple mortgage. For a simple mortgage, there must be a personal covenant either express or implied;[257] and in the absence of such a covenant, the security is generally, but not necessarily a charge.[258]

(31) No Possession

The characteristic of a simple mortgage is that possession is not given. If a simple mortgagee sues to enforce his security, a decree for possession would be illegal; and if passed, would not operate as a foreclosure, but would make the simple mortgagee, a mortgagee with possession.[259]

The primary consideration in a suit for sale of the mortgaged property is the debt borrowed, and the mortgage is only by way of security in favour of the mortgagee. There is thus, no legal hurdle in recovering the amount of debt by a simple money decree.[260]

A simple mortgage with possession is a simple mortgage usufructuary, which is not included in the definition of an anomalous mortgage. In the undernoted case,[261] the mortgage was a simple mortgage with a provision that if default was made in payment of interest, the mortgagee should take possession. This was really simple mortgage usufructuary or an anomalous mortgage, though called a simple mortgage in the judgment.

(32) Right to Cause the Property to be Sold

This right as already explained is a right in rem, although it can only be enforced by the intervention of the court.[262] In fact, the very words "cause the property to be sold" indicate that the power of sale is not to be exercised without the intervention of the court.[263] The transfer of this right may be express,[264] or it may be implied;[265] and in *Motiram v Vitai*[266] J Nanabhai Haridas said that a power of sale is very seldom expressly given in a native *mofussil* mortgage. Any words pledging the property as security for the debt are sufficient to imply a right of sale.[267] The word *muakiza*[268] is not commonly used to denote a simple mortgage; but the words *nazar gahan* and *taran gahan*[269] import a power of sale. And so do words like *rehan, arh,* or *mastagharag.*[270] In a Madras case,[271] the words "in default I shall on the security of the house site belonging to me ... pay and make good the principal and interest" were held to

257. *Wahid-un-Nissa v Gobardhan,* (1900) ILR 22 All 453, p 461; *Abbakke v Kinhiamma,* (1906) ILR 29 Mad 491; *Bhugwan v Parmeshwari,* (1907) 5 Cal LJ 287; *Jangi Singh v Chander Mal,* (1908) ILR 30 All 388; *Ram Kishore v Surajdeo,* (1911) 9 Cal LJ 5 :1 IC 442.
258. *Matlub Hasan v Kalawati,* 147 IC 302 : AIR 1933 All 934; *Sampuran Singh v Ahmad Din,* AIR 1941 Lah 274 : 43 Punj LR 277 : 198 IC 100.
259. *Papamma v Pratapa,* (1896) ILR 19 Mad 249 : 23 LA 32.
260. *Saraswatidevi v Krishnaram Baldeo Bank Ltd,* AIR 1998 MP 73.
261. *Yashvant v Vithal,* (1897) ILR 21 Bom 267.
262. *Ma Hnin Yeik v KARK Chettyar Firm* 183 IC 728 : AIR 1939) Rang 321.
263. *Kishan Lal v Ganga Ram,* (1891) ILR 13 All 28.
264. *Onkar Ramshet v Govardhan,* (1890) ILR 14 Bom 577.
265. *Ram Brahman v Venkatanarasu,* (1912) 23 Mad LJ 131 : 16 IC 209; *Ponnuranga v Thandavarya,* (1915) Mad WN 21 : 26 IC 274; *Sant Ram v Bhagwat Das,* AIR 1958 Punj 309.
266. *Motiram v Vitai,* (1889) ILR 13 Bom 90, p 92.
267. *Lala Ramdhari Lal v Janessar,* (1870) 6 Beng LR 14; *Rangasami v Muttukumarappa,* (1887) ILR 10 Mad 509, p 518; *Bishen Dayal v Udit Narain,* (1886) ILR 8 All 486, p 489; *Sheoratan v Mahipal,* (1885) ILR 7 All 258, p 264; *Ponnuranga v Thandavarya,* (1915) Mad WN 21 : 26 IC 274.
268. *Dalip Singh v Bahadur Ram,* (1912) ILR 34 All 446 : 15 IC 435.
269. *Datto v Vithu,* (1896) ILR 20 Bom 408.
270. *Gauhar Khan v Ajudhia Singh,* 20 IC 870.
271. *Balasubramania v Sivaguru,* (1911) 21 Mad LJ 562 : 11 IC 629.

constitute a simple mortgage. The Privy Council in *Gokuldoss v Kriparam*[272] held that the following words sufficed to create a simple mortgage:

> If I fail to pay the money as stipulated, I and my heirs, shall without objection cause the settlement of the said village to be made with you.

Where a mortgage deed gives a mortgagor the option of repaying the loan by selling the mortgaged property, that does not exclude the personal covenant in cases where there is one.[273]

In a simple mortgage the security for the debt is, therefore, twofold:

(1) the personal obligation; and

(2) the property.[274]

CLAUSE (C)

(33) Mortgage by Conditional Sale

This is a mortgage in which the ostensible sale is conditional, and intended as a security for the debt. In case of payment at the time fixed, the condition was that the sale became void, or that the mortgagee executed a reconveyance. The distinction between a mortgage by conditional sale and a sale with a condition of repurchase has already been explained in the note "Sale with a condition of retransfer" above.

In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement; no debt subsists and no right to redeem is reserved by the debtor, but only a personal right to purchase. This personal right can only be enforced strictly according to the terms of the deed, and at the time agreed upon.[275] However, in a mortgage by conditional sale, the right of redemption subsists notwithstanding that the mortgagor has failed to pay at the time stated.[276] This right arises from the fact that the property is considered to be merely a pledge for the loan.[277] A mortgage by conditional sale was common in India from very early times, and among Hindus it generally took the form of a mortgage which worked itself out in a sale on default of payment. Justice Sadasiva Ayyar, in the undernoted case,[278] suggested that this form of mortgage does not fall within the definition of mortgage by conditional sale in the TP Act. It is submitted, however, that there is no substance in this distinction, for in a mortgage by conditional sale the ostensible sale is really a mortgage, and it does not matter by what name it is called.[279] The Hindu form of mortgage was treated as a mortgage by conditional sale in a Madras case[280] by CJ Sir Charles Turner, a member of the second Indian Law Commission. Again, this form of mortgage was recognized by the Privy Council as standing on the same

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272. *Gokuldoss v Kriparam*, (1874) 13 Beng LR 205 (PC).
273. *Ramgopal v Ramchandra*, (1949) ILR Nag 284 : AIR 1949 Nag 354.
274. *Wahid-un-nissa v Gobardhan*, (1900) ILR 22 All 453.
275. *Williams v Owen*, (1840) 5 My & Cr 303, p 305; *Kakerlapoody v Vutsavoy*, (1837) 2 MIA 1; *Situl v Luchmi*, (1884) ILR 10 Cal 30 : 10 IA 129; *Bhup Kuar v Muhammadi*, (1884) ILR 6 All 37; *Vasudeo v Bhau*, (1897) ILR 21 Bom 528.
276. *Venkat Subbiah v Juma Mosque*, (1941) 1 Mad LJ 754 : 53 Mad LW 731 : (1941) Mad WN 532 : AIR 1941 Mad 666. See also Transfer of Property Act 1882, section 60.
277. *Seton v Slade, Hunter v Seton*, (1802) 7 Ves 265, p 273; *Ramegowda v Boramma*, AIR 2012 Kant 52 :(2011) 6 Kar LJ 512.
278. *Srinivasa v Radhakrishnam*, (1915) 38 Mad 667 : 22 IC 54.
279. *Sheoram Singh v Babu Singh*, (1926) ILR 48 All 302 : 94 IC 849 : AIR 1926 All 493; *Ali Ahmad v Rahmatullah*, (1892) ILR 14 All 195.
280. *Ramasami v Samiyappanayakan*, (1882) ILR 4 Mad 179.

footing as mortgages by conditional sale in *Balkishen v Legge.*[281] But the distinction made by J Sadasiva Ayyar, has been followed in some subsequent cases.[282] In, ancient India, there was no equity of redemption in case of default in a mortgage by conditional sale, any more than in an outright sale with a condition of repurchase.[283] The Rajasthan High Court[284] quoted with approval the decisions of Supreme Court,[285] and observed that if the sale and agreement to re-purchase are embodied in separate documents, then the transaction cannot be a mortgage, irrespective of whether the document are contemporaneously executed. But the converse does not hold good, i.e., the mere fact that there is only one document does not necessarily mean that it must be a mortgage, and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter of construction which was meant. This change was effected in the TP Act by the amendment in section 58(c). The legislature has made a clear classification, and excluded transactions embodied in more than one document from the category of mortgages. Therefore, it is reasonable to suppose that persons who, after the amendment choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words.

Execution of a rent note on the same day of transfer by sale deed would not mean that document of sale was not outright sale. In *Fatma Bai v Yogendra Sharma,*[286] as per Sale Deed which according to vendor was document of mortgage by conditional sale, property was sold by vendor to vendee for consideration of Rs.50,000/-. Entire ownership, right, title and interest were transferred. Rent deed was executed on the same day. Vendees were in possession of the entire house except ground floor. It was held that transaction was not mortgage and document of sale was never written as document of conditional sale.

(34) Bengal

In Bengal, the Usury Regulations 15 of 1793 and 34 of 1802, required the mortgagee on redemption to give an account of rents and profits, and to credit receipts in excess of legal interest to capital. Bengal Regulation I of 1798 empowered the mortgagor to pay the money into court on the day named. However, none of these Regulations extended the time for redemption, nor did they require any judicial procedure for foreclosure. This was effected by Bengal Regulation 17 of 1806. Under this Regulation, it was necessary for the mortgagee to make an application for foreclosure to the district judge before he could acquire an absolute title (section 8). The mortgagor had a right of redemption on payment or tender of the amount due, or on making a deposit in the court; and this right he could exercise within one year of service upon him of notice of the mortgagee's application for foreclosure. The provisions as to service were imperative and not merely directory;[287] and a notice that did not inform the mortgagor of the different courses open to him invalidated foreclosure

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281. *Balkishen v Legge,*, (1899) ILR 22 All 149 : 27 IA 58; *Mohamed Haji v Ramappa,* (1929) 25 Nag LR 187 : 119 IC 684 : AIR 1929 Nag 254.
282. *Hakeem Patte Muhammad v Shaik Davood,* (1916) ILR 39 Mad 1010 : 30 IC 569; *Kandula Venkiah v Donga Pallaya,* (1920) ILR 43 Mad 589 : 57 IC 724; *Asrath v Chimabai,* (1925) 27 Bom LR 1246 : 91 IC 330 : AIR 1926 Bom 107.
283. *Thumbusawmy v Mahomed Hoosain,* (1875) ILR 1 Mad 1 : 2 IA 241; *Pattabhiramier v Vencatarow,* (1870) 13 MIA 560; *Gobardhan v Gokal Das,* (1880) ILR 2 All 633; *Mallikarjunuda v Mallikarjunuda,* (1885) ILR 8 Mad 185.
284. *Askaran v Madan Lal,* AIR 1995 Raj 130.
285. *Chunchun Jha v Ibadat Ali,* AIR 1954 SC 345.
286. *Fatma Bai v Yogendra Sharma,* AIR 2013 MP 82.
287. *Madho Pershad v Gajadhur,* (1884) ILR 11 Cal 111 : 11 IA 186; *Mahesha Mal v Gopal,* (1933) ILR 14 Lah 640 : 144 IC 390 : AIR 1933 Lah 676.

proceedings.[288] The mortgagee was not entitled to possession without taking foreclosure proceedings;[289] and if he entered without taking proceedings for foreclosure, the mortgagor could eject him as a mere trespasser.[290] The function of the judge in the proceedings was ministerial,[291] and if the mortgagee did not get possession after foreclosure, he was obliged to file a suit for the purpose.[292] If he neglected to file a suit, the mortgagor remaining in adverse possession for 12 years would acquire a prescriptive title, which could not be displaced by a foreclosure proceeding under the TP Act.[293] The effect of these Regulations was, therefore, to curtail the strict rights of the mortgagee on the analogy of English rules of equity. These Regulations were followed in the United and Central Provinces and Oudh, and in Punjab. They were extended to the Central Provinces by Act, 20 of 1875. The Privy Council approved of their being followed in the non-regulation provinces as being in accordance with the rule of equity and good conscience.[294] The TP Act does not affect any right, or any relief in respect of a right, under the repealed Regulation (section 2(c)). So when the mortgagee had given notice of foreclosure under the Regulations, he could not treat the proceedings as a suit filed under the TP Act,[295] nor could he file a fresh suit under the TP Act.[296] On the other hand, if the suit is properly filed under the TP Act, the mortgage or cannot claim the benefit of one year's grace allowed in the repealed Regulation.[297] Section 37A of the Bengal Money-Lenders Act provides that in the case where any loan is secured by a mortgage, and the mortgagor ostensibly sells the mortgaged property on any of the conditions specified in sub-section (c) of section 58 of the TP Act, then, notwithstanding anything to the contrary contained in proviso to the said sub-section, the transaction shall always be deemed to be a mortgage by conditional sale and the mortgagee, a mortgagee by conditional sale for the purpose of the said sub-section, even if the transaction is effected by two separate deeds, viz the ostensible sale deed, and the agreement for reconveyance.[298]

(35) Madras

The term "Tamil term 1" means a sale, which is to take effect after a particular time limit. A document termed "Tamil term 2" is an outright sale. The term "Tamil term 3" is more or less equivalent to "Tamil term 1". On the facts, the document in which the consideration was an odd sum was held to be not outright sale, but a sale in the category "Tamil term 1". The entire sum paid by the defendant under the document went towards the discharge of loans due by the plaintiff, and there was also evidence to show that the property was worth much more than the sum mentioned in the document, and also that when the plaintiff gave notice calling upon the defendant to accept the sum and to return possession of the property to the plaintiff, the defendant did not protect and also did not send any reply. Hence, the document was a mortgage by conditional sale.[299]

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288. *Tarachand v Chiman*, (1912) 3 Punj LR 1912 : 12 IC 530.
289. *Badri Das v Besu*, 145 IC 159 : AIR 1933 Lah 174.
290. *Sheikh Hub Ali v Wazir-un-nissa*, (1906) ILR 28 All 496 : 33 IA 107.
291. *Forbes v Ameeroonissa Begum*, (1865) 10 MIA 340.
292. *Norender Narain v Dwarka Lal Mundur*, (1873) ILR 3 Cal 397 : 5 IA 18; *Kishori v Gunga Bhau*, (1896) ILR 23 Cal 228 : 22 IA 183.
293. *Srinath Das v Khettermohun*, (1889) ILR 16 Cal 693.
294. *Gokuldas v Kriparam*, (1874) 13 Beng LR 205 (PC).
295. *Sitla Bakhsh v Lalta Prasad*, (1886) ILR 8 All 388.
296. *Mohabir v Gungadhur*, (1887) ILR 14 Cal 599; *Umesh Chunder v Chunchun*, (1888) ILR 15 Cal 357.
297. *Ganga Sahai v Kishen Sahai*, (1884) ILR 6 All 262; *Bhobo Sundari v Rakhal Chunder*, (1886) ILR 12 Cal583, disapproving *Pergash Koer v Mahabir*, (1885) ILR 11 Cal 582.
298. *Abdul Gaffar v Sudha Kanta Ray*, AIR 1985 Cal 133, p 136; See also *Satyanarayan Shah v Star Company Ltd*, AIR 1984 Cal 399; *Swaminath Tat v Chandi Charan Dey*, AIR 1984 Cal 30, p 135.
299. *Murugan v Jayarama Pillai*, AIR 1974 Mad 311 : (1974)1 Mad LJ 371.

(36) Bombay

In Bombay, the ancient law was followed and no right of redemption was recognized by the *Sadar Adalat* in *gahan lahan* mortgages. However, the change came in 1864 when in *Ramji v Chimo,*[300] the Bombay High Court approved the leading Madras case,[301] and allowed a right of redemption tempered with an allowance to the mortgagee for improvements effected under the mistaken impression that he had become a purchaser.[302] And in Madras, this course of decisions persisted despite *Pattabhiramier's* case,[303] and was justified by CJ Westropp after an exhaustive review of the case law in the under– noted case.[304] The Bombay High Court refused to alter this course of decisions even after *Thumbusawmy's* case,[305] and two years after that case, CJ Westropp in *Bapuji v Semavaraji*[306] declared that the doctrine known as the equity of redemption was part of the ancient law of India, and this was followed in subsequent cases.[307]

The TP Act, repealed the Regulations and removed the differences between the different High Courts; and as to all mortgages executed after it came into force, the right of redemption is given by section 60.

(37) Central Provinces

In Central Provinces (now forming part of Madhya Pradesh) in the case of a *gahan lahan* mortgage, a court can pass a decree either for foreclosure, or for sale.[308]

(38) Bihar

Where a document of title contained a stipulation that the vendor is entitled to repay the consideration by a certain date and take back the property and if the vendee or his representative refuses to accept the consideration money, the vendor must be entitled to deposit the money in the government treasury, and enter into possession, it was held that the transaction was a mortgage and not a sale.[309]

(39) Kutch

In Kutch, in the case of a mortgage by conditional sale executed before the merger, there would be a right of redemption after the specific term.[310]

(40) Personal Liability

The definition does not mention a personal covenant to repay, and the personal liability is not an essential ingredient of a mortgage by conditional sale.[311] It has been said that this circumstance makes mortgages by conditional sale an exception to the rule "no debt no mortgage".[312] It is true that the test of a right of personal recovery applied by CJ Weslropp, in

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300. *Ramji v Chimo,* (1864) 1 Bom HC 199.
301. *Venkata v Parvati,* (1862) 1 Mad HC 460.
302. *Anandrav v Ravji,* (1868) 2 Bom HC 214.
303. (1870) 13 MIA 560.
304. *Shankarbhai v Kassibhai,* (1872) 9 Bom HCR 69.
305. (1875) ILR 1 Mad 12.
306. *Bapuji v Semavaraji,* (1877) ILR 2 Bom 236.
307. *Kanayalal v Pyarabai,* (1883) ILR 7 Bom 139; *Ramchandra v Janardan,* (1890) ILR 14 Bom 19; *Abdul Rahim v Madhavrav,* (1890) ILR 14 Bom 78.
308. *Sitaram v Krishnarao,* 190 IC 641 : AIR 1940 Nag 156.
309. *Mahabir v Bigan,* (1949) ILR 28 Pat 286.
310. *Jadeja Godji v Jadeja Bhawaangji,* AIR 1949 Kutch 10.
311. *Balkishen v Legge,* (1900) ILR 22 All 149, p 159; *Ramasami v Samiyappanayakan,* (1882) ILR 4 Mad 179, p 183; *Mahomed Haji v Ramappa,* (1929) 25 Nag LR 187 : 119 IC 684 : AIR 1929 Nag 254.
312. Ghose, *Law of Mortgages,* p 90; *Balkrishna Das v Legge,* (1897) ILR 19 All 334, p 445.

Bapuji v Senavaraji[313] fails because of the absence of a personal covenant. But this test would also fail in the case of usufructuary mortgage,[314] and CJ Westropp, in the case cited applied the maxim "once a mortgage always a mortgage" to mortgages by conditional sale. It is, therefore, submitted that the debt subsists, although the creditor's right of recovery is limited to the mortgaged property.

(41) On a Certain Date

In a Calcutta case,[315] CJ Maclean, said that "a certain date" was an essential element of a mortgage by conditional sale. In a later case,[316] it was held by the same High Court that "on a certain date" means "on or before a certain date." The Madras High Court, however, has held that these words refer to the default in the second clause of section 58(c), and not to the payment in the third or fourth clause.[317] Same is the Gujarat view.[318]

(42) Clause (c), Proviso

The proviso to clause (c) was added by section 19 of the Transfer of Property (Amendment) Act, 1929. The proviso was introduced in this clause only to set at rest the controversy about the nature of the document, whether the transaction would be a sale or a mortgage. It has been specifically provided by the amendment that the document would not be treated as a mortgage, unless the condition of repurchase was contained in the same document.[319] The Special Committee, in its Report,[320] stated:

> Section 58(c) contains the definition of a mortgage by conditional sale. It is with the greatest difficulty in many cases that such mortgages can be distinguished, from sale with a condition for repurchase. As clause (c) of section 58 indicates, the real point of difference between the two kinds of transactions is that, in the case of a mortgage by conditional sale, the sale is only ostensible, whereas in the case of an out and out sale, it is real. The ostensible or real nature of transaction can, however, be only determined by finding out the intention of the parties. In order to escape the liability of accounting for the profits of the property and other liabilities imposed on a mortgagee, and also to escape the provisions of some of the local laws enacted for the benefit of agriculturists, creditors resort to the mode of having a mortgage which is in form of an out and out sale. Since the decision of the Privy Council in *Balkishan Das v Legge*,[321] it has been a well-settled rule that it is not open to Courts to allow any extraneous evidence in order to find out the intention of the parties. Such intention must, therefore, be gathered from the document itself which purports to effect the transaction. These transactions have given rise to a great deal of litigation and Courts are compelled to enumerate and consider all the various criteria which have been laid down for the purpose of determining whether a transaction is a mortgage or an out and out sale. In order to avoid the difficulties indicated above, we think it desirable to lay down a statutory test by which the intention is to be gathered. We, therefore, propose that no transaction should be deemed to be a mortgage by conditional sale unless the condition is embodied in the document which operates or purports to effect the sale.

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313. *Bapuji v Senavaraji*, (1877) ILR 2 Bom 236.
314. *Ram Narayan Singh v Adhindra Nath*, (1917) ILR 44 Cal 388 : 44 IA 87 : 38 IC 932 : AIR 1916 PC 119.
315. *Kinuram v Nitve Chand*, (1907) 11 Cal WN 400.
316. *Mahomed Mozaffer Ali v Asraf Ali*, 25 IC 93.
317. *Padmanabha v Sitarama*, (1928) 54 Mad LJ 96 : 106 IC 158 : AIR 1928 Mad 28.
318. *Asmal Bagas Abharam v Raj Mahijibhai Parbhasingh*, AIR 1974 Guj 19.
319. *Vidhyadhar v Manikrao*, (1999) 3 SCC 573 : AIR 1999 SC 1441, p 1452; *PL Bapuswami v N Pattay Goudner*, AIR 1966 SC 902; *Raj Kishore v Prem Singh*, AIR 2011 SC 382 : (2011) 1 SCC 657.
320. Referred to in *Debi Singh v Jagdish Saran Singh*, AIR 1952 All 716, pp 720–721.
321. *Balkishan Das v Legge*, (1900) ILR 22 All 149.

This position has now been settled by several decisions of the Supreme Court,[322] and by the High Courts in many cases.[323] The effect of the proviso is that a transaction in which the stipulation for reconveyance is contained in a separate document cannot be a mortgage of any kind, both because of the language of the proviso, and because it could not fall in any other category of mortgage.[324] The apex court has laid down the following distinguishing features between the mortgage with conditional sale and sale with an option of repurchase:

(i) In a mortgage with conditional sale, the relation of a debtor and a creditor subsists while in a sale with an option of re-purchase, there is no such relationship and the parties stand on an equal footing.

(ii) A mortgage by conditional sale is effected by a single document, while a sale with an option of repurchase is generally effected with the help of two independent documents.

(iii) In a mortgage with conditional sale the debt subsists as it is a borrowing arrangement, while in a sale with an option of repurchase, there is no debt but a consideration for sale.

(iv) In a mortgage with conditional sale, the amount of consideration is far below the value of the property in the market but in a sale with an option of repurchase the amount of consideration is generally equal to or very near to the value of the property.

(v) In a mortgage with conditional sale, since this is a mortgage transaction, the right of redemption subsists in favour of the mortgagor despite the expiry of the time stipulated in the contract for its payment. The mortgagor has the option to redeem the mortgage and take back the property on the payment of the mortgage money, after the specified time, but in a sale with an option of re-purchase, the original seller must re-purchase the property within the stipulated time period. If he commits a default the option of re-purchase is lost.[325]

The very object of the proviso to section 58(c) is to shut out an inquiry, irrespective of whether a sale with a stipulation to re-convey is a mortgage, where the stipulation is not embodied in the same document. Hence, if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot amount to mortgage, irrespective of whether the documents are executed contemporaneously.[326]

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322. *Pandit Chunchun Zha v Sheikh Ebadat Ali,* [1955] 1 SCR 174 : AIR 1954 SC 345 : [1954] SCJ 469; *Bhaskar Waman Joshi v Narayan Rambilas Agarwal,* [1960] 2 SCR 117 : AIR 1960 SC 301 : [1960] SCJ 327; *Simrathmull v Nanja Lingiah,* AIR 1963 SC 1182; *Mushir Mol Khan v Sajeda Banoo,* (2000) 3 SCC 536, paras 9, 14; And see *Bahadur v Motiram,* AIR 1972 Raj 250; *Ramjan Khan v Baba Raghunath Dass* AIR 1992 MP 22, pp 26, 27; See also *P Obayya v AC Vekalappa,* AIR 1974 AP 232; *Raj Kishore v Prem Singh,* AIR 2011SC 383 : (2011)1 SCC 657;*C Cheriathan v P Narayan,* AIR 2009 SC 1502; *Vishvanath Dadoba Karale v Parisa Shatappa Upadhya,* AIR 2008 SC 2510 : (2008) 11 SCC 504;*Chennamal v Munniammal,* AIR 2005 AP 205.

323. See *P Obayya v AC Vekalappa,* AIR 1974 AP 232; *Mishreelal Shah v Jaganath Sah,* AIR 2007 Pat 145 : (2007) 2 BLJR 2364; *Vasant Rao v KishanRao Neb,* AIR 2008 Bom 42 : (2007) 4 Bom CR 861; *S K Mohammad Ilyas v Narayan Sah,* AIR 2009 Pat 17 : (2008) 2 MPLJ 602; *Amirchand Meghraj v Devidas Bhogaram,* AIR 1973 MP 15; *Rambhika Bodke v Sadashiv Laxman,* AIR 2007 Bom 162 : (2007) 6 Bom CR 744 : (2008) 1 All MR 63; *C Raghunathan v K Nageshwar Rao,* AIR 2009 AP 205 : (2009) 6 ALD 257 : (2009) 5 ALT 584; *Assam Electricity Borad v R N Dutta,* AIR 2009 Gau 117 : (2009) 5 GLR 246 : (2009) 2 GLT 951.

324. *Suryaprakasa v Venkataraju,* (1953) ILR Mad 1196 : (1953) 1 Mad LJ 667 : AIR 1953 Mad 830.

325. *Chennammal v Muniamalaiyan,* AIR 2005 SC 4397 : (2005) 13 SCC 71. See also *Raj Kishore v Prem Singh,* AIR 2011 SC 382 : (2011) 111 CLT 709 : 2011 Supp (1) OLR 221. See also *Amir Bee v The Sub Divisional Magistrate, Sakaleshpur,* AIR 1980 Kant 154.

326. *Hasam Nurani Malak v Mohansingh,* AIR 1974 Bom 136.

A registered sale-deed was executed by the defendant in favour of the plaintiff on 27 August 1952 for ₹ 10,000. There was a separate *kararnama* executed by the plaintiff in favour of the defendant to reconvey the property on payment of ₹ 10,000 by 6 June 1953. In a suit for possession filed by the plaintiff, it was contended that the transaction was not a sale, but a mortgage. It was held that the fact that possession was deferred will not go against the transaction being a sale, as delivery of possession is not necessarily an integral part of sale. Regarding the sale deed and the *kararnama*, it was clear that there was a complete transfer of title, and vesting thereof in the plaintiff on 27 August 1952. At the same time, there was a contemporaneous agreement between the plaintiff on the one hand and the defendant on the other, of reconveyance of the property.[327] Where the suit property was purchased by *B* from *A*, through three sale deeds, and the fourth sale deed was in the form of an agreement to re-convey property on repayment of consideration money, the transaction would be a sale with a condition of repurchase and not a mortgage.[328]

ILLUSTRATION

A executed a document, selling certain property to *B* for a certain sum. On the same day, a contemporaneous document was executed by *B* in favour of *A*, agreeing to sell the property in question for the same amount within 10 years of the date of execution of the document by *A*. The possession of the property remained with *A* and he was to pay ₹ 80 per month as rent to *B*. The Municipal and other taxes in respect of the property were to be paid by *A*. The question was about the real nature of the transaction between *A* and *B*. It was held that the transaction in question was, in essence and substance, a mortgage, though it was clothed in the garb of a transaction of ostensible sale.[329]

Where separate documents of sale deed, deed of reconveyance and lease deed were executed in the same transaction and the condition effecting the sale as a mortgage was not embodied in the sale deed itself, the mortgagor was debarred from saying that the transaction was in the nature of mortgage by conditional sale.[330] In a Calcutta case, the plaintiff executed a sale deed in respect of certain immovable property in favour of the defendant. On the same day, an agreement for re-conveyance and a lease of the property in favour of the plaintiff's son were also executed. The plaintiff subsequently brought a suit for relief under Bengal Act, (10 of 1940) for a declaration that the transaction was, in fact, a mortgage. The court found that it was not a mortgage, but went on to investigate whether it was a loan, and granted a declaration that it was a loan with a charge. On appeal, it was held that the court could not do so. The object behind the legislative enactment in the matter of adding a proviso to section 58(c) would be wholly frustrated if it be considered open to a court to make an investigation (as had been done by the lower court), and then to grant a declaration that the transaction, though on the face of it is an outright sale, yet was a loan subject to a charge over the property. Such being the position, the decree as passed was clearly unsustainable in law.[331] However, it does not follow that if the stipulation for reconveyance is embodied in the same document, the transaction is necessarily a mortgage,[332] but a reasonable inference of mortgage can be drawn from such a clause, and unless the presumption is displaced, the deed is one of

327. *Narayan Trimbakrao Gopalrao*, AIR 1988 Bom 94.
328. *Ram Chandra Yadav v Shahid Alam*, AIR 2011 Jhar 97 : (2011) 2 JCR 360.
329. *Indira Kaur v Sheo Lal Kapoor*, AIR 1988 SC 1074.
330. *Sunil Kumar Sarkar v Aghor Kumar Basu*, AIR 1989 Gau 39; see also *Ramegowda v Boramma*, AIR 2012 Kant 52 : (2011) 6 Kar LJ 512.
331. *Bithika Dutta v Bela Rani Bhattacharyya*, AIR 1981 Cal 5.
332. *Bishan Lal v Banwari Lal*, AIR 1939 All 713; *Shambhu Singh v Jagdish Baksh*, AIR 1941 Oudh 582; *Darshan Das v Ganga Bux*, (1962) ILR AP 53; *PL Bapuswami v N Pattay Goudner*, AIR 1966 SC 902 : [1966] 2 SCR 918.

mortgage by conditional sale.[333] In *Pandit Chunchun Jha v Sheikh Ebadat Ali,*[334] Mr Justice Bose, delivering the judgment of the court, observed:

> The Legislature has made a clear-cut classification and excluded transactions embodied in more than one document from the category of mortgages; therefore, it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of section 58(c) are fulfilled, then we are of opinion that the deed would be construed as a mortgage.[335]

These observations do suggest that in all cases where the whole transaction is in one document, there is a presumption that the transaction is a mortgage, and that such a presumption can only be rebutted by express terms, Such transactions in some earlier cases were regarded as a mortgage.[336] In *Rajamma v B Renuka Murthi,*[337] under a deed titled as "conditional sale deed", *A* took ₹ 2,000/- ; delivered possession of the property to *B* and it was *B*, who was asked to pay taxes. After 5 years, *A* paid to *B* the amount of ₹ 2000/- with interest and brought a suit for title over property and injunction. The issue before the court was whether the present condition was a mortgage by conditional sale or out and out sale with a condition to repurchase. The court held that, the language employed in the document was plain and unambiguous and intention of the parties was also very clear and the transaction was a sale transaction with a condition to repurchase. In *Patel Ravjibhai Bhulabhai v Rahemanbhai M Shaikh,*[338] *A* executed a deed in 1960, in favour of *B* which was titled as a conditional sale for a sum of ₹ 10,000 providing therein that if the repayment is made within a period of five years, *B* shall give back the property in suit with possession to *A* with further stipulation that *A* would have no right to get back the property after the expiry of five years. *A* instituted a suit in 1984 for redemption of property on repayment of mortgage money. The Supreme Court went on to differentiate between a "mortgage by conditional sale" and a "sale with an option to repurchase" and concluded that the actual transaction between *A* and *B* was of a loan wherein the relationship of a debtor and creditor existed and the deed constituted a mortgage with conditional sale. In *Maharishi Ayurveda Products Pvt Ltd v Sparsh Builders Private Ltd.*[339] the issue was whether the series of documents created a title or any proprietary interest in favour of the transferee, *B*, or it was in the nature to secure a loan advanced by *B* to *A*. The Court reasoned, that when the law compels a document to be in writing, that and that alone will be determinative of what the parties intend. It is where the terms are ambiguous that extrinsic evidence is permitted. The exception to this rule is where the document's professed identity is impeached as a sham or that it is a façade, the real intention of the parties being something else, oral evidence is not precluded. However, in every such exception, there was an evidence to support the claim that the document impeached was sham. The second principle is that where the transaction is said to be a mortgage by conditional sale, proviso to section 58(c) enjoins that a sale deed would not be deemed a mortgage "unless the condition is embodied in the document which effects or purports to effect the sale."

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333. *Janki Devi v Murta Kuer,* AIR 1974 Pat 246.
334. *Pandit Chunchun Jha v Sheikh Ebadat Ali,* [1955] 1 SCR 174; AIR 1954 SC 345 : [1954] SCJ 469.
335. Ibid, p 178; *B Jayashankarappa v DS Gulwadi,* AIR 2000 Kant 359, p 365 : (2000) 4 Kar LJ 35.
336. *Man Singh v Guman, (*1929) 27 All LJ 887 : 119 IC 108 : AIR 1929 All 619; *Ram Dhani v Ram Rikh Singh,* (1931) ILR 53 All 607 : 131 IC 545 : AIR 1931 All 548; *Tondala Muniswamappa v Narijundachari,* (1951) ILR Mys 426 : AIR 1952 Mys 56; *Rangabai v Gobind,* (1949) ILR Nag 78 : AIR 1949 Nag 243; *MA Bashir v Ethel,* AIR 1957 MP 207.
337. *Rajamma v B Renuka Murthi,* 2016 (3) AKR 291.
338. *Patel Ravjibhai Bhulabhai v Rahemanbhai M Shaikh,*AIR 2016 SC 2146 : 2016 (4) SCALE 600 : 2016 (116) ALR 905.
339. *Maharishi Ayurveda Products Pvt Ltd v Sparsh Builders Private Ltd,* RFA, (OS) 58/2014, decided on 3 March 2016 (Delhi High Court).

The Court noted that there is overwhelming material on the record to establish that the documents executed sought to convey proprietary interest to *B*. These included a registered agreement to sell; receipt for Rs. 4 crores; Affidavits, Indemnity Bond, etc. A letter, symbolic of possession too, was signed. The other series of documents also showed that *B* agreed to lease out the property for agreed lease rent, *A*; that arrangement was extended. A was undoubtedly given the option to seek purchase of the property; this was subject to a mutually agreeable consideration. That condition was not fulfilled. Furthermore, A never claimed the suit property as its asset in its balance sheets, which were placed on the record during the trial. Also, it consistently paid tax-deducted amounts towards rent agreed by the parties, to *B*. Most significantly, it never sought re-conveyance of the suit property in a manner known to law, through cancellation of the agreement to sell, or a separate suit. All this behavior and conduct was consistent with the *B*'s interest in the property. The Court held it to be a sale and not a mortgage.In absence of any stipulation of re-transfer of property the transaction would be an absolute sale and not a mortgage more so if the seller intended to transfer his absolute ownership rights to the transferee.[340] The Gujarat High Court has held that once the condition of conveyance is incorporated in the document of ostensible sale executed by the owner, the applicability of section 58(c) is not ruled out merely because the ostensible purchaser's promise to reconvey the property after the specified period is contained in a separate document.[341] Where the deed here embodied the condition of repayment of the consideration amount and the possession of the property was delivered to the transferee in two years during which the transferor had to repay the amount, and thus it would be a mortgage and the mortgagor would be entitled to redeem the property.[342] Where the language of the deed clearly revealed the transaction contained in the deed as mortgage by conditional sale, and there was no specific condition of the sale becoming absolute on non-compliance of the conditions of repayment of amount but there was specific condition of re payment of amount, the transaction would be one of mortgage by conditional sale and not sale.[343] The Supreme Court in *Shyam Singh v Daryao Singh*[344] has held that since the sale and agreement of repurchase are contained in two separate documents, although contemporaneously executed, the transaction cannot be treated to be a "mortgage" as defined in section 58(c) read with proviso thereunder, but it seems to be a transaction akin to a "mortgage"—if not "mortgage proper". However, where an illiterate mortgagor executed one document styled as document "*A*" titled as "loan transaction" and document "*B*" as 'reconveyance after payment of loan', the Chhattisgarh High Court held that the circumstances were sufficient to prove that transaction was a mortgage transaction.[345]

However, it would be open to the other side to show that it was intended to be an out and out sale.[346] As the Supreme Court has itself observed in the latter case, the question whether, by the incorporation of such a condition, a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties, to be gathered from the language of the deed interpreted in the light of the surrounding circumstances.[347]

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340. *Maya Devi Pandey v Sumit Mathur,* AIR 2014 (NOC)171 (All).
341. *Kantilal M Kadia v Somabhai Dahyabhai Kadia,* AIR 2003 Guj 205, p 213 : (2003) 1 GLR 817.
342. *Rajwati Devi v Prem Nandani Sinha,* AIR 2013 Pat 166 : LNIND 2013 PAT 84 : JCNO P 2013 0216.
343. *Jairambhai Ramabhai Rabarir v Bipinchandra Naranbhai Barot, Heir and Administrator of Property of deed Naranbhai Palundra,* AIR 2013 Guj 272: LNIND 2013 GUJ 56 : JCNO GUJ 2013 0045.
344. *Shyam Singh v Daryao Singh,* AIR 2004 SC 348 : (2003) 9 JT 151 : (2003) 9 Scale 802.
345. *Mangtin v Rahibai,* AIR 2012 Chh 77.
346. *Kuppa v Mhasti,* (1931) 33 Bom LR 633 : 134 IC 337; *Ramnarayan v Ram Ratan* 149 IC 354 : AIR 1934 Nag 18.
347. *Bhaskar Waman Joshi v Narayan Rambilas Agarwal,* [1960] 2 SCR 117, p 122 : AIR 1960 SC 301 : [1960] SCJ 327 : [1960] 2 SCA 189; *L Bapuswami v N Pattay Goudner,* AIR 1966 SC 902; *Padmashree SN Swamy v Gowaramma,* AIR 1993 Kant 208, p 213, (transaction held to be an out and out sale, with option to repurchase and not a mortgage by conditional sale).

It has been held by the Allahabad High Court,[348] that the proviso does not have retrospective effect.

In Punjab, where the TP Act is not in force, a sale deed and a stipulation for reconveyance by a separate document may amount to a mortgage, if the latter is registered, for the rule contained in the proviso has been held not to embody a rule of justice, equity and good conscience.[349]

(43) Limitation for a Suit on a Simple Mortgage

The period of limitation is 12 years from the date when the money sued for becomes due.[350]

CLAUSE (D)

(44) Usufructuary Mortgage

In a usufructuary mortgage, the mortgagee is placed in possession and has a right to enjoy the rents and profits until the debt is paid.[351] It is not necessary that the mortgagee should take physical possession, for the mortgagor may continue in possession as lessee of the mortgagee,[352] or he may direct the tenants to pay rent to the mortgagee;[353] but unless there is a clause providing for the mortgagee going in possession, there cannot of course, be a usufructuary mortgage.[354] As possession by the mortgagee is the distinguishing feature of such a mortgage, it follows that there cannot be two different usufructuary mortgages on the same property at the same time.[355] When a mortgage was executed and the property mortgaged was leased to the mortgagee, both formed one transaction which was a usufructuary mortgage, and not a simple mortgage.[356] A *lekha mukhi* mortgage in Punjab is a usufructuary mortgagee.[357]

Where a mortgage is void by virtue of breach of section 165, MP Land Revenue Code, possession has to be given back to mortgagor. Parties must return benefits received to each other, by virtue of section 65, Indian Contract Act, 1872 where an agreement becomes void, or is discovered to be void.[358]

The expression "usufructuary mortgage" as understood in the context of the TP Act, does not apply to the said expression as used in section 12 of the Bihar Money Lenders Act, 1975.[359]

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348. *Debi Singh v Jagdish Singh*, (1952) ILR 2 All 200 : AIR 1952 All 716.
349. *Amir v Inder Singh*, 147 IC 1191 : AIR 1934 Lah 453; *Raghubar Dial v Zahur Ahmad*, (1946) 48 Punj LR 517; *Lal Chand v Atma Ram*, (1960) 62 Punj LR 586 : AIR 1960 Punj 444; *Sita Ram v Basheshar Dayal*, (1963) 65 Punj LR 1064 : AIR 1964 Punj 81.
350. *Vasudeva v Srinivasa*, (1907) ILR 30 Mad 426 : 34 IA 186. See also Limitation Act 1963 : Article 63.
351. *Hastimal v P Tej Ram Sharma*, AIR 2007 SC 3246 : (2007) 11 SCC 87.
352. *Feroz Shah v Sobhat Khan*, 60 IA 273 : (1933) All LJ 1193 : 37 Cal WN 993 : 58 Cal LJ 52 : 65 Mad LJ 150 : 35 Bom LR 877 : 143 IC 659 : AIR 1933 PC 178; *Raja Pertab Bahadur v Gajadher*, (1902) ILR 24 All 521 : 29 IA 148; *Kapildeo Narain Singh v Deputy Collector Land Reforms*, AIR 1985 Pat 183, p 185.
353. *Venkataratnam v Varahaliah*, (1932) 63 Mad LJ 310 : 139 IC 449 : AIR 1932 Mad 768.
354. *Bachan Singh v Waryam Singh*, AIR 1961 Punj 477.
355. *Ram Narain Lal v Murli Dhar*, (1920) 5 Pat LJ 644 : AIR 1920 Pat 67; *Manu Pande v Mt Sukhalia* AIR 1958 Pat 79.
356. *Isaq Hussain v Sahu Chedda*, AIR 1949 All 312.
357. *Gahi Mal v Shera*, (1881) PR 90; *Khandu Lal v Fazal*, (1920) ILR 1 Lah 89 : 51 IC 953; *Karam Chand v Shera*, 133 IC 655 : AIR 1931 Lah 498.
358. *Haji Fatima Bee v Prahlad Singh*, AIR 1985 MP 1.
359 *Surendra Prasad v Member, Board of Revenu Patna*, AIR 1995 Pat 69 : (1995) 1 PLJR 377.

The words "expressly or by implication binds himself to deliver possession" were inserted by the amending Act of 1929. The fact that possession was not given cannot alter the character of the transaction,[360] and the words now inserted make it clear that the mortgagee who is entitled to possession under the mortgage, but who has not received possession, is a usufructuary mortgagee. There is nothing illegal in a usufructuary mortgagee leasing the property to the mortgagor. The mere fact that at the time of the execution of the mortgage it was agreed that the mortgagor would continue in possession as a lessee, would not affect the latter's legal position.[361] Where a usufructuary mortgagee leases the property back to the mortgagor, whether the relationship between them is that of landlord and tenant would depend upon the construction of the deed. If it is, the mortgagee may evict the mortgagor for non- payment of rent.[362] A Full Bench of the Karnataka High Court while answering the question whether an usufructuary mortgagee is a landlord for purposes of part II of the Karnataka Rent Control Act, 1961 in the affirmative, held that since delivery of possession is a necessary concomitant of a usufructuary mortgage and since the concomitant entitles the usufructuary mortgagee to claim possession of the property to the exclusion of all others, including the mortgagor, the mortgagee is for all intents and purposes the owner himself, as he steps into the shoes of the owner, and by reason of it he acquires the status of a landlord under section 3(h) as well as the provisions of part II for claiming possession of mortgaged premises for his personal use.[363] The Supreme Court has found itself in agreement with the view of the Full Bench.[364] The document introducing any conditions other than those covered by section 58(d) could not be regarded as usufructuary mortgage. Thus, where the document fixed the time to enjoy property for a term of 25 years on *illidarwar* rights; created a personal covenant to pay value of improvements as decided by four respectable persons, and after the period of 25 years or when the mortgagee demanded mortgage money, payment of not only the mortgage money, but also the value of improvements were agreed as the terms of the document, it was held that the document cannot be regarded as usufructuary mortgage.[365] The essential features of a usufructuary mortgage must be evident from the recitals of the mortgage deed itself. In order to determine whether a mortgage is a simple mortgage or a usufructuary mortgage, the course of conduct of parties is of no relevance for the construction of a deed which is itself unambiguous.[366] Normally upon transfer in case of usufructuary mortgage, the mortgagee is entitled to enjoy the usufruct of the property, there can be conditions stipulated in the mortgage deed prohibiting the mortgagee to alienate the interest further even by way of lease or otherwise. If the mortgagee violates the condition and transfers it, the transferee of mortgagee who cultivated the property under the mortgage cannot be deemed to be a lawful tenant.[367]

A usufructuary mortgage of an occupancy holding was not valid as a mortgage with all its incidents and subject, to the provisions of law relating to usufructuary mortgage, but was valid only in a qualified sense, i.e., in the sense of subletting with a covenant that the

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360. *Khunni Lal v Madan Mohan,* (1908) ILR 31 All 318, p 322 : 1 IC 208; *Modun Mohun v Ashad Ally,* (1884) ILR 10 Cal 68; *Ram Khilawan v Ghulam Hussain,* (1933) ILR 8 Luck 190 : 141 IC 464 : AIR 1933 Oudh 35; *Harnath Singh v Maiya Ambika Devi,* 193 IC 272 : AIR 1941 Pat 307.
361. *Mahomed Isaq Hussain v Cheddalal,* AIR 1948 All 348.
362. *Asa Ram v Kishan Chand,* 120 IC 166 : AIR 1930 Lah 386; *Bakshi Ram v Buta Singh,* (1957) ILR Punj 331 : AIR 1957 Punj 57; *Ram Udhar v Hari Chand,* (1958) ILR Punj 427 : AIR 1958 Punj 140.
363. *R Virendra v The House Rent Accommodation Controller,* AIR 1988 Kant 285 : (1988) 2 Kar LJ 8.
364. *SB Abdul Azeez v M Maniyappa Setty,* AIR 1989 SC 553, p 556 : (1988) 4 SCC 727 : 1988 Supp (3) SCR 505.
365. *A Narayana Rao v Laxmi Amma,* AIR 1994 Ker 371 : ILR 1994 (3) Kerala 329.
366. *Mathai Mathai v Joseph Mary,* (2015) 5 SCC 622 : 2014 (6) SCALE 41 : JT 2014 (6) SC 526 : AIR 2014 SC 2277.
367. *Monappa Naika v Land Tribunal, Puttur,* AIR 2012 Karn 161.

mortgagor will not be entitled to recover possession without payment of the mortgage money, and further, that under such a mortgage there is no transfer of the right of an occupancy tenant and consequently no suit for redemption was maintainable, nor was there any extinguishment of the right of an occupancy tenant upon expiry of the period of limitation fixed for redemption under Article 148 of the Limitation Act, 1908.[368] A mortgagor executed a usufructuary in respect of his agricultural rent. Since no rent in respect of the land was paid to the landlord, he instituted a suit for arrears of rent and obtained a decree and on an execution thereof, the property was put to sale. The mortgagee paid the decretal amount. It was held that if on some default in payments of rent, a rent decree is obtained and the mortgagee pays the sum even then the mortgage in question is liable to be redeemed at the option of the mortgagor. The mortgagor cannot escape from his obligations by bringing the equity of redemption of sale in execution of a decree on the personal covenant.[369]

(45) Appropriation of Rents and Profits

The manner of appropriation of rents and profits depends upon the terms of the deed. The definition has been widened by the addition of the words "or any part of such rents and profits." This would cover cases where the mortgagee is put in possession and retains part of the rents and profits in discharge of the debt, and pays the residue as rent to the mortgagor. Thus, in a Madras case[370] the plaintiff in return for a loan of ₹ 1,400 put the defendant in possession of premises of a rental value of ₹ 16-12-0 per mensem. The defendant retained ₹ 14 towards principal and interest, and paid the plaintiff ₹ 2-12-0 as rent.

The rents and profits or part of the rents and profits may be appropriated

(1) in lieu of interest;

(2) in lieu of principal; or

(3) in lieu of principal and interest.

The first case resembles the Welsh mortgage, and is the most common form where the borrower practically says to the creditor: "you lend the money and I lend the land; if either of us wants that which he has lent, he shall restore that which was lent to him.[371] The mortgagor recovers possession when he pays the principal and there is no question of an account between the mortgagor and mortgagee. In the first case, the mortgagee takes the chance of the rents and profits being greater or less than the interest.[372] In the second case, the mortgagor continues to pay interest, and is entitled to recover possession when the rent and profits received was equal to the amount of the principal. An account of the rents and profits is necessary for this purpose. In the third case, the mortgagor is not entitled to recover possession until the principal and interest are paid out of the rents and profits. This is a common form and an account is necessary to ascertain whether the principal and interest have been paid off. There are cases, however, in which the condition is that the rents and profits are taken in lieu of interest and defined portions of the principal. Thus, if the condition is that the rents and profits each year shall be taken in lieu of interest and one-tenth of the principal, the debt is discharged in 10 years, and no account is necessary.

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368. *Ram Adhar Singh v Bansi,* AIR 1987 SC 987, p 989; *Samharu v Dharamraj Pandey,* AIR 1970 All 350. See also '*Zuripeshgi* Leases' below.
369. *Parichham Mistry v Acchiabar Mistry,* AIR 1997 SC 456.
370. *Venkateshwara v Kesava,* (1879) ILR 2 Mad 187; *Mashook Marem,* (1875) 8 Mad HC 31.
371. *Vanneri v Patanattil,* (1865) 2 Mad HC 382; *Sadashiv v Vyankatrao,* (1896) ILR 20 Bom 296.
372. *Raja Pertab Bahadur v Gajadher,* (1902) ILR 24 All 521, p 531 : 29 IA 148.

The characteristics of a usufructuary mortgage as defined in this section are:

(1) there is no personal liability on the mortgagor;

(2) no time limit is fixed;

(3) the mortgagee takes the whole or part of the rent and profits.[373]

(46) No Personal Liability

The mortgagee takes possession, and looks to the rent and profits to repay himself. The mortgagor cannot be sued personally for the debt.[374]

In a Calcutta case,[375] the words were "having paid the principal money in the month of *Chaitra* 1297 we shall take back the documents and the land. In case we fail to repay the principal money at due date, the *sudbharna* bond shall remain in force." But they were held to import no personal covenant. As there is no personal liability, a debt secured by a usufructuary mortgage cannot be attached under O 21, rule 46 of the Code of Civil Procedure as if it were a simple debt.[376] The interest of such a mortgagee can only be attached under O 21, rule 54.

This characteristic is lacking in many mortgages that are commonly called usufructuary. A personal covenant is often included in order to provide a personal remedy against the mortgagor. If the covenant does not import a right of sale, it has been said that the character of the mortgage is not altered,[377] but it is submitted that it is an anomalous mortgage. If it does import a right of sale, it would still be an anomalous mortgage since the amending Act of 1929, but a simple mortgage usufructuary under the TP Act as it stood before the amendment.

As section 58(d) stands, if under the mortgage deed, a mortgagor expressly or by implication binds himself to convey possession of the mortgaged property to the mortgagee, the transaction is a usufructuary mortgage, notwithstanding the fact that the actual possession has not been delivered. Such a transaction being a usufructuary mortgage, section 67 does not empower the mortgagee to bring the property to sale. Section 68 may confer a right on the mortgagee to sue for the mortgage money when the mortgagor fails to deliver the property to him without disturbance by the mortgagor or any person claiming under him. This does not expressly or by implication confer a right on him to recover the mortgage money by the sale of the property.[378]

(47) No Time Limit

The mortgagee retains possession until the mortgage money is paid. It has been held that this is an uncertain time dependent on the state of the account or the ability of the mortgagor to repay, and that if a time limit if fixed the mortgage is not a mortgage "until payment of the

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373. *Mohammed Saeed v Abdul Alim*, AIR 1947 Lah 40.
374. *Chathu v Kunjan*, (1889) ILR 12 Mad 109, dissenting from *Venkatasami v Subramanya*, (1888) ILR 11 Mad 88; *Sadashiv Abaji v Vyankatrao*, (1896) ILR 20 Bom 296; *Ram Narayan Singh v Adhindra Nath*, (1917) ILR 44 Cal 388 : 44 IA 87 : 38 IC 932 : AIR 1916 PC 119.
375. *Luchmeshar v Dookh*, (1897) ILR 24 Cal 677, followed in *Kamal Nayan v Ram Nayan*, 120 IC 308 : AIR 1930 AP 152.
376. *Manilal Ranchod v Motibhai*, (1911) ILR 35 Bom 288 : 10 IC 812; *Subraya Pai v Subramania Pattai*, 11 IC 218 : AIR 1928 Mad 648. See *Ramasami v Srinivas*, (1916) ILR 39 Mad 389 : 28 IC 284.
377. *Kashi Ram v Sardar Singh*, (1906) ILR 28 All 157; *Krishna Bhaichand v Hari*, (1908) 10 Bom LR 615; *Mohammad Abdullah v Mohammad Yasin*, 141 IC 377 : AIR 1933 Lah 151.
378. *Subarayya v Subramanyan*, (1952) 2 Mad LJ 55 : AIR 1952 Mad 856.

mortgage money" and is, therefore, not a usufructuary mortgage.[379] But this view does not seem to be correct. A time limit may be impliedly fixed when the agreement is that referred to in section 77, when the rent and profits are in lieu of interest and defined portion of the principal. In *Ram Narayan Singh v Adhindra Nath*[380] a fixed date was appointed for restoration of possession after calculation of the time when the mortgage money would be discharged out of the usufruct, yet the Privy Council held that it was only a usufructuary mortgage. Again section 62(b) expressly provides for a case where a term is prescribed for the payment of the mortgage money. However, if the time limit imports a personal covenant to pay and a right of sale in default, the mortgage would not be a usufructuary mortgage, but an anomalous mortgage of the species "simple mortgage usufructuary".[381] If at the expiry of the time limit the mortgage is to become a mortgage by conditional sale, it is an anomalous mortgage of the species "mortgage usufructuary by conditional sale".[382]

(48) Usury Regulations

Usufructuary mortgages were a cloak for usurious transactions, the rent being taken in lieu of exorbitant interest. The Usury Regulations[383] were designed to check this practice by limiting the mortgagee to interest at 12 per cent and by making him liable to account for rents and profits, notwithstanding the terms of the contract, and allowing redemption before the expiry of the period fixed in the deed.[384] Usufructuary mortgages executed while these regulations were in force are controlled by them, even though the suit be filed under the TP Act.[385] Thus, in one case redemption was allowed before the expiry of the period fixed.[386] But in a case where the contract was not usurious, the Privy Council held that a condition exonerating the mortgagee from filing accounts was valid, although it was governed by the regulations.[387]

(49) Possession of property, recovery of[388]

Possession of the mortgagee is permissive in character in the sense that it is with the consent of the mortgagor.[389] Therefore, on redemption of mortgage, the mortgagee is

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379. *Hikmatulla v Imam Ali*, (1890) ILR 12 All 203 (mortgage of land for 4 years, the mortgagee to credit the rents and profits to interest and the balance to capital, and the mortgagor to pay the deficiency at the end of the term); *Visvalinga v Palaniappa*, (1898) ILR 21 Mad 1; *Tukaram v Ramchand*, (1902) ILR 26 Bom 252; *Krishna v Hari*, (1908) 10 Bom LR 615; cf *Shaik Idrus v Abdul Rahiman*, (1892) ILR 16 Bom 303 (a case under Reg 5 of 1827); contra *Vaddiparthi v Appalanarasimhulu*, (1921) 41 Mad LJ 563 : 68 IC 717 : AIR 1921 Mad 517.
380. *Ram Narayan Singh v Adhindra Nath*, 44 IA 87 : (1916) ILR 44 Cal 388 : 38 IC 932 : AIR 1916 PC 119.
381. *Pargan Panday v Mahatam Mahto*, (1907) 6 Cal LJ 143; *Pitamber Parkait v Madhu Sudan*, 6 IC 153; *Dattambhat Rambhat v Krishnabhat*, (1910) ILR 34 Bom 462 : 7 IC 446; *Jag Sahu v Ram Sakhi*, (1922) ILR 1 Pat 350 : 65 IC 666 : AIR 1972 Pat 58; *Sivakami v Gopala*, (1894) ILR 17 Mad 131; *Udayana Pillai v Senthivelu*, (1896) ILR 19 Mad 411; *Mahadaji v Joti*, (1892) ILR 17 Bom 425; *Madhwa v Venkata*, (1903) ILR 26 Mad 662; *Kangaya v Kalimuthu*, (1904) ILR 27 Mad 526; *Chhathi Lal v Bindeshwari Prasad*, (1929) ILR 8 Pat 16 : 120 IC 32 : AIR 1929 Pat 605; *Sarajbashini Ghose v Baijnath Pandey*, 176 IC 892; *Indu Bala v Monimala*, (1955) ILR AP 505.
382. Macpherson, p 13; *Ramasami v Samiyappanayakam*, (1882) ILR 4 Mad 179, p 183; *Girwar Singh v Thakur Narain*, (1887) ILR 14 Cal 730, p 737.
383. Bengal Regulation 15 of 1793 : 34 of 1803 : 17 of 1806; Madras Regulation 34 of 1802; Bombay Regulation 1 of 1814.
384. *Shah Mukhun Lal v Sree Kishen Singh*, (1869) 12 MIA 157 : 2 Bom LR 44 : 11 WR 9.
385. *Samar Ali v Karim-ul-lah*, (1886) ILR 8 All 402.
386. *Tippayya v Venkata*, (1883) ILR 6 Mad 74 dissenting from *Perlathail v Mankude*, (1881) ILR 4 Mad 113.
387. *Badri Prashad v Babu Murlidhar*, (1882) ILR 2 All 593.
388. See also Transfer of Property Act 1882, section 83.
389. *Pratap Singh Babu Ram v Deputy Director of Consolidation, Mainpuri*, (2000) 4 SCC 614; *Shri Ram v Dhan Bahadur Singh*, AIR 1965 All 223; *Mustafa Khan v Dy Director of Consolidation*, AIR 1973 All 372 : (1972) All LJ 854; *Mahabal Singh v Ram Raj*, AIR 1950 All 604 : (1950) All LJ 713.

required to hand over the possession of the property to the mortgagor. There are, however, certain exceptions to it. In case of the mortgagee, a tenant of the mortgagor prior to the mortgage, it is a general principle of law that there is no automatic merger of the tenancy rights with the mortgage rights. Both of them operate independent of each other, and on redemption of the mortgage, tenancy would revive except in a case where an intention of the parties is reflected to the contrary.[390] The effect of the mortgage is to keep the lessee's rights in abeyance which stood revived upon the redemption of mortgage.[391] For a merger to arise, it is necessary that a lesser estate and a higher estate should merge in one person at one and the same time and in the same right, and no interest in the property should remain outside. In the case of a lease, the estate that is in the lessor, is a reversion. In the case of a mortgage, the estate that is outstanding, is the equity of redemption of the mortgagor. Therefore, there cannot be a merger of lease and mortgage in respect of the same property since neither of them is a higher, or a leaser estate than the other.[392] Since there is no automatic merger, in absence of proof of surrender of lease by the mortgagee/lessee, the mortgagor/lessor is not automatically entitled to recover possession of leased premises on redemption of mortgage.[393] However, if the mortgagee had no tenancy rights prior to mortgage, he cannot claim the same after mortgage ends.[394]

As regards tenants inducted by the mortgagee, the Supreme Court has held that he may grant lease not extending beyond the period of the mortgage; any leases granted by him must come to an end at redemption[395] since it is not an act of prudent management.[396] They can be evicted on redemption of mortgage.[397]Such tenants are not entitled to the protection of rent control legislation against the mortgagor after the redemption of the mortgage.[398]An agricultural lease may confer at best the status of tenants from year to year.[399]

(50) *Zuripeshgi* and Similar Leases

Zuripeshgi leases bear a close resemblance to usufructuary mortgages, but are not mortgages, unless the lease is for the purpose of securing a debt. The word *zuripeshgi* means lease for a premium—the premium being the original loan. Mortgages were given in this form in order to evade the prohibition against usury in the Koran, and in the Usury Regulations. The usual form of such a mortgage was a loan repayable on the day the lease should expire, and the rent is either wholly the interest, or partly the interest, and partly

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390. *Parmar Kanaksinh Bhagwansinh v Makwana Shanbhai Bhikhabhai*, (1995) 2 SCC 501 : AIR 1995 SC 188; see also *Nand Lal v Sukhdev*, (1987) SCC 87 (Supp); *Nemi Chand v Onkar Lal*, AIR 1991 SC 2046; *Ajay Kumar v Gujjar Mal*, AIR 2004 P&H 167; *MC Venkateshappa v KN Sadashivaiah*, AIR 2004 Kant 438, p 439 (on facts, found that mortgagee was a prior tenant, and there was no evidence to indicate termination of tenancy)
391. *Narayan Vishnu Hendre v Baburao Savalaram Kothawale*, (1995) 6 SCC 608 : AIR 1996 SC 368.
392. *Shah Mathuradas Manganlal & Co v Nagappa Shankarappa Malage*, (1976) 3 SCC 660 : AIR 1976 SC 1565, approving *Narayan v Ramchandra*, (1963) 65 Bom LR 449; *Gambangi Applaswamy Naidu v Behara Venakataramanayya Patro*, (1984) 4 SCC 382 : AIR 1984 SC 1728.
393. *Gopalan Krishnankutty v Kunjamma Pillai Sarojini Amma*, (1996) 3 SCC 424 : AIR 1996 SC 1659; *Cheriyan Sosamma v Sundaressan Pillai Saraswathy Amma*, (1999) 3 SCC 251 : AIR 1999 SC 947.
394. *Kharati Lal v Janak Raj*, AIR 2004 P & H 29.
395. *Mahabid Gope v Harbans Narain Singh*, AIR 1952 SC 205 : [1952] SCR 775; see also *All India Film Corp Ltd v Raja Gyan Nath*, (1969) 3 SCC 79; *Sachalmal Parasram v Ratanbai*, AIR 1972 SC 637.
396. *Om Prakash Garg v Ganga Sahai*, AIR 1988 SC 108.
397. *Shambhu Dayal v Shivcharan Lal*, AIR 2004 Raj 118.
398. *Hanumant Kumar Talesara v Mohan Lal*, (1988) 1 SCC 377 : AIR 1988 SC 299 affirming the view taken by a Full Bench of the Rajasthan High Court reported in AIR 1985 Raj 11 : 1984 Rajasthan LR 709.
399. *Harihar Prasad Singh v Munshi Nath Prasad*, AIR 1956 SC 305 : [1956] SCR 1; *Asa Ram v Ram Kali* AIR 1958 SC 183.

repayment of the principal with a proviso that the lessee shall continue in possession till the loan should be repaid.[400] Once you get a debt with the security of land for its repayment, then the arrangement is a mortgage by whatever name it is called.[401] Where, however, a lease does not intend to create the relationship of debtor and creditor and reserves no right of redemption to the lessor, but simply asks the lessee to quit the land without any payment on the part of the lessor at the expiry of the term of the lease, it is *zuripeshgi* lease, and not mortgage.[402] The Privy Council in the *Bengal Indigo Company v Mohunt Roghubur Das*[403] described the possession of the lessees under a *zuripeshgi* lease as being "in part at least, not that of cultivators only, but that of creditors operating repayment of the debt due to them by means of their security." The case of *Venkateshwara v Kesava*[404] is a good illustration of such a transaction. The plaintiff borrowed ₹ 1,400 from the defendant, and leased him a piece of land and a warehouse for eight years. It was agreed that the rent of the warehouse should be ₹ 16-12-0 per mensem, and that the defendant should retain ₹ 14 as interest on the advance and pay ₹ 2-12-0 as rent to the plaintiff. The warehouse was destroyed by fire after four years; the defendant ceased to pay ₹ 2-12-0 as rent, and the plaintiff sued to recover possession for non-payment of rent. The suit was dismissed on the ground that the defendant was entitled to possession as mortgagee. Justice Innes said:

> The gist of the agreement was not a letting of the premises with a rent reserved, but a usufructuary mortgage of the premises with a certain small portion of its income made payable to the plaintiff.

As the lease is security for the loan, it has been held that *zuripeshgi* leases are construed as mortgages, when there is a right of redemption expressly or impliedly reserved.[405] In *Maharaja Kesho Prasad v Chandrika Prasad,*[406] CJ Dawson Miller:

> I think the result of the authorities as well as of the textbooks is that the test in such cases must be whether there is a secured debt and a right of redemption.

In a mortgage by *zuripeshgi* lease for a fixed term, a personal covenant to repay is implied.[407] If the lease is not security for the loan, the transaction would not be a mortgage, but a lease and an ordinary money debt.[408] If the original premium is not an advance which is repayable, the transaction is a lease, and not a mortgage.[409] The Supreme Court has approved[410] the above discussion in the fourth edition of this work, and set out the following tests to ascertain whether the transaction is a lease or a mortgage:

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400. *Rutton Singh v Greedharee*, (1868) 8 WR 310; *Sheo Golam Singh v Roy Dinkur*, (1869) 12 WR 215; *Ram Doolary v Thacoor*, (1878) ILR 4 Cal 61; *Tukaram v Ramchand*, (1902) ILR 26 Bom 252; *Bengal Indigo Co v Mohunt Roghubur Das*, (1896) ILR 24 Cal 272; *Chennapatnam v Tadakamalla*, (1904) ILR 27 Mad 86; *Mahmad Muse v Bagas*, (1908) ILR 32 Bom 569.
401. Ghose, *Law of Mortgages*, vol 1, p 102; *Immani Seshayya v Dronamraju*, (1930) 57 Mad LJ 800 : 124 IC 282 : AIR 1930 Mad 160; *Rameshwar Narain v Pani Ram*, AIR 1934 Pat 217.
402. *Tulsi Ram v Muna Koer*, (1936) ILR 12 Luck 161 : 162 IC 225 AIR 1937 Oudh 146.
403. *Bengal Indigo Company v Mohunt Roghubur Das*, (1896) ILR 24 Cal 272 : 23 IA 158, p 165.
404. *Venkateshwara v Kesava*, (1879) ILR 2 Mad 187, p 191.
405. *Basant Lal v Tapeshri*, (1881) ILR 3 All 1; *Gopal v Desai*, (1882) ILR 6 Bom 674.
406. *Maharaja Kesho Prasad v Chandrika Prasad*, (1923) ILR 2 Pat 217 : 68 IC 394 : AIR 1923 Pat 122; *Hussain Ali Shah v Sardar Ali Shah*, 149 IC 509 : AIR 1933 Lah 786.
407. *Chhathi Lal v Bindeshwari Prasad*, (1929) ILR 8 Pat 16 : 120 IC 32 : AIR 1929 Pat 605.
408. *Kammara Peda v Kararna Chennapa*, (1915) 28 Mad LJ 303 : 28 IC 842; *Chotey Lal v Mohanian*, (1930) 28 All LJ 332 : 127 IC 425 : AIR 1930 All 375; *Mahadeo v Rameshar*, (1935) All LJ 275 : 157 IC 364 : AIR 1935 All 150.
409. *Abdulbhai v Kashi*, (1887) ILR 11 Bom 462; *Ramautar v Batuk Behari*, AIR 1952 Pepsu 56.
410. *Maharajadhiraj Sir Kameshwar Singh v State of Bihar*, [1960] 1 SCR 332, p 346 : AIR 1959 SC 1303 : [1960] SCJ 145. And see *Mahesh Bhagat v Ram Baran*, [1968] 3 SCR 742, p 744 : AIR 1968 SC 1466 : [1969] 1 SCJ 89.

(1) Is there an express term which makes the loan returnable either by repayment, or by enjoyment of the usufruct;

(2) Is interest fixed;

(3) Is the right of redemption granted;

(4) Is there any provision for personal liability if any amount remains outstanding after the term of the lease.

These tests have been applied in several cases.[411]

It cannot, of course, be a mortgage where the mortgagee is entitled to remain in possession even after the discharge of the entire amount advanced.[412]

In a mortgage by *zuripeshgi* lease, the lease and the mortgage may or may not be separable transactions, and it is purely a question of construction whether the remedies can be separately pursued.[413] The undernoted cases[414] are examples of combined lease and mortgage. The lease was of a coal mine and the mortgage was of the leasehold premises to secure an advance made by the lessee to the lessor, and the mortgagee-lessee also had the right to appropriate the royalties to the discharge of the principal money secured by the mortgage. These were separate transactions, and the mortgaged property was sold subject to the lease. In a Punjab case,[415] where the lease was merely a means of realising the interest of the mortgage which was executed the same day, a suit for rent was held to bar a subsequent suit for recovery of the principal and interest under O 2, rule 2 of the Code of Civil Procedure.

In a *zuripeshgi* lease, the mortgagee is the lessee and has physical possession. However, a usufructuary mortgagee may lease the mortgaged property to the mortgagor and put him in physical possession. In such cases, the lease and mortgage are distinct.[416] The distinction between a usufructuary mortgage and a *kanam- kuzhikanam,* a transaction common in the south, was considered by the Supreme Court in *Lakshmi v Narayani.*[417] The court held that the question must be resolved by considering the transaction as a whole to determine whether the purpose of the transaction was the enjoyment of the property, or whether it was intended to secure repayment of a debt; the description in the document was

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411. *Apaya v Govind,* AIR 1956 Bom 625; *Harilal Bhagwanji v Hemshankar Umiyashankar,* (1958) ILR Bom 765 : 59 Bom LR 881 : AIR 1958 Bom 8; *Somulu v Appalanaidu,* AIR 1958 AP 501; *Ayyappan v Venkedeswara Naikkan,* (1962) ILR 2 Ker 614 : AIR 1963 Ker 309; *Puthanjamma v Channabasavanna,* AIR 1967 Mys 41.
412. *Board of Revenue v Simpson & Micanechy Ltd,* (1958) ILR Mad 917 : (1958) 2 MLJ 273 : AIR 1958 Mad 508.
413. *Khuda Bakhsh v Alim-un-nissa,* (1905) ILR 27 All 313; *Chimman Lal v Bahadur,* (1901) ILR 23 All 338; *Altaf Ali v Lalta Prasad,* (1897) ILR 19 All 496; *Baghelin v Mathura Prasad,* (1882) ILR 4 All 430; *Imdad Hasan v Badra Prasad,* (1898) ILR 20 All 401; *Madhwa v Venkata,* (1903) ILR 26 Mad 662; *Meenakshisundara v Rathnasami,* (1918) ILR 41 Mad 959 : 49 IC 291; *Kishundayal v Mahabir,* (1920) 5 Pat LJ 492 : 58 IC 291; *Karamat Ali Khan v Ganeshi Lal,* (1927) ILR 49 All 658 : 101 IC 516 : AIR 1927 All 552; *Ramnarain Pasi v Sukhi,* (1957) ILR AP 24; *Lalchand v Nenuram,* (1962) ILR 12 Raj 947 : AIR 1963 Raj 69.
414. *Baraboni Coal Concern Ltd v Deb Prasanna Mukerji,* (1934) 38 Cal WN 481 : 59 Cal LJ 207 : 66 Mad LJ 479 : 154 IC 596 : AIR 1934 PC 119.
415. *Natha Singh v Chuni Lal,* 47 IC 364.
416. *Mathuralal v Keshar Bai,* [1970] 3 SCR 724 : AIR 1971 SC 310 : [1917] 1 SCJ 171 : (1970) 1 SCC 454; *Chimman Lal v Bahadur,* (1901) ILR 23 All 338; *Uttam Chandra v Rajkrishna,* (1920) ILR 47 Cal 377 : 55 IC 517; *Asa Ram v Kishan Chand,* 120 IC 166 : AIR 1930 Lah 386; *Abdul Rahim v Raghunath,* 130 IC 531 : AIR 1931 Pat 22; *Ganpat Turi v Mohammad Ashraf Ali,* AIR 1961 Pat 133; *Lalchand v Nenuram,* (1962) ILR 12 Raj 947 : AIR 1963 Raj 69.
417. *Lakshmi v Narayani,* [1967] 1 SCR 314 : AIR 1967 SC 876.

immaterial. This was reiterated by the Supreme Court in *Mangala v Puthiyaveethil.*[418] The court in the latter case emphasised the quantum of money paid and the proportion it bore to the value of the property; if it was a substantial proportion of the value, the transaction would be a mortgage.

Some of the guidelines for deciding whether a transaction is a lease or a mortgage are, that the name given to the document is not conclusive. The question has to be decided with reference to the predominant intention of the parties as gathered from the recitals and the terms in the entire document, and the surrounding circumstances, including the conduct of the parties. Further, while, in the case of a mortgage, there is a transfer of interest in the property to secure repayment of a debt, in the case of a lease it is transfer of a right to enjoy the property. In the instant case, the property was the premises of a shop. The transferee was to be in possession, and was to carry on his business therein, but with no power to lease it out. No rate of interest was fixed in the document and there was no mention of how the money said to have been lent should be realised if the transferor, for some reason, could not remain in possession. Nor was there any clause that if possession was not re-delivered at the end of the period, the transferor had the right to redeem the property. The transferee was a dealer in liquor, and was having business in the premises. On earlier two occasions, the non-residential premises had been given to the transferee. Considering all the above facts, it was held that the predominant intention of the parties was not to secure the repayment of debt. Taking into account the conduct of the parties as evidenced by the earlier deals, the transaction was held to be a lease, and the transferor's suit for "redemption" of the alleged self- redeeming mortgage was dismissed.[419]

CLAUSE (E)

(51) English Mortgage

In an English mortgage, as defined in section 58(e), there is, in form, a transfer of ownership to the mortgagee, with a covenant to repay the debt on a certain date, and a proviso that on this condition being performed the mortgagee will retransfer the property to the mortgagor. Options as regards earlier payment or extension of time for repayment are matters of grace, which do not affect the undertaking to repay at a certain date.[420] In *Narayana v Venkataramana*[421] the Madras High Court said:

> The three essentials of an English mortgage are
>
> (1) That the mortgagor should bind himself to repay the mortgage money on a certain day;
>
> (2) That the property mortgaged should be transferred absolutely to the mortgagee;
>
> (3) That such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage money, on the day on which the mortgagor bound himself to repay the same.

The question arises whether this requirement that the property should be transferred absolutely is a mere matter of form, or is a matter of substance so that the whole of the interest of the mortgagor must pass to the mortgagee. The word "absolutely" in the definition of an English mortgage in clause (e) seems inconsistent with the general definition in clause (a) that "a mortgage is a transfer of an interest" in the property. If a mortgage is a transfer of an interest in property, it is not an absolute transfer. Chief Justice Rankin in *Bengal National Bank v Janaki Nath Roy,*[422] suggested that clause (e) and clause (a) might be

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418. *Mangala v Puthiyaveethil,* AIR 1971 SC 1575.
419. *Namdev Keshav Hindalekar v Nazar Sheriyar Mazada,* AIR 1983 Kant 19.
420. *Raja Janki Nath v Syed Asad Reza,* (1935) ILR 14 Pat 560.
421. *Narayana v Venkataramana,* (1902) ILR 25 Mad 220, p 235; *Apte v Price,* AIR 1962 AP 274.
422. *Bengal National Bank v Janaki Nath Roy,* (1927) ILR 54 Cal 813 : 104 IC 484 : AIR 1927 Cal 725.

reconciled, that the estate vests absolutely in the mortgagee, and that the assignment is not less absolute because the mortgagee is under a covenant to reconvey. It was accordingly held that a mortgage by a lessee by way of an English mortgage operated as an absolute assignment of the lease and established privity of estate between the assignee and the lessor, so as to entitle the lessor to claim rent from the assignee. The reasoning of the learned Chief Justice was, however, doubted in a later Calcutta case[423] where with reference to this inconsistency J Mukerji said:

> The definition of an English mortgage as given in the Transfer of Property Act section 58(e) must be read subject to the definition of a mortgage as given in clause (a) of that section, and consequently, an English mortgage in India can hardly be regarded as the transfer of the entire estate of the mortgagor to the mortgagee. It is correct, however, not to regard what is left in the mortgage as an equitable estate, but it is nevertheless some estate; an interest only in the estate having been transferred under the mortgage. In our opinion, therefore, it is not easy to say of an assignment by way of an English mortgage in India executed by a lessee that the whole of the estate passes under the mortgage to the mortgagee.

The reasoning adopted by J Mukerji found favour with the Judicial Committee in *Ramkinkar v Satyacharan*[424] where the nature of an English mortgage as defined in section 58(e) has been clearly explained.

The question as to whether the deed is a deed of mortgage by conditional sale, or a deed of English mortgage, is one of the intention of the parties, to be gathered from the language of the deed, interpreted in the light of the surrounding circumstances. Where the transaction under the deed was a English mortgage, a decree for foreclosure was incompetent under section 67. However, in the instant case, the mortgagee-plaintiff had filed a suit for foreclosure and a final decree was passed in it, and the same cannot be set aside, keeping intact the preliminary decree for foreclosure against which no appeal was preferred by mortgager/appellant. When this was of English mortgage, the mortgagee had a right to apply for passing decree for sale of mortgaged property.[425] In *Ramkinkar v Satyacharan,*[426] the question that was ultimately raised was whether a lessor could sue a mortgagee from a lessee for rent. This he could do if there was a privity of estate between him and the mortgagee. There could be privity of estate between the lessor and the mortgagee if the mortgage operated as an absolute assignment of the lease by the lessee to the mortgagee.

The question was answered as follows:

> The Indian mortgagor, however, retains some rights, though the English rules of equity do not apply. He retains a right to a reconveyance of the land and a right to transfer such right by way of sale or second mortgage (sections 81, 82, 91 and 94), and this right in India is a legal right.

The interest which remains in the mortgagor, being thus a legal interest, its retention will, therefore, prevent the whole of the mortgagor's interest from passing to the mortgagee. The correctness of this position is also indicated by the fact that section 54 which deals with sale speaks of a sale as a transfer of ownership as opposed to the transfer of interest spoken of in section 58(a) in the case of a mortgage. The word "interest", it is pointed out, is, when used in opposition to ownership, more appropriate to a limited right. The question arises as to

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423. *Falakrishna Pal v Jagannath*, (1932) ILR 59 Cal 1314, p 1330 : 36 Cal WN 709 : 56 Cal LJ 187 : 140 IC 788 : AIR 1932 Cal 775.
424. *Ramkinkar v Satyacharan*, 66 IA 50 : (1939) ILR 1 Cal 283 : 41 Bom LR 672 : 43 Cal WN 281 : (1939) 1 Mad LJ 544 : 179 IC 328 : AIR 1939 PC 14.
425. *Kartick Chandra Mullick v Parchottam Das Goel*, AIR 1988 Cal 247.
426. *Ramkinkar v Satyacharan*, AIR 1939 PC 14.

what is the nature of this legal right. Whether it is a mere contractual right to have the property reconveyed? If it is, then under section 54 such contractual right does not create any interest in the property, and the mortgagor cannot possibly assign his right of redemption or create a second mortgage so as to bind the property. However, sections 81, 82, 91 and 94 recognise second mortgagor. It follows, therefore, that the right of a mortgagor in India is more than a mere contractual right, and must be a legal right in the property itself. If it is a legal right in the property which remains with the mortgagor, it clearly follows that the mortgagor has not parted with the whole of his rights. The issue, therefore, is to reconcile this position with the language of section 58(e) which speaks of absolute transfer of the mortgaged property to the mortgaged.

Referring to that section, their Lordships observed:

> In using those words, does it mean that no interest or no legal interest in the property remains in the mortgagor? Their Lordships cannot think so. If the sub-section stopped at the word "mortgagee" it might be necessary to put this construction upon it, but it did not stop there: it adds the proviso that the mortgagee 'will transfer' the property 'upon payment of the mortgage money as agreed.

Their Lordships observed that with this addition, the sub-section upon its true construction does not declare "an English mortgage" to be an absolute transfer of the property. It declares only that such a mortgage would be absolute were it not for the proviso for transfer. It does not determine what legal effect follows from the use of a particular form of words; it merely prescribes the form of words necessary to constitute what is known in India as an English mortgage. Section 58(e) deals with form, not substance. The substantial rights are dealt with in sections 58(a) and 60. Whatever form is used, nothing more than an interest is transferred, and that interest is subject to the right of redemption.

In India, the distinction exists between the position before and after the date of payment. Before that date, the mortgagor has an interest in the land which for the reasons given above is legal, and not equitable. After that date, he has the legal right of redemption given to him by section 60 of TP Act. In each case, he retains a legal interest in the property. Their Lordships, therefore, held that in India a mortgagor when he assigns his interest under a lease to a mortgagee does not under any of the forms specified in section 58 of the TP Act, transfer an absolute interest and consequently, the mortgagee is not liable by privity of estate for the burdens of the lease. In *Jagadamba Loan Co Ltd v Raja Shiba Prosad*[427] the Judicial Committee reiterated and applied the above principles, and held that the fact that the mortgagee had not entered into possession did not make any difference. In the light of these two decisions, the earlier Indian cases should be read where it has been held that in Indian law as well, the right of redemption remaining in the mortgagor is an estate in land.[428] In Indian law, the right to redemption is conferred by section 60 of TP Act. One of the essentials of English mortgage is that the mortgagor has to bind himself to pay the mortgage-money on a certain date. Thus, where the repayment was to be made within a period of eight years, which originally was five years, it was held that this did not constitute a binding obligation to repay the debt on a certain date.[429] Similarly, where the mortgagor does not bind himself to repay the mortgage money on a certain date and the deed does not even remotely suggest that the transaction was in the nature of a mortgage the transaction would not be an English mortgage.[430]

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427. *Jagadamba Loan Co Ltd v Raja Shiba Prosad,* (1941) ILR Kant 66 : 43 Bom LR 789 : 45 Cal WN 644 : (1941) 2 Mad LJ 53 : AIR 1941 PC 36 : reversing AIR 1939 Pat 146.
428. *Lalla Kanhoo Lal v Manki,* (1901) 6 Cal WN 601; *Tana Peena v Mammakanta Kath,* 34 IC 24.
429. *Mahammad Sanoowar Aliv Asman Ali Majumdar,* AIR 1989 Gau 71, p 74.
430. *Raj Kishore v Prem Singh,* AIR 2011 SC 382 : (2011) 1 SCC 657.

(52) English Mortgage—Personal Debt

Such a mortgage includes a personal covenant to which is generally annexed a power of sale in section 69. The mortgagee acquires the right to take possession as soon as the mortgage is executed, irrespective of whether a right of entry is expressly covenanted for.[431] In order to avoid the liability to account on the footing of wilful default, an English mortgage usually provides for the appointment of a receiver by the mortgagee on behalf of the mortgagor, so that the receiver is agent of the mortgagor, and possession remains with the mortgagor.[432] When one of the terms of a mortgage was that the mortgagor should execute an irrevocable power of attorney authorizing the mortgagee to collect the rents, either by one's own self or by a substitute, on behalf of the mortgagor, this provision was held to be equivalent to placing a receiver in possession as agent of the mortgagor. It had not the effect of delivering possession to the mortgagee, or of converting the mortgage into a usufructuary mortgage, or of making the mortgagee liable to account for more than the sums actually received by him.[433]

CLAUSE (F)

(53) Mortgage by Deposit of Title Deeds

This is called in English law an equitable mortgage. It is the well-established rule of equity that mere deposit of a document of title without writing or without word of mouth, will create in equity a charge upon the property referred to. The term "equitable mortgage" is not appropriate in India, for the law of India knows nothing of the distinction between legal and equitable estates.[434] However, the phrases "equitable mortgage" and "equity of redemption" are commonly used in Indian courts. The phrase "equity of redemption" is not, in view of the two decisions of the Judicial Committee mentioned above, less appropriate than the phrase "right of redemption." The phrase "equitable mortgage" might have been formerly justified in India on the ground that it was an inchoate mortgage perfected by equity. Equitable mortgages or mortgages by deposit of title deeds were accepted in India as equivalent to simple mortgages after the Privy Council decision in *Varden Seth v Luckpathy,*[435] and this is still the case in districts to which the TP Act has not been extended.[436] The TP Act recognizes such mortgages as equivalent to simple mortgages,[437] but restricts their operation to certain centers of commerce. This has been done as a matter of convenience to the mercantile community to enable them to borrow money without the delay of investigation of title, and the publicity of registration. Such mortgages are, however, at variance with the policy of publicity of transfer underlying TP Act and the Registration Act, 1908. The Privy Council in *Imperial Bank of India v U Rai Gyaw Thu,*[438] held that although there was no formal conveyance, an equitable mortgage effected a transfer of an

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431. *Rukmini Kanta v Baldeo Das,* (1924) 28 Cal WN 920, p 927 : 81 IC 1025 : AIR 1925 Cal 77; *Latchmiput Singh v Land Mortgage Bank,* (1887) ILR 14 Cal 464.
432. See note 'Receiver' under section 69A.
433. *Raja Janki Nath v Syed Asad Reza,* (1935) ILR 14 Pat 560.
434. *Webb v Macpherson,* (1904) ILR 31 Cal 57 : 30 IA 238, p 245. See also *Rani Chhatra Kumari v Mohan Bikram,* (1931) ILR 10 Pat 851 : 58 IA 279 : 133 IC 705 : AIR 1931 PC 196.
435. *Varden Seth v Luckpathy,* (1864) 9 MIA 307; *Mankeji v Rustomji,* (1890) ILR 14 Bom 269; *Himalaya Bank v Quarry,* (1895) ILR 17 All 252.
436. *Moti Ram v Bharat National Bank,* (1921) 3 Lah LJ 373 : 67 IC 421 : AIR 1921 Lah 253; *Stewart v Bank of Upper India,* 34 IC 937; *Shukyi v Hajee Bee Bee,* (1919) 12 Bur LJ 184 : 55 IC 248.
437. Seesection 96, The transfer of Property Act, 1882.
438. *Imperial Bank of India v U Rai Gyaw Thu,* (1923) ILR 1 Rang 637 : 50 IA 283 : 76 IC 910 : AIR 1923 PC 211; *Gokul Dass v Eastern Mortgage & Agency Co,* (1906) ILR 33 Cal 410; See *also KJ Nathan v SV Maruthy Reddy,* [1964] 6 SCR 727 : AIR 1965 SC 430 : [1964] 2 SCJ 671.

interest in property, and for purposes of priority stood on the same footing as a mortgage by deed. A proviso to this effect has been added to section 48 of the Registration Act by the amending Act 21 of 1929.

A delivery of documents of title alone is sufficient to create equitable mortgage under the section. There is no necessity to execute any document.

A document merely recording a transaction which is already concluded and which does not create any rights and liabilities does not require registration. Hence, charge of mortgage can be entered into revenue record in respect of mortgage by deposit of title deeds, says the Supreme Court in *State of Haryana v Navir Singh.*[439]

(54) Territorial Restrictions

Equitable mortgage by deposit of title deeds is permissible in Simla in view of the notification dated 22 May 1976.[440]

Where a deposit takes place, it has to be ascertained in the usual way; so where a debtor handed over the deeds to the assistant of the common attorney of the debtor and creditor outside Calcutta,[441] or where a debtor posted the deeds at a place not notified to the creditor under the latter's express instruction,[442] it was held that the transaction was complete outside a notified town, and section 58(f) did not apply. However, what constitutes the transaction is delivery with the intention of creating a security. So in a case where physical delivery takes place outside the notified town, but the intention to create an equitable mortgage is formed after the deeds are in one of the above towns, the Supreme Court applied the section.[443]

Territorial restriction referred to in section 58(f) has reference only to the delivery of the documents of title, and not to the situation of the property mortgaged. Once the mortgage is created in a notified town, the registration of the memorandum can be either at the town where the equitable mortgage is created, or in the office of the sub-registrar within whose jurisdiction, the mortgaged property is situated. As long as the memorandum merely confirms an equitable mortgage already created in a notified town, the registration of the memorandum even outside the notified towns, will be valid.[444] However, a plea that deposit of title deeds are not in relation to properties situated in towns specified in section 58 (f) or in towns notified by the state government is an important plea and cannot be ignored as a non consideration of such a plea would go to the root of the matter and result in remitting of the matter for fresh consideration to the lower court.[445]

(55) Requisites of a Mortgage by Deposit of Title Deeds

The requisites of an equitable mortgage are:

(1) a debt;

(2) a deposit of title deeds;[446] and

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439. *State of Haryana v Navir Singh,* AIR 2014 SC 339 : 2013 (12) SCALE 514 : (2014) 1 SCC 105.
440. *State Bank of Patiala v Shri Durga Oil & Flour Mills* ,AIR 1984 HP 22 (NOC).
441. *Surajmull Shroff v Gopeeram,* (1932) 36 Cal WN 1028 : 141 IC 257 : AIR 1932 Cal 823.
442. *Indian Cotton Co v Hari Poonjoo,* (1937) ILR Bom 763 : 38 Bom LR 1222 : AIR 1937 Bom 39.
443. *KJ Nathan v SV Maruty Ready,* [1964] 6 SCR 727.
444. *State Bank of Mysore v SM Essence Distilleries Pvt Ltd,* AIR 1993 Kant 359, p 365.
445. *State of Haryana v Navir Singh,* AIR 2014 SC 339 : 2013 (12) SCALE 514 : (2014) 1 SCC 105; 2014 (123) RD 762; *Allahabad Bank v Shivganga Tube Well,* AIR 2014 Bom 100 : LNIND 2014 AUG 132 : 2014 (3) AIR Bom R 689.
446. *Allahabad Bank, Trivandrum v Ley Brothers,* AIR 2010 Ker 90; *Nirmala Baldwa v Government of AP,* AIR 2011 AP 26 : (2011) 1 ALD 619 : (2010) 6 ALT 653.

(3) an intention that the deeds shall be security for the debt.[447]

The above three requisites (debt, deposit, and intention to create security) have been reiterated in a Calcutta case.[448] The main ingredient of mortgage by deposit of title deeds is that deposit of title deeds should be with an intent of creating a security. Where during the subsistence of debt, the debtor handed over the title deeds to the creditor, it would raise the initial presumption of creating security. The debtor executed a memorandum acknowledging the deposit of title deeds as security for the debts due, thus a presumption can rightly be raised by the court for creating a mortgage by deposit of title deeds.[449] These three essentials, i.e., a debt, deposit of title deeds and the intention that the delivery of documents should be security for the debt are mandatory in order to create a valid mortgage, but it is not necessary that the whole, or even the most material of the documents deposited should show a complete or good title in the depositor and it is sufficient if the deeds deposited bona-fide relate to the property or are material evidence of title and which are shown to have been deposited with the intention of creating a security thereon.[450]

(1) Debt:

The debt may be an existing debt, or a future debt. The use of the word "debt" as one of the requisites of a mortgage by the deposit of title deeds in this work, as well as in several leading decisions, does not, it is submitted, preclude such a mortgage being created to secure future advances or contingent pecuniary liabilities. Any transfer of an interest in property to secure the payment of money, advanced or to be advanced, or an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability, is a mortgage—section 58(1); and sub-section (f), which defines an equitable mortgage, merely prescribes one of the modes of creating a mortgage.[451] Deposit of title deeds with banks to secure an overdraft account—which involves both existing and future advances—are common; and have been upheld as falling within sub-section (f);[452] and also a mortgage to secure a general balance due on an account;[453] similar transactions securing guarantees or indemnities are also common and would, it is submitted, be also so upheld. Nor does the use of the word "creditor" in the sub-section make any difference, for the word can mean a person having a future or contingent claim.[454]

(2) Deposit of title deeds:

It has been held in England that it is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title, and that it is not necessary that all the deeds

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447. *Behram v Sorabji,* (1914) ILR 38 Bom 372; *Kevaldas v Chhotubhai,* (1955) ILR Bom 962 : 57 Bom LR 844 : AIR 1955 Bom 454; *Rashtrothana Parishat v State of Karnataka,*AIR 1992 Kant 388, p 390; *Shailesh Textiles Industries v Chief Controlling Revenue Authority,* AIR 1994 Guj 153; *Lakshmi Vilas Bank Ltd v Shreechakra Enterprises,* AIR 2003 Mad 1, para 14; *MMTC Ltd v S Mohamed Ghani,* AIR 2002 Mad 378, para 18.
448. *Amulya Gopal Majundar v United Industrial Bank Ltd,* AIR 1981 Cal 404.
449. *Mukesh Kothari v State Bank of India,* AIR 2017 Bom 131 : 2017 (3) ABR 650 : 2017 (5) ALL MR 163.
450. *S Madhan v K Sacheedranadh Reddy,* C S No 164 of 2009, decided on: 2 March 2017. High Court of Madras.
451. This statement of law was approvingly referred in *Rosy George v State Bank of India,* AIR 1993 Ker 184, p 188.
452. *Imperial Bank of India v U Rai Gyaw,* AIR 1923 PC 211; *Himalaya Bank v Quarry,* (1895) ILR 17 All 252; *Girendro Coomar v Kumud,* (1898) ILR 25 Cal 611; *United Bank v Lekharam,* [1965] 2 SCJ 91, AIR 1965 SC 1591.
453. *Marcar v Sigg,* (1886) ILR 2 Mad 239 (PC).
454. See *Roderiques v Ramaswami Chettiar,* (1917) ILR 40 Mad 783 : 32 Mad LJ 257 : (1917) Mad WN 238 : 38 IC 783.

should be deposited.[455] These cases have been followed in India.[456] But CJ Page in a Full Bench decision of the Rangoon High Court[457] held that the documents must not only relate to the property, but must also be as to show a prima facie or apparent title in the depositor. If the deeds are lost, certified[458] copies may be deposited.[459] The essential requirement is that the title deeds should be deposited.[460] The transfer would not be regarded as an equitable mortgage upon failure to prove the deposit of title deeds.[461] If the deposit is accompanied by a memorandum in writing, the written bargain determines what is the scope and extent of the security, otherwise the scope of the security is the scope of the title.[462] If a share of an indigo concern is mortgaged, it is sufficient to deposit the title deeds under which the share was acquired and if the mortgagee's sale takes place at some subsequent date, the share will pass at the date of sale, i.e., not only what is called accession, but changes in good will, rights under contract, and so forth.[463]

ILLUSTRATION

A had purchased two plots of leasehold land. *A*'s title deed was the sale deed of both plots and two leases, one of each plot, on each of which was an endorsement showing that A was the purchaser. *A* made a mortgage by deposit of the sale-deed and one lease with *B*. 16 months later *A* made a mortgage by deposit of the other lease with *C*. *B*'s mortgage was a valid mortgage of both plots and *C*'s mortgage was a valid mortgage of one plot, but *B*'s mortgage being earlier had priority.[464]

Physical delivery of documents is not the only mode of deposit, and constructive delivery is sufficient.[465] The Supreme Court in *KL Nathan v SV Maruty Ready,*[466] observed that:

> it would be hyper technical to insist upon the formality of the creditor delivering the title-deeds to the debtor and the debtor re-delivering them to the creditor.

If the documents deposited show no kind of title, no mortgage is created.[467] A tax receipt and a plan are not documents of title, and their deposit does not create a mortgage.[468] A deposit of an expired lease creates a mortgage of the leasehold when the mortgagor obtains a renewal of the lease.[469] It has been said that a *patta* of land in the *mofussil* is usually a document of title;[470] but this would depend upon the circumstances under which it was

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455. *Exparte Wetherall,* (1805) 11 Ves 389; *Roberts v Croft,* (1857) 24 Beav 223; *Lacon v Allen,* (1856) 3 Drew 579; *Dixon v Muckleston,* (1872) 8 Ch App 155.
456. *Bhupendra v Wajiunnissa,* (1917) 2 Pat LJ 293 : 39 IC 564; *Elizabeth May Toomey v Bhupendra Bose,* (1928) ILR 7 Pat 520 : 111 IC 57 : AIR 1928 Pat 304; *Firm VEARM v AKRMMK Firm,* (1929) ILR 7 Rang 28 : 116 IC 475 : AIR 1929 Rang 65; *Surendra Mohan v Mohendra Nath,* (1932) ILR 59 Cal 781 : 36 Cal WN 420 : 140 IC 662 : AIR 1932 Cal 589.
457. *VERMAR Chettyar Firm v Ma Joo Tean,* (1933) ILR 11 Rang 239 : 147 IC 1105 : AIR 1933 Rang 299.
458. *Indian Bank v Punjab Naitonal Bank,* AIR 2010 Mad 84 : (2010) 1 MLJ 346. See also *Allahabad Bank, Trivandrum v Ley Brothers,* AIR 2010 Ker 90; *Nirmala Baldwa v Government of AP,* AIR 2011 AP 26 : (2011) 1 ALD 619 : (2010) 6 ALT 653.
459. *Stewart v Bank of Upper India,* 34 IC 937.
460. *Allahabad Bank, Trivandrum v Ley Brothers,* AIR 2010 Ker 90; *Nirmala Baldwa v Government of AP,* AIR 2011 AP 26 : (2011) 1 ALD 619 : (2010) 6 ALT 653.
461. *State Bank of India v Zeenath X Ray & ECG Clinic,* AIR 2007 (NOC) 2315.
462. *Pranjiwandas Mehta v Chan Ma Phee,* (1916) ILR 43 Cal 895 : 43 IA 122 : 35 IC 190.
463. *Bhupendra v Wajiunnissa,* 39 IC 564.
464. *VEARM Firm v AKRMMK Firm,* (1929) ILR 7 Rang 28 : 116 IC 475 : AIR 1929 Rang 65.
465. *MMTC Ltd v S Mohamed Ghani,* AIR 2002 Mad 378, para 14.
466. *KL Nathan v SV Maruty Ready,* [1964] 6 SCR 727 : AIR 1965 SC 430 : [1964] 2 SCJ 671; *Natesa Mudaliar v Munuswami Naidu,*(1965) 1 Mad LJ 179; See also *Himalaya Bank v Quarry,* (1895) ILR 17 All 252; *Girendro Coomar v Kumud,* (1898) ILR 25 Cal 611; *VMRV Chettyar Firm v Asha Bibi,* 118 IC 407 : AIR 1929 Rang 107; *KaKoo Shah v Kamta Wati,* AIR 1969 Del 120.
467. *Venkataramayya v Narsinga Rao,* (1911) 21 Mad LJ 454 : 9 IC 309.
468. *VERMAR Chettyar Firm v Ma Joo Tean,* AIR 1933 Rang 299. affirming *Ma Joo Tean v Ma Thein Nyun,* (1932) ILR 10 Rang 403 : 140 IC 487 : AIR 1932 Rang 185.
469. *Villa v Petley,* 148 IC 721 : AIR 1934 Rang 51.
470. *Official Assignee v Badri Narayan,* (1925) ILR 48 Mad 454 : 88 IC 401 : AIR 1925 Mad 723.

issued.[471] A mortgage is not a deed of title for the mortgagor, for it only shows that the mortgagor has dealt with the property as his.[472] However, a mortgage is a document of title of the mortgagee, and a mortgagee can effect an equitable sub-mortgage by deposit of his mortgage deed.[473] When the documents deposited along with the memorandum of deposit, though not complete in themselves for holding the title, were undoubtedly documents relating to the property, and prima facie showing title to the same, they constitute ' "documents of title" within the meaning of section 58(f) according to a Madras case. In this case, the documents were:

(1) the *hundi* towards the purchase price;

(2) the agreement by the previous owner of the site to convey the property; and

(3) tax receipt in the name of the plaintiff's father.[474]

A copy is not a document of title, and its deposit cannot be an equitable title. It is only an evidence of title but, where the original is lost, a certified copy made with safeguards can be received as document of title. However, it must be made out that the original is lost.[475] Where the mortgagor who was one of the donees of the properties gifted to various persons, did not possess the original title deed, the deposit of registration copy of the title deed, tax receipts and a certificate issued by the president of the *Panchayat* with an unequivocal intention to create an equitable mortgage was held to be sufficient to create such mortgage.[476] Where the original title deed is lost, an equitable mortgage can still be created. The mortgagee in such cases has only to be vigilant in accepting such representation made to him and should make necessary inquiries before agreeing to advance monies on the basis of registration, extracts of documents of title, or copies of documents. That is the principle underlying section 78, which provides that if the conduct of prior mortgagee amounted to gross neglect, the mortgage in his favour will be postponed to the subsequent mortgage.[477]

In order to create a valid equitable mortgage, it is not necessary:

(a) that all the documents of title to the property should be deposited; or

(b) that the documents deposited should show a complete or good title.

It is sufficient if the deeds deposited bona fide relate to the property, or are material evidence of title, and are shown to have been deposited with the intention of creating a security thereon.[478] However, no mortgage is created if the mortgagee fails to prove that title deeds were ever deposited even though a letter in proof of deposit of title deed is executed.[479]

Where a mortgage has been effected by deposit of title deeds and the credit facility was secured on its strength from the Bank, but the signatures on the mortgaged document and the loan document were slightly different, a plea that there is no obligation on part of the creditors to pay as the signatures on the loan documents are different from the actual signatures would not be tenable as there is a possibility that that the loan document might have been signed differently. As the documents were not given to the experts for verifying the difference in signatures it was held that the mortgagors were liable to repay the loan amount to the Bank with interest.[480]

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471. See *Donganna v Jammanna,* (1931) Mad WN 508 : 133 IC 782 : AIR 1931 Mad 613.
472. *Nageswara v Srinivasa,* 94 IC 427 : AIR 1926 Mad 743.
473. *Gokul Dass v Eastern Mortgage & Agency Co,* (1906) ILR 33 Cal 410.
474. *Angu Pillai v MSM Kasivishwanthan Chettiar,* AIR 1974 Mad 16 : (1973) 1 Mad LJ 334.
475. *Syndicate Bank v Modern Tile and Clay Works,* (1980) KLT 550.
476. *C Assiamma v State Bank of Mysore,* AIR 1990 Ker 157, p 164.
477. *K Prakasa Rao v N Rama Krishna Rao,* AIR 1982 AP 282.
478. *Amulya Gopal Majumdar v United Industrial Bank Ltd,* AIR 1981 Cal 404; *MMTC Ltd v S Mohamed Ghani,* AIR 2002 Mad 378, para 14.
479. *Lakshmi Vilas Bank Ltd v Shreechakra Enterprises,* AIR 2003 Mad 1.
480. *South Indian Bank Ltd v Thiruvanathanthapuram v K P Ramachandran,* AIR 2017 Ker 161.

(3) Intention to create security:

The intention that the title deeds shall be security for the debt is the essence of the transaction. In *Heng Moh v Urn Saw Yean,*[481] the managing partner admitted that he had received title deeds from the other partner in the capacity of a manager, and the Privy Council held that the delivery of the deeds was a mere partnership transaction, and did not give the managing partner the rights of an equitable mortgagee. Whether the requisite intention exists is a question of fact in each case, and is to be ascertained after considering oral, documentary, and circumstantial evidence. The mere fact of a deposit does not raise the presumption that such an intention existed,[482] and the fact that at the time of making the deposit the parties intended to execute a mortgage deed does not negative an intention to create an equitable mortgage till such a deed is executed. And even the distinction made in English law between an antecedent and a subsequent debt has been described by the Supreme Court as only a guide.[483]Such an intention cannot, as already stated, be presumed from possession, for mere possession of the deeds is not enough without evidence as to the manner in which the possession originated so that a contract may be inferred.[484]In *Jethibai v Putlibai,*[485] it was said that mere possession of title deeds by the creditors, coupled with the existence of a debt, does not necessarily lead to the presumption of a mortgage, that may be so when the title deeds are produced by the creditor after the lapse of many years without explanation. Although the fact that the documents were coming from the custody of the plaintiff is not, by itself, sufficient to prove an intent to create a security, that fact is significant, and unless the defendants satisfactorily explain how the documents came in the plaintiff's custody, this fact would have a great bearing.[486] According to the High Court of Andhra Pradesh, where there are structures on a land, then the equitable mortgage should extend to the land and structures even though the deeds deposited relate to the land only.[487]

If it is in contemplation of parties to have a legal mortgage prepared and if the title deeds are deposited for that purpose only, the deposit does not create an equitable mortgage.[488] In *Jaitha Bhima v Haji Abdul,*[489]the deeds were delivered for the preparation of a legal mortgage; the legal mortgage was prepared and executed, but was not registered; and the creditor then contended that he had abandoned the idea of taking a legal mortgage, and claimed as mortgagee by deposit of title deeds. This plea was disallowed, for the court found that there was no antecedent debt at the time of the delivery of the deed, and that the creditor would not have advanced the money if the debtor had not been ready to execute the deed. If an additional amount is advanced to the mortgagor on the understanding that the mortgagee will be entitled to retain the documents as security for the additional amount also, the agreement is treated as a constructive delivery of the title deeds to the creditor, as security for further advances.[490]

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481. *Heng Moh v Urn Saw Yean,* (1923) ILR 1 Rang 545 : 75 IC 287 : AIR 1923 PC 87.
482. *Saradindu v Amiya Kumar,* AIR 1977 Cal 343.
483. *KJ Nathan v SV Maruty Reddy,* [1964] 6 SCR 727.
484. *Miller v Babu Madho Das, (*1896) ILR 19 All 76 : 23 IA 106; *Behram v Sorabji,* (1914) ILR 38 Bom 372 : 23 IC 140; *Ganpat v Adarji, (*1877) ILR 3 Bom 312, p 329; *Chapman v Chapman, (*1851) 13 Beav 308; *Wardle v Oakely,* (1864) 36 Beav 27; *Dixon v Muckleston,* (1872) 8 Ch App 155.
485. *Jethibai v Putlibai,* (1912) 14 Bom LR 1020; *Halsbury's Laws of England,* 3rd edn vol 27, p 168, para 168.
486. *Monoj Kumar v Nabadrup,* 82 Cal WN 166; see also *MMTC Ltd v S Mohamed Ghani,* AIR 2002 Mad 378, para 14.
487. *Boda Narayan v Balluri,* (1977) 2 Andh WR 480.
488. *Norris v Wilkinson,* (1806) 12 Ves 192; *Lloyd v Attwood,* (1859) 3 De G & J 614, p 651; *Madras Deposit Co v Oonnamalai,* (1893) ILR 18 Mad 29.
489. *Jaitha Bhima v Haji Abdul,* (1886) ILR 10 Bom 634.
490. *Ishwar Das v Dhanang Singh,* AIR 1985 Del 83.

(56) Registration

A mortgage by deposit of title deeds does not require any writing,[491] and being an oral transaction it is not affected by the law of registration. where the mortgage is an equitable mortgage, it does not require registration, and a plea of the mortgagor that they are not under any obligation to repay the loan amount because the letter acknowledging the mortgage was not registered would not be tenable . The letter acknowledging the creation of mortgage does not impose any right or liability and therefore does not require registration.[492] But it is usual for the deposit to be accompanied by a memorandum in writing.[493] If this writing is the contract of mortgage so that it creates the mortgage it must be registered—and oral evidence to contradict it is not admissible.[494] However, registration is not necessary if the mortgage is complete without the writing and the writing is merely a statement that the mortgage has been effected, or a statement of facts from which the contract of mortgage can be inferred. If a memorandum is drawn to record the *fait accompli* of deposit, it does not require registration. Thus a memorandum that merely records past events of facts of deposit and does not create a mortgage itself would not require registration. However, if only the document itself creates the deposit and contains the bargain between parties, it would require registration. In all such cases the recitals in the memorandum is the best guide of what the parties have intended and how the[495] transaction has taken effect and how it affects the right to property. In *Obia Sundarachariar v Narayanna Ayyar,*[496] the memorandum was merely a list of the deeds deposited, and it did not need registration, although it was deposited before the money was advanced. Their Lordships of the Judicial Committee said—

> No such memorandum can be within the section unless on its facts it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned, it constitutes the agreement between the parties.

Similarly, where the memorandum confirms the deposit of title deeds as security for repayment of money advanced or to be advanced, the document would not require registration.[497] The necessity for registration, therefore, depends upon the construction of the memorandum in the light of the surrounding circumstances,[498] and if it is loosely worded the distinction is very fine. To illustrate this is the leading case of *Kedarnath Dutt v Shamloll Khettry.*[499] In that case, Shankerial had advanced ₹ 1,200 to the borrower who deposited the title deeds, and executed the promissory note for the amount. On the promissory note he made the following endorsement: "For the repayment of the loan of ₹ 1,200 and the interest

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491. *Shaw v Foster,* (1872) LR 5 HL 32; *Jivandas v Framji,* (1870) 7 Bom HCR 45; *Oo Noung v Moung,* (1886) ILR 13 Cal 322; *Behram v Sorabji,* (1914) ILR 38 Bom 372.
492. *South Indian Bank Ltd v Thiruvanathanthapuram v K P Ramachandran,* AIR 2017 Ker 161.
493. *Miller v Madho Das,* 23 IA 106.
494. *Pranjivandas Mehta v Chan Ma Phee,* (1916) ILR 43 Cal 895 : ILR 35 IC 190 : (When the bargain is a written bargain it alone must determine what is the scope and extent of the security); *Chunilal v Vithaldas,* (1922) 24 Bom LR 502 : 68 IC 1005 : AIR 1922 Bom 440; *Subramonian v Lutchman,* (1923) ILR 50 Cal 338 : 50 IA 77 : 71 IC 650 : AIR 1923 PC 50.(The test is: did the document constitute the bargain between the parties or was it merely the record of an already completed transaction); *Kshetranath v Harasukdas,* (1927) 31 Cal WN 703 : 102 IC 871 : AIR 1927 Cal 538; *Allahabad Bank, Trivandrum v Ley Brothers,* AIR 2010 Ker 90.
495. *Prakashwati Jain v Punjab State Industrial Development Corporation,* AIR 2012 P&H 13 : (2011) 164 PLR 242.
496. *Obia Sundarachariar v Narayanna Ayyar,* (1931) ILR 54 Mad 257, p 264 : 58 IA 68 : 131 IC 328 : AIR 1931 PC 36.
497. *Nirmala Baldwa v Government of AP,* AIR 2011 AP 26 : (2011) 1 ALD 619 : (2010) 6 ALT 653.
498. *Ram Ratan v Sew Kumari,* AIR 1938 Cal 823; *Ebrahim Hazi v Official Trustee,* AIR 1937 Cal 741; *Ram Sarup v Shiv Dayal,* AIR 1940 Lah 285 : 190 IC 463.
499. *Kedarnath Dutt v Shamloll Khettry,* (1873) 11 Beng LR 405, p 406 : 20 WR 150.

due thereon on the written note of hand, I hereby deposit with Shamloll Khettry, as a collateral security by way of equitable mortgage, title deeds of my property."

Sir Richard Couch in giving judgment pointed out that if there had been no endorsement at all on the promissory note, there would have been a complete equitable mortgage, and that the endorsement was merely a recital of the fact of the deposit from which the contract of mortgage is inferred so that though the writing was not registered, there was a valid equitable mortgage. This case may be contrasted with *Bhairab Chandra v Anath Nath De.*[500] The defendant had mortgaged his house to the plaintiff and had delivered his title deeds to him for the purpose of that mortgage. He then took a fresh advance of ₹ 1,500, executed a promissory note for that amount, and on the sale date sent the plaintiff a letter in these terms: "For the payment of the sum of ₹ 1,500 with interest I have borrowed from you a promissory note of date, I hereby put it on record that the title deeds in my premises already deposited with you shall be held by you as collateral security." It was held that the letter constituted the mortgage contract, and that it was inadmissible for want of registration. The distinction between the two cases lies in the fact that in *Kedarnath's* case, the loan and deposit were completed irrespective of the endorsement, while in *Bhairab Chandra's* case there was no completed contract of mortgage before the letter passed, and it was by the letter that the deeds were made security for the fresh loan.

In *Rachpal Maharaj v Bhagwandas Daruka*[501] J Patanjali Sastri (as he then was), has stated the law thus:

> The crucial question is: did the parties intend to reduce the bargain regarding the deposit of title deeds to the form of a document? If so, the document requires registration. If, on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document itself, being merely evidential does not require registration.

Where the letter did not set out the amount borrowed or the rate of interest, and did not even mention the details of the title deeds deposited, the Supreme Court held that it was merely evidential.[502] It is only when the parties intend to reduce their bargain regarding the deposit of title deeds to the form of a document, that the document requires registration. If proper construction of the document and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then the contract to create the mortgage arises by implication of the law from the deposit itself (if made with the requisite intention). The document is merely evidential, and does not require registration. On the facts, it was held that the deposit of title deeds made by referring to the "promissory note already executed earlier" did not make the memorandum the sole document evidencing the terms of the bargain. The memorandum only confirmed the execution of the promissory note. The memorandum and the promissory note could not, therefore, be considered as integral parts of one transaction, but on the other hand, the deposit was made more than two months after the execution of the promissory note. The mere statement that a deposit is made by way of security for the repayment of the loan cannot be read as a contract which is arrived at by the document itself. Hence, the document cannot be read as recording an agreement between the parties to create a mortgage by deposit of title deeds. It is at best an

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500. *Bairab Chandra v Anath Nath De,* (1919) 24 Cal WN 599 : 51 IC 686.
501. *Rachpal Maharaj v Bhagwandas Daruka,* [1950] SCR 548, p 551 : AIR 1950 SC 272 : [1950] SCJ 361; *United Bank of India v Lekharam & Co,* AIR 1965 SC 1591 : [1965] 2 SCJ 91 : [1966] SCA 44; *Chitalia Bros v South Indian Bank,* AIR (1988) Kant 59, pp 62–63; *State Bank of Mysore v SM Essence Distilleries Pvt Ltd,* AIR 1993 Kant 359, p 364.
502. AIR 1950 SC 272.

evidence of the fact that the title deeds had been deposited with the plaintiff.[503] In case a document was executed for the purpose of creating of mortgage under section 58(f) of the TP Act, no doubt it requires registration. Similarly, when the memorandum or letter was executed on the date of the deposit or delivery of the title deeds, that needs registration. And after the delivery of the title deeds, if any letter or memorandum was executed endorsing the earlier deposit of title which already created a mortgage, the letter needs no registration.[504] In a Karnataka case, since the title deed delivered was not original and only a certified copy, the memorandum of deposit of title deed was executed and registered. Since the memorandum was denied, the court, in view of section 68 of the Indian Evidence Act, 1872 held that the bank ought to have examined one of the attestors of the document. Failure to do so led to dismissal of the suit.[505]

In all cases in which a deposit is made by a letter which explains why the deeds are deposited, the letter must be registered, for there is nothing but the letter to connect the deposit with the debt.[506] In some cases,[507] registration was held to be necessary, and in other cases[508] registration was held to be not necessary.

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503. *HG Nanjappa v MFC Industries, (P) Ltd,* AIR 1987 Mad 108.
504. *Hubert Pyoli v SK Sivadasan,* AIR 1998 Ker 344.
505. *Syndicate Bank v M Sivarudrappa,* AIR 2003 Kant 210 : (2003) 2 Kar LJ 226.
506. *Dwarkanath Mitter v SM Sarat Kumari,* (1871) 7 Beng LR 55; *Jaggannadhan v Official Assignee,* (1931) 60 Mad LJ 309 : 129 IC 814 : AIR 1931 Mad 124: *Swami Chetty v Ethirajulu,* (1917) ILR 40 Mad 547 : 34 IC 853; *Alwar Chetty v Jagannatha,* (1928) 54 Mad LJ 109 : 108 IC 291.
507. *Gunpat v Adarji,* (1879) ILR 3 Bom 312; *Behram v Sorabji,* (1914) ILR 38 Bom 372 : 23 IC 140; *Chunilal v Vithaldas,* (1922) 24 Bom LR 502 : 68 IC 1005 : AIR 1922 Bom 440; *Krishnayya v Ponnuswami,* (1924) ILR 47 Mad 398 : 84 IC 629 : AIR 1974 Mad 547; *Subramonian v Lutchman,* (1923) ILR 50 Cal 338 : 50 IA 77 : 71 IC 650 : AIR 1923 PC 50; *Muthu Chetty v Kothandaramaswami,* (1916) 31 Mad LJ 347 : 35 IC 864; *Nageswara v Srinivasa,* 94 IC 427 : AIR 1926 Mad 743; *Arunachallam Chetty v Jagannatha Pillai,* 98 IC 872 : AIR 1926 Mad 1138; *Bairab Chandra v Anath Nath De,* (1919) 24 Cal WN 599 : 51 IC 686; *Shailendranath v Hede Kaze Mane,* (1932) ILR 59 Cal 586 : 36 Cal WN 193 : 54 Cal LJ 328 : 137 IC 500 : AIR 1932 Cal 356; *National Bank of India v Nazir Co,* (1932) 34 Bom LR 748 : 139 IC 745 : AIR 1932 Bom 401; *Ebrahim Haji v Official Trustee,* AIR 1937 Cal 741; *Kedarnath v Hari Shankar,* (1937) ILR 2 Cal 586 : 175 IC 578 : AIR 1938 Cal 308 : affd by the PC in 66 IA 184 : (1939) All LJ 869 : 41 Bom LR 1149 : (1939) ILR 2 Cal 243 : 43 Cal WN 806 : (1939) 2 Mad LJ 522 : 181 IC 935 : AIR 1939 PC 167 *(sub-nom Hari Shankar v Kedarnath);* *Krishna Swami v Gouriama,* (1936) Mad WN 367 : 163 IC 195 : AIR 1936 Mad 256; *Ram Sarup v Shiv Dayal,* AIR 1940 Lah 285; *Indian Bank Ltd v AS Rao & Sons,* AIR 1971 AP 287; *Kakaraparthy Bhavanaravana v S Venkataratnam,* AIR 1971 AP 359.
508. *Oo Noung v Moung,* (1886) ILR 13 Cal 322; *Gokul Das v Eastern Mortgage Agency Co,* (1906) ILR 33 Cal 410; *Esther v Martu,* (1917) 25 Cal LJ 160 : 37 IC 117; *Haripada v Anath Nath,* (1918) 22 Cal WN 758 : 44 IC 211; *Vadamalai v Subramania,* 71 IC 130 : AIR 1923 Mad 262; *Umrao Singh v Punjab National Bank,* (1921) 3 Lah LJ 44 : 59 IC 578 : AIR 1921 Lah 274; *Motiram v Bharat National Bank,* (1921) 3 Lah LJ 373 : 67 IC 421 : AIR 1921 Lah 253; *Bhuban Mohan v Co-operative Hindusthan Bank,* (1925) 29 Cal WN 784 : 88 IC 866 : AIR 1925 Cal 973; *Krishnayya v Ponnuswami Aiyar,* (1924) ILR 47 Mad 398 : 84 IC 629 : AIR 1924 Mad 547; *Ma Sein Bye v SRMMRM Chetty Firm,* (1925) ILR 3 Rang 443 : 91 IC 663 : AIR 1926 Rang 10; *Kshetranath v Harasukhdas,* (1927) 31 Cal WN 703 : 102 IC 871 : AIR 1927 Cal 538; *Ramakrishna v Kesavalu,* (1927) 53 Mad LJ 179 : 102 IC 34 : AIR 1927 Mad 1145; *Tyabali v Parbatibai,* (1932) 26 Sind LR 92 : AIR 1932 Sau 73; *Sundaracharlar v Narayana Ayyar,* (1931) ILR 54 Mad 257 : 35 Cal WN 494 : 53 Cal LJ 396 : 131 IC 328 : AIR 1931 PC 36; *Surendra Mohan v Mohendra Nath,* (1932) ILR 59 Cal 781 : 140 IC 662 : AIR 1932 Cal 589; *SPKRRM Chettyar Firm v Administrator General of Bengal,* (1933) ILR 11 Rang 481 : 149 IC 457 : AIR 1933 Rang 307; *Jaimal Singh v People's Bank of Northern India,* 141 IC 541 : AIR 1933 Pesh 35; *Central Bank v Jawahir Singh,* AIR 1936 Lah 65; *Ram Ratan v Sew Kumari,* AIR 1938 Cal 823; *Dwarka Das v New Bank of India,* (1958) 60 Punj LR 213 : AIR 1958 Punj 218; *Binapani Roja v Rabindranath Sarkar,* AIR 1959 Cal 213; *Indersain v Mohammed Raza,* (1961) 2 Mad LJ 328 : AIR 1962 Mad 258; *Rangabati v United Bank of India,* (1961) ILR AP 158; *Sham Lal v Punjab National Bank,* (1960) 62 Punj LR 599 : AIR 1961 Punj 81; *Rajamma v Mahant Krishnananelgeri,* AIR 1973 Mys 310.

A document merely recording a transaction which is already concluded and which does not create any rights and liabilities does not require registration. In such cases payment of registration fee and stamp duty is not required.[509]

(57) Limitation for Suit on Mortgage by Deposit of Title Deeds

The period of limitation is 13 years as per Article 62 of the Limitation Act, 1963.

(58) Transfer of Equitable Mortgage

The transfer of an equitable mortgage falls under section 54, and requires a registered instrument.[510]

CLAUSE (G)

(59) Anomalous Mortgages

Under the definition inserted as clause (f) of section 58, it is a mortgage which does not fall within any of the other five classes enumerated. The definition, therefore, includes simple mortgages, usufructuary mortgages, and mortgages usufructuary by conditional sale, in the term "anomalous mortgage". Even before the amendment, these combination of the simple forms were sometimes described as anomalous mortgages.[511]

Anomalous mortgages take innumerable forms moulded either by custom or the caprice of the creditor—some are combinations of the simple forms, others are customary mortgages prevalent in particular districts, and to these special incidents are attached by local usage. Such are the *kanom, otti, and peruartham* mortgages of Madras, and the *san* mortgage of Gujarat.[512]

A document styled as a possessory mortgage was held to be in effect anomalous mortgage, the mortgagee having been given the right to realise the mortgage money by bringing the right, title, and interest of the mortgagor to sale.[513]

(60) Simple Mortgage Usufructuary

This is now one class of anomalous mortgage, and it is a combination of a simple mortgage, and a usufructuary mortgage. The mortgagee is in possession and pays himself the debt out of the rents and profits, and there is also a personal covenant with an express or implied right of sale. The property is only collaterally pledged as in the case of a simple mortgage, but the mortgagee is given the usufruct of it either by allowing him to take the rents and profits, or by giving him a lease for a fixed period. Instances of such mortgages are the cases cited below.[514] The Bombay case of

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509. *State of Haryana v Navir Singh,* AIR 2014 SC 339 : 2013 (12) SCALE 514 : (2014) 1 SCC 105.
510. *Elumalai v Balakrishna,* (1921) ILR 44 Mad 965, p 968 : 60 IC 168 : AIR 1922 Mad 344.
511. *Motiram v Vitai,* (1889) ILR 13 Bom 90; *Yashvant v Vithal,* (1897) ILR 21 Bom 267; *Amarchand v Killa Morar,* (1903) ILR 27 Bom 600.
512. See *Chadumrai v Rani Navli,* AIR 1943 All 337; *Suresh Chandra v Jadas Chandra,* AIR 1940 Cal 372 : 189 IC 866; *Mir Singh v Raghuvir Singh,* AIR 1939 All 615; *Nadachi Ammal v Narayana Nadar,* AIR 1955 Tr & Coch 207.
513. *Hathika v Puthiyapurayil Padmanabhan,* AIR 1994 Ker 141, p 144.
514. *Nanu v Raman,* (1893) ILR 16 Mad 335; *Mahadaji v Joti,* (1892) ILR 17 Bom 425; *Jafar Hasan v Ranjit Singh,* (1899) ILR 21 All 4; *Sivakami v Gopala,* (1894) ILR 17 Mad 131; *Phul Kuar v Murli Dhar,* (1879) ILR 2 All 527; *Kangaya v Kalimuthu,* (1904) ILR 27 Mad 526; *Dattambhat v Krishnabhat,* (1910) ILR 34 Bom 462 : 7 IC 446; *U San v Maung Sein,* (1936) ILR 14 Rang 85 : 169 IC 295 : AIR 1937 Rang 151; *Rahimuddin Chowdary v Nayan Chand,* AIR 1950 Assam 18; *Ruplaswami v Girdharilal,* AIR 1950 Assam 19; *Jankidas v Laxminarain,* (1957) ILR 9 Raj 268 : AIR 1957 Raj 32; *Abohala Sastriar v Kalimurthu,* (1962) 1 Mad LJ 304 : AIR 1962 Mad 308.

Amarchand v Killa Morar[515] is a typical simple mortgage usufructuary. The mortgagee was put in possession and authorized to retain possession till payment of the mortgage money; there was a personal covenant to pay, and an agreement that the debt was recoverable from the mortgaged land and from the mortgagor personally. This was described in the judgment as an anomalous mortgage,[516] though under the TP Act it is an anomalous mortgage. In a simple mortgage usufructuary, the mortgagee may sue for sale though merely as an usufructuary mortgagee, he could not have done so.[517] A mortgage which is neither purely simple, nor usufructuary exclusively, but a two, is an anomalous mortgage, within the meaning of section 58(g). The mortgage stipulated that, in the event of failure on the part of the mortgagor within the specified period of time, it shall be open to the mortgagee to make realisation of the same by sale of the property mortgaged. This was a characteristic feature of a simple mortgage. And yet, the mortgage was not purely simple, as under the mortgage deed, the mortgagee was given constructive (if not actual) possession over certain shops, with the right to realise the rent thereof from the respective tenants. It was further provided that the mortgagee shall be entitled to be in possession over certain lands. These terms gave the features of a usufructuary mortgage. Hence, it was an anomalous mortgage.[518] The case of *Narsingh Partab v Mohammad Yaqub*[519] is an instance of a simple mortgage usufructuary, and the Privy Council held that its character as such was not affected by the fact that the mortgagor had reserved the right to act as manager, and to enhance rents of the property given into the possession of the mortgagee. If the mortgagee is entitled to recover any part of the mortgage money personally from the mortgagor in a usufructuary mortgage, it would become an anomalous mortgage.[520]

The right of sale is not to be implied merely from the personal covenant to repay,[521] although it may in some cases have this effect.[522] In *Jag Sahu v Ram Sakhi*[523] the court quoted with approval the following passage from the judgment in a Calcutta case:[524]

> It is well settled that where an instrument of mortgage gives a right to possession and also contains a covenant to pay, thus presenting a combination of an usufructuary and a simple mortgage, the two rights are independent and the mortgagee may sue for sale although he may have given up possession, and the right, accrues immediately after the due date is passed.

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515. *Amarchand v Killa Morar,* (1903) ILR 27 Bom 600. See also *Udayana Pillai v Senthivelu,* (1896) ILR 19 Mad 411; *Madhwa v Venkata,* (1903) ILR 26 Mad 662.
516. See the criticism in *Srinivasa v Radhakrishnan,* (1915) ILR 38 Mad 667 : 22 IC 54.
517. *Jugal Kishore v Ram Sahai,* (1886) All WN 212; *Umrao v Valiullah,* (1888) All WN 171; *Ramayya v Garuva,* (1891) ILR 14 Mad 232; *Sivakami v Gopala,* (1894) ILR 17 Mad 131; *Jafar Husan v Ranjit Singh,* (1899) ILR 21 All 4; *Narpat v Ram Saran,* (1908) ILR 30 All 162; *Chintaman v Dulari,* (1910) 7 All LJ 1087 : 8 IC 570; *Dattambhat v Krishnabhat,* (1910) ILR 34 Bom 462 : 7 IC 446; *Fida Ali v Ismailji,* (1909) 6 Nag LR 20 : 5 IC 701; *Ram Khilawan v Ghulam Hussain,* (1933) ILR 8 Luck 190 : 141 IC 464 : AIR 1933 Oudh 35; *Venkitasubramania Ayyar v Vadasseri Karnavan,* (1956) ILR Mad 983 : (1956) 1 Mad LJ 355 : AIR 1956 Mad 434.
518. *Munni Lal v Phuddi Singh,* AIR 1987 All 155.
519. *Narsingh Partab v Mohammad Yaqub,* (1929) ILR 4 Luck 363 : 56 IA 299 : 116 IC 414 : AIR 1929 PC 139.
520. *Ramdayal v Bhanwarlal,* AIR 1973 Raj 173.
521. *Kashi Ram v Sardar Singh,* (1906) ILR 28 All 157; *Krishna v Hari* (1908) 10 Bom LR 615; *Mohammad Abdullah v Mohammad Yasin,* 141 IC 377 : AIR 1933 Lah 151; *Ram Lal v Genda,* AIR 1942 All 326 : (1942) All LJ 441 : 203 IC 135.
522. *Ramayya v Garuva,* (1891) ILR 14 Mad 232; *Sivakami v Gopala,* (1894) ILR 17 Mad 131; *Srinivasa v Radhakrishnan,* (1915) ILR 38 Mad 667 : 22 IC 54.
523. *Jag Sahu v Ram Sakhi,* (1922) ILR 1 Pat 350, p 355 : 65 IC 666 : AIR 1922 Pat 167.
524. *Pitambar Purkait v Madhu Sudan,* 6 IC 153.

Again, a simple mortgage usufructuary may be primarily a simple mortgage with a right to take possession in case of default superadded. In such a case, a suit for sale is always permissible.[525] However, the application of sections 67 or 68 is not excluded.[526] In *Deputy Commr of Rae Barelli v Lal Rampal Singh*[527] there was a mortgage of a village for a sum payable within a certain period by installments with a provision that the mortgagee should take possession in default of payment, but the last clause of the deed was as follows:

> Should on the expiration of the term of this instrument any money remain due, then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this then as soon as the breach of promise occurs, they will at the end of the year realize the whole amount of installment by sale of the villages.

The Privy Council construed the document as a whole as a simple mortgage usufructuary, the mortgagee having an absolute right to take possession, and to sell if the mortgagor objected to the application of the rents, and profits to reduction of interest.

In *Jawahir Singh v Someshar*[528] there was a mortgage with possession and

(1) a stipulation for interest and the appropriation of the usufruct to the interest; and

(2) a clause that if the rent and profits do not cover the interest, the mortgagor would make good the deficiency out of his own pocket.

The Privy Council held that under the later clause, the mortgagor was personally liable to the mortgagee for the principal and the interest.

In *Panaganti Ramarayanimgar v Maharaja of Venkatagri,*[529] the mortgage was with possession with covenants to pay both principal and interest, and there was a contemporaneous lease of the mortgaged property for a rent equivalent to the interest, and the lease made the rent a charge on the property. The Privy Council construed the mortgage and lease as one transaction of anomalous mortgage of the type simple mortgage usufructuary, and held that the assignee of the equity of redemption was entitled to a decree for redemption of both the mortgage and the charge.

(61) Mortgage Usufructuary by Conditional Sale

This is another composite mortgage which is now classed as anomalous. The mortgagee is in possession as usufructuary mortgagee for a fixed period and if the debt is not discharged at the expiry of that period, he is a mortgagee by conditional sale.[530] He has, therefore, a right of foreclosure. A typical instance is a Madras case[531] where the mortgage was with possession, the usufruct to be set-off against interest and the principal to be repaid in five years and if not paid, the mortgage was to work out into a sale at the expiry of 20 years. The Privy Council

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525. *Motiram v Vitai,* (1889) ILR 13 Bom 90; *Yashvant v Vithal,* (1897) ILR 21 Bom 267; *Deputy Commr v Lal Rampal Singh,* (1885) ILR 11 Cal 237 : 12 IA 1; *Jawahir Singh v Someshar,* (1906) ILR 28 All 225 : 33 IA 42; *Lingam Krishna v Maharaja of Vizainagram,* (1911)13 Bom LR 447 : 10 IC 272 (PC); *Ramayya v Venkatarama,* (1903) 13 Mad LJ 2; *Lalta Prasad v Hari Lal,* 16 OC 90 : 19 IC 748; *Pandit Ram Lochan Prasad v Ram Raji,* (1935) ILR 10 Luck 10 : 148 IC 1197 : AIR 1934 Oudh 255; *Mohammad Saeed v Abdul Alim,* AIR 1947 Lah 40; *Govinda v Narain,* (1956) ILR Hyd 339 : AIR 1956 Hyd 107; *Govindoo v Ramachander,* AIR 1957 AP 511; *Sant Ram v Bhagwatt Das,* AIR 1958 Punj 309.

526. *Surya Prakasa Rao v Gottumukkala,* (1953) ILR Mad 1196 : AIR 1953 Mad 830.

527. *Deputy Commr of Rae Barelli v Lal Rampal Singh,* (1885) ILR 11 Cal 237 (PC) : 12 IA 1.

528. *Jawahir Singh v Someshar,* (1906) ILR 28 All 225 : 33 IA 42; *Bhola Das v Bishnath,* (1912) 10 All LJ 162 : 16 IC 982.

529. *Panaganti Ramarayanimgar v Maharaja of Venkatagri,* (1927) ILR 50 Mad 180 : 54 IA 68 : 100 IC 86 : AIR 1927 PC 32.

530. *Ramasami v Samiyappanayakan,* (1882) ILR 4 Mad 179, p 183; *Girwar Singh v Thakur Narain,* (1887) ILR 14 Cal 730, p 737; *Mohini Mohan v Sarat,* 86 IC 353 : AIR 1925 Cal 862.

531. *Veddiparthi v Appalanarasimhulu,* (1921) 41 Mad LJ 563 : 68 IC 717 : AIR 1921 Mad 517.

case of *Abid Husain v Kaniz Fatima*[532] is another instance, for there, a usufructuary mortgage was consolidated with a subsequent mortgage by conditional sale. *Sita Nath v Thakurdas*[533] was also a case of a usufructuary mortgage for a fixed period with profits in lieu of interest, with a condition that if the principal was not paid at the end of the period, the mortgagee was to have a right to foreclosure.

In some cases, an usufructuary mortgage has a time limit and a condition that in default of redemption the property shall be sold for the amount then due. In such a case, the stipulation for sale is invalid as a clog on the equity of redemption.[534] However, before the Privy Council decision in *Mahommad Sher Khan v Seth Swami Dayal*,[535] that the doctrine of clog on the equity of redemption shall be applied to all mortgages, such mortgages were sometimes wrongly classed as anomalous. Thus, in a Madras case[536] the terms of the mortgage were as follows:

> Within these limits, a house site together with a thatched house thereon we have mortgaged—that is, we have kept it as a possessory mortgage and have received ₹ 10 from you. So, having paid the principal and interest pertaining to these 10 rupees within the end of a year from the said date, we shall take possession of our house and site. If we do not act according to the said condition we shall quit the land and the house as if this is a sale.

This was construed as an anomalous mortgage, but it is clear that it was an usufructuary mortgage, and that the condition as to sale was void as a clog on redemption. This was so held in another very similar case.[537] Where the terms of mortgage deed stated that the amount secured was to be redeemed within a stipulated period, the provision therein, that upon failure to redeem within the stipulated time, the mortgage shall be treated as a sale, would not have the effect of converting the mortgage from usufructuary to an anomalous one. In such a case, when there was no condition in the mortgage-deed that on expiry of stipulated period, the mortgage shall be deemed to be redeemed in full without payment whatsoever by the mortgagor, as required by section 165(b) of Madhya Pradesh Land Revenue Code, the mortgage could not be considered to be valid. The possession of the property mortgaged has to be given back to the mortgagor, under the aforesaid provisions. As the mortgage was void, the parties were liable to return to each other the benefits earned under the contract in view of section 65 of the Indian Contract Act, 1872.[538]

(62) Customary Mortgages

Customary mortgages are mortgages to which special incidents are attached by local usage. Thus, *otti* and *kanom* mortgages cannot be redeemed before the expiry of 12 years in the absence of a special agreement to the contrary.[539] The *otti-holder* has a right of pre-emption.[540] The *kanom* partakes of the character of a mortgage and a lease.[541] *Apemartham* mortgage is redeemable for the market value of the land at the time of redemption.[542]

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532. *Abid Husain v Kaniz Fatima*, (1924) ILR 46 All 269 : 51 IA 157 : 80 IC 1019 : AIR 1924 PC 102.
533. *Sita Nath v Thakurdas*, (1919) ILR 46 Cal 448 : 52 IC 433.
534. *Chellakutti v Vengappa*, 82 IC 809 : AIR 1925 Mad 366; *Srinivasa v Radhakrishnam*, (1915) ILR 38 Mad 667 : 22 IC 54; *Kandula Venkiah v Donga Pallaya*, (1920) ILR 43 Mad 589 : 57 IC 724; *Pandiyan v Vellayappa*, (1917) 33 Mad LJ 316 : 42 IC 438; *Vaddiparthi v Appalanarasimhulu*, AIR 1921 Mad 517.
535. (1922) ILR 44 All 185 : 49 IA 60 : 66 IC 583 : AIR 1972 PC 17.
536. *Hakeem Patte Muhammad v Shaik Davood*, (1915) ILR 39 Mad 1010 : 30 IC 569.
537. *Kondula Venkiah v Donga Pillay*, (1920) ILR 43 Mad 589 : 57 IC 724.
538. *Haji Fatima Bee v Prahlad Singh*, AIR 1985 MP 1.
539. *Edathil v Kopashon*, (1862) 1 Mad HC 122; *Kumini v Parkam*, (1863) 1 Mad HC 261; *Keshava v Keshava*, (1878) ILR 2 Mad 45; *Kelu Nedungadi v Krishnan*, (1903) ILR 26 Mad 727; *Idichandi Mathai v Narayanan Unithan*, AIR 1962 Ker 27.
540. *Edathil v Kopashon*, (1862) 1 Mad HC 122.
541. *Kanna Karup v Sankara*, (1921) ILR 44 Mad 344 : 62 IC 386 : AIR 1921 Mad 243.
542. *Shekari v Mangalom*, (1876) ILR 1 Mad 57.

(63) Other Anomalous Mortgages

Other anomalous mortgages are very varied. Some are usufructuary mortgages with a covenant to pay,[543] or with a time limit but which do not fall within the class of simple mortgage; usufructuary because neither the covenant, nor the time limit imports a right of sale. Instances of such mortgages are a mortgage with possession for three years, where the land is to be redeemed without payment at the expiry of that period,[544] or a mortgage with possession for four years, where the mortgagee is to credit the rents and profits first to the interest, and then the balance, if any, towards the principal, and the mortgagor is to pay the deficiency at the end of the term,[545] or a mortgage with possession for 10 years with the rent and profits to be in lieu of the principal and interest and the mortgagee's right is to cease at the end of the term;[546] or a simple mortgage repayable in three years' time, but with a condition giving the mortgagee power of foreclosure at any time if a creditor brought a suit against the mortgagor, or attempted to attach his property,[547] or to obtain proprietary possession of the mortgaged property by bringing a suit for a decree of foreclosure.[548]

Other instances of anomalous mortgages are a mortgage where possession was only partly given and there was no personal covenant to pay;[549] and a mortgage which combines the elements of a simple mortgage, a usufructuary mortgage, and a mortgage by conditional sale.[550] In the case last cited, there was a mortgage for three years; wherein, in default of redemption at the end of the term, the mortgagee was to be in possession for four years, and to take the rents and profits in lieu of interest; in default of redemption at the end of four years, the mortgage was to work itself out into a sale. In a Rangoon case,[551] a mortgage with a covenant to pay interest but no covenant to pay the principal, was treated as an anomalous mortgage. It is submitted, however, that the covenant to pay interest implied a covenant to pay principal. In another anomalous mortgage,[552] the mortgagee was to have possession and appropriate rents and profits towards the satisfaction of a certain rate of interest; the mortgagor was to redeem within eight years and in default, the mortgagee was to have the right to recover the total amount through the court by the sale of the property mortgaged, and by sale of the other property of the mortgagor.

(64) Attestation

An anomalous mortgage deed requires attestation.[553]

[554]**59. Mortgage when to be by assurance.**—Where the principal money secured is one hundred rupees or upwards, a mortgage [[555]other than a mortgage by deposit of title-deeds] can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

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543. *Akbarali v Mafijaddin,* AIR, 1942 Cal 55 : 74 Cal LJ 370 : 45 Cal WN 823 : 198 IC 674.
544. *Visvalinga v Palaniappa,* (1898) ILR 21 Mad 1.
545. *Hikmatulla v Imam Ali,* (1890) ILR 12 All 203.
546. *Tukaram v Ramchand,* (1902) ILR 26 Bom 252; cf *Shaik Idrus v Abdul Rahiman,* (1892) ILR 16 Bom 303 (a case under Reg 5 of 1827).
547. *Solema Bibi v Hafez Mohammad,* (1927) ILR 54 Cal 687 : 104 IC 833 : AIR 1927 Cal 836.
548. *Ujagar Ali v Lokendra Singh,* (1941) ILR All 240 : (1941) All LJ 111 : 194 IC 520 : AIR 1941 All 169.
549. *Madho Rao v Gulam Mohiuddin,* (1920) 15 Nag LR 134 : 56 IC 717 : AIR 1919 PC 121.
550. *Sunder Dei v Thakur Baldeo,* (1915) 18 OC 10 : 28 IC 161; *Vijay Kumar v Ramprasad,* (1960) 62 Bom LR 222 : AIR 1960 Bom 411.
551. *Gupta v Administrator-General,* (1927) ILR 5 Rang 558 : 105 IC 586 : AIR 1928 Rang 16.
552. *Gajadhar v Sibananda,* (1924) 28 Cal WN 532 : 81 IC 768 : AIR 1924 Cal 592.
553. *Kanna Karup v Sankara,* (1921) ILR 44 Mad 344 : 62 IC 386 : AIR 1921 Mad 243.
554. As to limitation to the territorial operation of section 59, see section 1, supra, section 59,extends to every cantonment—see section 287 of the Cantonments Act, 1924 (2 of 1924).
555. Ins. by Act 20 of 1929, sec. 20.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by [556][a registered instrument] signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

[***][557]

Synopsis

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(1) Amendments

The words "other than a mortgage by deposit of title deeds" were inserted by the amending Act 20 of 1929. The amendment makes no change in the law.

(2) Extent of Applicability

The section does not apply to territories excluded from the operation of the Registration Act, 1908. It has been extended to cantonments by section 2 of the Cantonments Act, 1924. If, however, the property mortgaged is situated in an area to which the Act has not been extended, the section does not apply even if the contract may have taken place in such an area.[558] An oral mortgage, even if the money secured exceeds ₹ 100, is valid where the Act does not apply. Hence, a mortgage that was effected before section 59 was made applicable to the state of Haryana was valid. Limitation for redemption of such a mortgage is 30 years from the date of mortgage under Article 61 of Limitation Act.[559]

This section has been extended to the states of Punjab, and Haryana, with effect from 6 June 1968 and 5 August 1967, respectively. The section does not embody a rule of justice, equity and good conscience and does not affect a mortgage executed before the section was enacted,[560] or at a place where the section was not in force.[561]

As a result of the extension of this section to the states of Haryana and Punjab, mortgages other than mortgages by deposit of title deeds can only be made by following the manner prescribed by the section. Mortgages by deposit of title deeds are not, however, affected. Such mortgages would be governed in Punjab by the rules of justice, equity and good conscience. In Haryana, however, section 58(f) has also been extended with effect from 10 May 1972, and some towns notified, so that such mortgages can only be made if the deposit is made in the said towns.[562]

(3) Mode of Transfer

Besides deposit of title deeds, there are only two ways in which property may be transferred by way of mortgage, and these are:

(1) Registered instrument; and

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556. Subs. by Act 6 of 1904, sec. 3, for "an instrument".
557. The third paragraph omitted by Act 20 of 1929, sec. 20
558. *Iqbal Begam v Uttam Chand*, AIR 1947 Lah 324.
559. *Siri Chand v Nathu*, AIR 1983 P&H 171.
560. *Satar v Mahantu*, AIR 1959 J&K 64.
561. *Ramnath v Kamidan*, AIR 1963 Raj 116; *Chhuttan Lal v Punjab National Bank Ltd*, AIR 1972 Raj 159.
562. See the commentary on section 58(f).

(2) delivery of possession.

As in the case of sales, the first overlaps the second, for a mortgage for less than ₹ 100 may also be made by registered instrument. If the principal money secured is less than ₹ 100, a mortgage may be made by delivery of possession. But of course, this would not apply to a simple mortgage, for in such a mortgage, the mortgagor does not part with possession. A simple mortgage must always be registered.[563] An oral mortgage effected by delivery of possession is entitled to precedence over a subsequently registered mortgage.[564]

Even an admission of a mortgage will not be sufficient to create a mortgage.[565]

Where a mortgage was created against a principal amount of ₹ 200 taken as loan, the mortgage deed was unregistered and unstamped, it was held that there was no valid mortgage, as section 59 of the TP Act clearly lays down that where the principal money accrued is ₹ 100 or upwards, a mortgage, other than a mortgage by deposit of title deeds, can be affected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.[566]

(4) Transfer when Complete

In the absence of a contract to the contrary, the completion of the mortgage does not depend upon the payment of consideration. The transfer takes effect on the execution of the deed of mortgage,[567] or where there is no deed, when possession is delivered. Mere undertaking to create mortgage is not sufficient to create interest in any immoveable property.[568]

(5) Principal Money Secured

These words show that interest is not to be taken into account in estimating the amount secured,[569] as is also the rule under the Registration Act, 1908.

(6) Registered Instrument

In the case of a mortgage other than a mortgage by deposit of title deeds, if the principal money secured is ₹ 100 or upwards, a registered instrument is necessary. The deeds must be—

(1) signed by the mortgagor;

(2) attested by at least two witnesses;

(3) registered.

Signed by the mortgagor

The section does not expressly empower the mortgagor to sign by an agent as section 123 empowers a donor, but this is implied.[570] The signature may be made by means of types or by

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563. *Maung Shwe Bye v Chawari Mutu,* 12 IC 25.
564. See Registration Act 1908,section 48.
565. *Bishun Singh v Sheodhari Das,* AIR 1947 Pat 110.
566. *Kapileshwar Sahoo v Rama Chandra Sahoo,* AIR 1996 Ori 7 : (1995) 2 OLR 74.
567. *Raghunath v Amir Baksh,* (1922) ILR 1 Pat 281 : 65 IC 329 : AIR 1922 Pat 299; *Allah Ditto v Nazar Din,* 33 IC 474; *Parameswaran v Narayana,* AIR 1957 Ker 117.
568. *Haryana Financial Corporation v Gurcharan Singh,* JT 2014 (1) SC 289 : 2013 (15) SCALE 296 : 2014 (3) SCJ 125 : 2014 (1) ShimLC 534.
569. *Jodh Ram v Lajja Ram,* (1913) 11 All LJ 729; *Kunhi Amma v Ahmed,* (1900) ILR 23 Mad 105; *Nana v Anant,* (1878) ILR 2 Bom 353; *Ram Doolary v Thacoor,* (1878) ILR 4 Cal 61; *Panchi Das v Ahmedulla,* (1883) 12 Cal LR 444; *Habibullah v Nakched Rai,* (1883) ILR 5 All 447.
570. *Deo Narain v Kukur Bind,* (1902) ILR 24 All 319 ILR overruling *Moti Begum v Zorawar,* (1899) All WN 196; *Sasi Bhusan v Chandra,* (1906) ILR 33 Cal 861, p 865; *Ram Charan v Bhikari Lal,* (1909) 12 OC 257 : 3 IC 915; *Lal Bahadur Singh v Rameshwar Prasad,* (1928) ILR 3 Luck 113 : 105 IC 581 : AIR 1927 Oudh 510.

a facsimile,[571] or, it may be a mark of an illiterate person.[572] But a literate person cannot sign by making a mark.[573]

Attested

That requisition as to attestation was first made by TP Act.[574] It is now clear that the requisition applies to anomalous mortgages, and this was so decided[575]before anomalous mortgages were included in the definition in section 58. The requirement of attestation does not, of course, apply to instruments executed by courts.[576] The definition includes attestation on admission of execution, and is retrospective. The word "attested" is defined in section 3 of the TP Act, and the question as to what constitutes a valid attestation is discussed in the note "Attested" under section 3. The mode of proving an attested document is laid down by sections 68 to 71 of the Indian Evidence Act, 1872. If execution of the instrument is denied specifically, it is necessary to call at least one attesting witness if there be one alive and subject to the process of the court. But even if execution is admitted, it is still incumbent on the plaintiff to prove the mortgage in the form prescribed by section 59, i.e., he must prove that it was attested by at least two witnesses.[577] In a case from Patna, a *purdahnashin* lady admitted execution of a deed of mortgage, and the Patna High Court relying on section 70 of the Indian Evidence Act, 1872 held the deed proved, although the attesting witnesses were on the other side of the *purdah*, and did not actually see her sign.[578] But the Privy Council reversed the decision saying that section 70 of the Indian Evidence Act, 1872 only applied to a document that was duly attested, and that as the mortgage deed was not attested within the meaning of section 59 of the TP Act, it was invalid as against her in spite of her admission.[579] It does not matter that the unattested deed has been put in without objection in the lower court, for section 59 enacts a rule of law, and not a rule of evidence;[580]but if the objection involves a question of facts it cannot be raised in second appeal.[581]

If attestation is invalid the deed cannot operate as a mortgage. Nor can it operate as a charge, for the words in section 100 "and the transaction does not amount to a mortgage" do not mean that a transaction which purports to be a mortgage becomes, by reason of

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571. *Nirmal Chunder v Saratmoni,* (1898) ILR 25 Cal 911 (a case of a will).
572. General Clauses Act,section 3 (52); *Govind v Bhau* (1916) ILR 41 Bom 384 : 39 IC 61.
573. *Sadananda Pal v Emperor,* (1905) ILR 32 Cal 550 (Criminal case).
574. *Ahmad Raza v Abid Husain,* (1916) ILR 38 All 494 : 43 IA 264 : 39 IC 11; *Jati Kar v Mukunda Deb,* (1912) ILR 39 Cal 227 : 11 IC 884; *Rangili v Pearey Lal,* (1939) All LJ 1056 : 186 IC 515 : AIR 1940 All 101.
575. *Kama Karup v Sankara,* (1921) ILR 44 Mad 344 : AIR 1921 Mad 243.
576. *Genamal v Ramaswamy,* AIR 1960 AP 465.
577. *RMARM Chettyar Firm v U Htaw,* (1933) ILR 11 Rang 26 : 141 IC 700 : AIR 1933 Rang 6 dissenting from a dictum in *Biswanath v Kayastha Trading, etc Corporation,* (1929) ILR 8 Pat 450 : 119 IC 405 : AIR 1929 Pat 422; *Rajani Kanta Barui v Bonbehari Sarkar,* (1953) ILR 1 Cal 120 : 56 Cal WN 9 : AIR 1952 Cal 7.
578. *Hira Bibi v Ramdhan Pal,* (1922) 6 Pat LJ 465 : 62 IC 540 : AIR 1922 Pat 70; reversed in *Hira Bibi v Ram Hari Lal,* 52 IA 362 : 89 IC 659 : AIR 1925 PC 203.
579. *Hira Bibi v Ram Hira Lal,* AIR 1922 Pat 70; *Maung Po Gyi v Muang Min Din,* (1927) ILR 5 Rang 561 : 104 IC 386 : AIR 1927 Rang 233; *Mushrafi Begum v Lala Kundan Lal,* (1933) ILR 9 Luck 12 : AIR 1933 Oudh 365.
580. *Banwari Prasad v Bigni,* 101 IC 277 : AIR 1927 Pat 131.
581. *Sricharan v Makhan Lal,* 51 IC 378; *Rangaswami v Veeraraghava,* (1924) 46 Mad LJ 56 : 76 IC 1003 : AIR 1924 Mad 513; *Raja Venkataramayya v Kamisetti,* (1927) 53 Mad LJ 216 : 101 IC 498 : AIR 1927 Mad 662.

defective execution a charge.[582] However, the invalidly attested deed is admissible as evidence to prove the personal covenant to pay, and if there is no personal covenant, the obligee may sue for compensation or pursue his remedy under section 68 of the TP Act, for the Privy Council said that "the position of the mortgagor under this section cannot, by reason of the non-attestation of the deed, be better than it would have been if the mortgage had been duly attested".[583] So, where the deed was unattested, the mortgagor in his suit for redemption was allowed to amend the plaint, and sue on his title.[584]However, if the deed is validly attested it cannot be proved except by the strict mode of proof required by section 68 of the Indian Evidence Act, 1872, and in default of such proof it cannot be used even as evidence of the personal obligation.[585]

Registration

Prior to the TP Act, a mortgage was not required to be in writing, and usufructuary mortgages in the *mofussil* were generally made without writing by simple delivery of possession.[586] The Act as originally enacted made registration compulsory for all mortgages of ₹ 100 and over, but as to mortgages for less than ₹ 100, allowed either an instrument registered, or unregistered, or an oral transfer by delivery of possession where the mortgage was not a simple mortgage. This corresponded with the provisions for optional registration in the Registration Act, 1877. And under both Acts interest was not calculated in computing the value of the security.[587] A simple mortgage for less than ₹ 100 could be made by an unregistered instrument.[588]

The word "registered" was inserted in the second clause of section 59 by Act 6 of 1904, which came into force on 11 March 1904. The amendment was made because the rule of priority of registered over unregistered instruments enacted in section 48 of the Registration Act had been construed by the courts as subject to the doctrine of notice. This doctrine had been expressly abolished as regards the early registration regulations by Act I of 1843, but the courts treated it as revived, as subsequent Registration Act did not

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582. *Pran Nath v Jadu Nath,* (1905) ILR 32 Cal 729; *Tofaluddi v Mahar Ali,* (1899) ILR 26 Cal 78, p 81; *Royzuddi v Kali Nath,* (1906) ILR 33 Cal 985; *Samoo Palter v Abdul Sammad,* (1908) ILR 31 Mad 337; *Anantrama v Yusufji,* (1916) 31 Mad LJ 133 : 36 IC 903 disapproving *Nelakantam v Madasami,* (1907) 17 Mad LJ 39; *Param Hans v Randhir Singh,* (1916) ILR 38 All 461 : 35 IC 748; *Collector of Mirzapur v Bhagwan Prasad,* (1913) ILR 35 All 104, 18 IC 311; *Narayan v Lakshmandas,* (1905) 7 Bom LR 934; *Debendra v Behari,* (1911) 16 Cal WN 1075 : 15 IC 666; *Sreemutty Rani v Rajah Sri Nath,* (1896) 1 Cal WN 81; *Khemchand v Malloo,* (1915) 10 Nag LR 81 : 26 IC 601; *Tarachand v Kesrimal,* AIR 1973 Raj 123. 79. *Pulaka Veetil Muthalakulangara v Thiruthipalli,* (1909) ILR 32 Mad 410 : 1 IC 1 approving *Sada Kavaur v Tedepally,* (1907) ILR 30 Mad 284 and overruling *Madras Deposit Co v Oonnamalai,* (1895) ILR 18 Mad 29; *Tofaluddi v Mahar Ali,* (1899) ILR 26 Cal 78; *Sonatun v Dino Nath,* (1899) ILR 26 Cal 222; *Mathura Prasad v Cheddi Lal,* (1915) 13 All LJ 553 : 29 IC 363; *Dhana Mohammed v Nastulla,* 92 IC 948 : AIR 1926 Cal 637; *Sama Rao v Vannajee,* (1923) ILR 46 Mad 64 : 71 IC 153 : AIR 1923 Mad 36; *Mahadeo Prasad v Gairaj Singh,* 34 IC 397; *Zamindar of Polavaram v Maharaja of Pittapuram,* (1931) ILR 54 Mad 163 : 135 IC 17 AIR 1931 Mad 140.

583. *Ram Narayan Singh v Adhindra Nath,* (1917) ILR 44 Cal 388 : 38 IC 932 : 44 IC 87 : AIR 1916 PC 119.

584. *Arab Ali v Farid Ali,* AIR 1961 Assam 48.

585. *Shib Chandra v Gour Chandra,* (1922) 27 Cal WN 134 : 68 IC 86 : AIR 1922 Cal 160; *Veerappa v Chinna Muthu,* (1907) ILR 30 Mad 251.

586. *Ahmad Raza v Abid Husain,* (1916) ILR 38 All 1494 : 43 IA 264 : 39 IC 11.

587. *Habibullah v Nakched,* (1883) ILR 5 All 447; *Nana v Anant,* (1878) ILR 2 Bom 353; *Ram Doolary v Thacoor,* (1878) ILR 4 Cal 61; *Panchi Das v Ahmedulla,* (1883) 12 Cal LR 444; *Jodh Ram v Lajja Ram,* (1913) 11 All LJ 729 : 21 IC 78; *Sadagopal v Dorasami,* (1882) ILR 5 Mad 214; *Kunhi Amma v Ahmed,* (1900) ILR 23 Mad 105.

588. *Narasayya v Guruvappa,* (1878) ILR 1 Mad 378; *Ram Doolary v Thacoor Rai,* (1879) ILR 4 Cal 61.

expressly exclude it.[589] The legislature considered that the application of the doctrine of notice opened the door to perjuries and other malpractices, and virtually abolished it by requiring all deeds of mortgage to be registered. The Amending Act 6 of 1904 thus abolished optional registration as regards mortgage deed, and the competition between registered and unregistered deeds under section 50 of the Registration Act cannot arise in respect of instruments of mortgage executed after 11 March 1904. Such competition may, however, still arise in places where the TP Act is not in force. In Punjab, a mortgage for less than ₹ 100 could, before section 59 was extended, be made by unregistered instrument. The Lahore High Court had held that a subsequent registered mortgagee loses priority over a previous unregistered mortgagee if he receives notice of it before registration of his mortgage, even though he had no notice of it at the time of execution.[590]

An oral mortgage is invalid where it is alleged to be a usufructuary mortgage for ₹ 450.[591]

In Sikkim, the TP Act does not apply *exproprio vigore*, and the provision in section 59 requiring a mortgage of the value of ₹ 100 or upwards to be effected by a registered instrument cannot be regarded as an embodiment of the rules of equity, justice, and good conscience. As regards the law of registration in Sikkim, though a document of sale or mortgage of immovable property would be compulsorily registrable under notification no 385/G dated 11 April 1928 and the rules relating to transfer of immovable property dated 18 January 1950, yet, under notification no 2947/G dated 22 November 1946, an unregistered document may be validated and admitted as evidence in a court of law to prove the title or other matters contained in the document on payment of a penalty upto 50 times the usual registration fees.[592]

(7) Registration Must be Valid

The registration must be valid according to the law in force in India (section 3). Thus, if the property is so incorrectly described that it cannot be identified,[593] or when the registration has proceeded on a misdescription which is a fraud on the law of registration;[594] or when the deed is registered in a circle in which the property is not situated,[595] or an infinitesimal property not really intended to be transferred is inserted in the deed only for the purpose of creating jurisdiction in the registration district where the properties really intended to be transferred are situated,[596] or is not presented for registration by the proper person,[597] the mortgage is invalid. When both a sale deed and an agreement to reconvey are executed with the intention that the transaction should be a mortgage, both the deeds must be registered.[598]

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589. See *Mulla's Registration Act.*
590. *Rodha Mal v Ramji Das,* 146 IC 40 : AIR 1933 Lah 609 following *Khiali Ram v Himmata,* (1908) ILR 30 All 238.
591. *Ramprasad v Kalyani,* AIR 1973 Raj 208.
592. *Bishnu Kala Karki Dholi v Bishnu Maya Durjeeni,* AIR 1980 Sikkim 1.
593. *Baij Nath v Sheo Sahoy,* (1891) ILR 18 Cal 556; *Narasamma v Subbarayudu,* (1895) ILR 18 Mad 364; *Nahar Lal v Baij Nath,* (1928) 32 Cal WN 241 : 113 IC 855 : AIR 1928 Cal 385.
594. *Joginee Mohan v Bhoot Nath,* (1904) ILR 29 Cal 654.
595. *Harendra Lal v Hari Dasi,* (1914) ILR 41 Cal 972 : 41 IA 110 : 23 IC 637 : AIR 1914 PC 67; *Bishwanath v Chandra,* (1921) ILR 48 Cal 509 : 48 IA 127 : 60 IC 833 : AIR 1921 PC 8; *Bisal Singh v Roshan Lal,* (1924) 22 All LJ 241 : 78 IC 265 : AIR 1924 All 373; *Akshayalingam v Ramayya,* 120 IC 876 : AIR 1929 Mad 426; *Kedar v Bidhu,* (1924) 38 Cal LJ 355 : 70 IC 583 : AIR 1924 Cal 348.
596. *Inuganti Venkatarama Rao v Sobhanadri Appa Rao,* 63 IA 169 : (1936) All LJ 258 : 38 Bom LR 457 : 40 Cal WN 545 : 70 Mad LJ 378 : 161 IC 29 : AIR 1936 PC 91.
597. *Dottie Karan v Lachmi Prasad,* (1931) ILR 10 Pat 481 : 58 IA 58 : 131 IC 321 : AIR 1931 PC 52.
598. *Rajjulal v Jalaluddin,* AIR 1950 Hyd 51.

(8) Registration, if Invalid

A mortgage deed invalid for want of registration cannot operate as a charge,[599] but it would be admissible in evidence for a collateral purpose to prove the nature and character of the possession under the Privy Council ruling in *Varatha Filial v Jeevarathammal.*[600] Following this ruling, it has been held that a plaintiff may sue on title for possession after he had executed a usufructuary mortgage which was invalid for want of registration,[601] or use the unregistered deed to defeat the defendant's claim to title by adverse possession.[602] In an Allahabad case,[603] a defendant who had been 12 years in possession under a usufructuary mortgage which was invalid for want of registration was held to have acquired a legally operative mortgage by adverse possession. Under section 53A and the proviso to section 49 of the Registration Act, 1908, a mortgage invalid for want of registration is available to a usufructuary mortgagee to protect his possession. A mortgagor cannot file a suit for redemption in the case of a mortgage which is invalid for want of registration. If the mortgage is usufructuary, the proper course is to treat the mortgagee as a trespasser, and to sue for eviction.[604]

Again an unregistered mortgage deed, though invalid as a mortgage may be used to prove the debt. It has been held that if the personal covenant to pay is separable from the creation of the security, it may be used to support a personal claim for the debt;[605] but not if the transaction is indivisible and if the loan and the mortgage cannot be separated.[606] Two Madras cases to the contrary are, it is submitted, unsound. In the first,[607] the mortgage bond was not admitted even as evidence on an express contract to pay contained in the deed, and in the other[608] it was not admitted even as evidence of a stipulation to pay compound interest. However, an oral usufructuary mortgage for a sum over ₹ 100 is void, and no suit for the redemption of such a mortgage, and the recovery of possession can lie.[609] However, if possession is delivered to the

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599. *MaungTunYa vMaungAung,* (1924)ILR2Rang313 :84IC 1023 :AIR1925 Rang1; *PR Somasundaram Chettiar v YPN Nachiappa Chettiar,* (1924) ILR 2 Rang 429 : 84 IC 302 : AIR 1925 Rang 55.See note 'Registration' undersection 100; *Vishwanatha v Fatima,* AIR 1952 Hyd 5.
600. *Varatha Filial v Jeevarathammal,* (1919) ILR 43 Mad 244 : 46 IA 285 : 53 IC 901.
601. *Ma Mo E v Ma Kun Hlaing,* AIR 1941 Rang 230; following *Ma Kyi v Mg Thon,* (1935) ILR 13 Rang 274 : 157 IC 565 : AIR 1935 Rang 230. See also *Hansia v Bakhtawarmal,* (1958) ILR 8 Raj 126 : AIR 1958 Raj 102. See *Raghunath Singh v Kishanlal,* AIR 1986 MP 215, p 217 holding that where mortgage deed is defective due to non-registration the mortgagor cannot be permitted to resist the redemption by the mortgagor.
602. *Appanna v Venkatasami,* (1924) ILR 47 Mad 203 : 79 IC 510 : AIR 1924 Mad 292.
603. *Maha Mangol Rai v Kishun Kandu,* 100 IC 346 : AIR 1927 All 311.
604. *Lingappa v Danappa,* AIR 1947 Bom 206.
605. *Lachmipat v Mirza,* (1869) 4 Beng LR 18; *Tukaram v Khandoji,* (1869) 6 Bom HC 134; *Sangappa v Basappa,* (1870) 7 Bom HC 1; *Shir Seshathri v Sankara,* (1873) 7 Mad HC 296; *Guduri v Rapaka,* (1874) 7 Mad HC 348; *Sheo Dial v Prag Dat,* (1881) ILR 3 All 229; *Krishto Lall v Nonomalee,* (1880) ILR 5 Cal 611; *Gour Charan v Jinnut Ali,* (1882) 11 Cal LR 166; *Ulfatunnissa v Hosain Khan,* (1883) ILR 9 Cal 520; *Jagappa v Latchappa,* (1882) ILR 5 Mad 119; *Gomji v Subbarayappa,* (1892) ILR 15 Mad 253; *Vani v Bani,* (1896) ILR 20 Bom 553; *Sriramula v Chinna,* (1902) ILR 25 Mad 396; *Nemdhari v Bissessari,* (1897) 2 Cal WN 591; *Sadu Kavur v Tadepally,* (1907) ILR 30 Mad 284; *Khudda Mal v Kunji,* (1881) PR 80; *Premsing v Mula Lal,* (1883) PR 10; *Jogin Mohun v Bhoot Nath,* (1902) ILR 29 Cal 654, on app (1901) ILR 31 Cal 146; *Rama Rao v Vedayya,* (1923) ILR 46 Mad 435 : 73 IC 188 : AIR 1923 Mad 447; *Basant Mal v Jawahir Singh,* (1925) 7 Lah LJ 3 : 87 IC 609 : AIR 1925 Lah 356; *Jagannadhan Pillai v Official Assignee,* (1931) 60 Mad LJ 309 : 129 IC 814 : AIR 1931 Mad 124; *Krishnaswami v Kamalamma,* AIR 1941 PC 90 : 68 IA 136; *Chhotibui Daulatram v Mansukhlal,* AIR 1941 Bom 1; *Harichand v Kartar Singh,* AIR 1952 Pepsu 56; *Mohanlal v Gajrujsingh,* AIR 1959 Mad 178; *Mon Koch v Guneswari,* AIR 1968 Ass & Nag 10.
606. *Muttongency v Ramnarain,* (1879) ILR 4 Cal 83; *Jaisukh v Sayad Mahomed,* (1880) PR 39.
607. *Achoo v Dhany Ram,* (1869) 4 Mad HC 378.
608. *Swami Chetty v Ethirajulu,* (1917) ILR 40 Mad 547 : 34 IC 853.
609. *Sonua Kumhar v Chamtu Pahan,* AIR 1953 Pat 134; See also *Kameshwur Prasad v Meghun Garain,* AIR 1951 Pat 137; *Ramulu, B v G Ramaswamy,* AIR 1971 Ori 58.

mortgagee under an oral mortgage such a mortgagee cannot hold the possession adversely to the mortgagor and the mortgagor though cannot regain possession on the strength of the mortgage as it is unregistered, can still do it as the owner of the property.[610]

(9) Effect of Registration

A mortgage does not become complete and enforceable until it is registered. Therefore, if a mortgage is impeached as a fraudulent preference, the time of three months under section 54 of the Provincial Insolvency Act runs from the date of registration.[611] But registration does not suspend the operation of the mortgage and under section 47 of the Registration Act, as soon as it is registered it takes effect from the date of execution. Therefore, if the property is attached after the date of execution of a mortgage, but before the date of registration, the mortgage will not be invalid as against claims enforceable under the attachment.[612] This is because an attachment does not affect a subsequent alienation.

When the mortgage and the terms of the mortgage are admitted in the pleading, it has been held that a suit for redemption will lie even though the deed is not registered.[613] On the other hand, if a person suing to enforce a claim arising out of a mortgage admits that the deed of mortgage has been altered by a subsequent verbal arrangement, he can neither prove the verbal arrangement, nor succeed on the footing that the transaction is governed by the mortgage.[614] If the mortgagee remains in possession of the mortgaged property for 12 years on the basis of a usufructuary mortgage deed which is not registered, the mortgagee prescribes to himself for a valid mortgagee's title; he does not acquire full title to the property.[615]

(10) Movables

The section has no application to a mortgage of movable property. A mortgage of movable property does not require registration or attestation.[616]

[617][**59A. References to mortgagors and mortgagees to include persons deriving title from them.**—Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.]

This section was inserted by the amending Act 20 of 1929 to make it clear that the words '"mortgagor" and "mortgagee" include all persons deriving title under them. These words were so used even before the amendment.[618] Even ignoring the amendment brought about by section 59A, the general position is that in the absence of any strong contra indication, a mortgagee would include the assignee of a mortgagee. Thus, the term mortgagee as

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610. *Jeet Ram v Ganga Phal,* AIR 2010 (NOC) 834 (P&H).
611. *Muthiah Chettiar v Official Receiver, Tinnevelley,* (1933) 64 Mad LJ 382 : 141 IC 101 : AIR 1933 Mad 185 followed in *Iswarayya v Subbamma,* (1934) 67 Mad LJ 380 : 151 IC 1054 : AIR 1934 Mad 637 (a sale).
612. *Nabadweepchandra Das v Lokenath Roy,* (1932) ILR 59 Cal 1176 : 36 Cal WN 733 : 143 IC 452 : AIR 1933 Cal 212.
613. *Govindan Nayar v Ammed,* 98 IC 195 : AIR 1927 Mad 92; *Munshi Ram v Baisakhi Ram,* AIR 1947 Lah 335.
614. *Kampta Singh v Chaturbhuj Singh,* 61 IA 185 : 66 Mad LJ 662 : (1934) All LJ 462 : 36 Bom LR 547 : 38 Cal WN 575 : 59 Cal LJ 277 : 148 IC 486 : AIR 1938 PC 98; *Munshi Ram v Baisakhi Ram,* AIR 1947 Lah 335.
615. *Balkrishan v Mohsin Bhai,* AIR 1999 MP 86, para 7.
616. *Jati Kar v Mukunda Deb,* (1912) ILR 39 Cal 227, p 230 : 11 IC 884; *Vasudevan v Kutti Amma,* (1941) 2 Mad LJ 293 : 54 Mad LW 233 : (1941) Mad WN 75 : 197 IC 259 : AIR 1941 Mad 805.
617. Ins. by Act 20 of 1929, sec. 21.
618. *Subbu Rao v Pakkiamma Nadathi,* (1924) 46 Mad LJ 74 : 80 IC 363 : AIR 1924 Mad 453; *Koli Narayani v Neelakantan Nanu,* AIR 1991 Ker 66, p 69.

contained in explanation IV to section 2(25) of the Kerala Land Reforms Act, was held to include the assignee mortgagee as well, subject of course, to his satisfying other conditions indicated in that provision.[619]

The Privy Council in *Muhammad Sidiq v Muhammad Nasirullah,*[620] treated the words as including the heirs of mortgagor, and of the mortgagee. The word "mortgagor", however, does not include a transferee of the mortgagor in section 68(a), as the transferee of the mortgagor is not bound by the mortgagor's personal covenant.[621] This is shown by the words "mortgagor himself" used in that section. However, in clause (c) of that section, a subsequent purchaser would be included.[622]The section refers to such persons as heirs, executors, and administrators who derive their title from a mortgagor or a mortgagee.[623] A recital in a mortgage deed regarding the payment of consideration is, therefore, held binding on a subsequent purchase of the mortgagor or his representative in title to the extent to which it was binding on the mortgagor himself.[624]In *Thankamony v Retnam Nadathy,*[625] after the death of the mortgagor, his widow and the daughter filed a suit for redemption of the mortgaged property . The mortgagee contested the suit challenging the status of the widow and of the daughter asking them to prove the same through a valid marriage and through the paternity determination. The court held that a mortgagee cannot be allowed to raise an inconsistent plea of unmarried status of the mortgagor or that of determination of paternity of the child, more so when the marriage was proved. A person who has purchased the right of redemption from the original mortgagor by a registered document, can claim that any question relating to the right of redemption in a suit for redemption must be determined by the court. The plaintiff in such a suit is entitled to demonstrate how the suit is not premature, as the minimum period of non-redemption provided in the mortgage deed is a clog on the equity of redemption and is, therefore, void.[626]In a Madras case, the auction purchasers purchased one-third share of the mortgagor in mortgaged items of properties, despite their having been made aware of the subsistence of the mortgage. Later on, when some of the purchasers instituted a partition suit, they as well as the other auction purchaser were put on notice of the subsistence of the mortgage, and were warned of the consequences of any collusive arrangement. Despite the notices, the litigant purchasers brought about a compromise partition decree. In this decree, the mortgaged items of properties were allotted to the other parties and some other items of properties (which, according to the mortgagee, were worthless) were allotted to the mortgagors. These materials were held to establish the commission of fraud by the mortgagors and the purchasers. It was held that in such circumstances, the normally available right of the co-sharers of asking for a partition of the mortgaged items free of mortgage, cannot be claimed by such purchasers. The resultant position would be that the mortgagee would be entitled to ignore the partition decree, and to enforce the mortgage against the one-third share of the mortgagor.[627]

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619. *Kali Narayaniv Neelakantan Nanu,* AIR 1991 Ker 66, p 72.
620. *Muhammad Sidiq v Muhammad Nasirullah,* (1899) ILR 21 All 23 : 26 IA 45.
621. *Jamna Das v Ram Autar,* (1912) ILR 34 All 63 : 39 IA 7 : 13 IC 304; *Manubhai v Trikamlal,* (1958) ILR Bom 1429 : 60 Bom LR 1092 : AIR 1960 Bom 247.
622. *Haridas v Jagannath,* (1940) ILR Nag 63 : 184 IC 579 : AIR 1939 Nag 256.
623. *Midnapore Zemindary Co Ltd v Saradindu Mukopadhaya,* AIR 1948 Cal 250.
624. *Kishan Lal v Gouri Shanker,* AIR 1949 Ajm 52.
625. *Thankamony v Retnam Nadathy,* AIR 2011 (NOC) 386 (Ker).
626. *Soni Bhailal Danji v Hiralal Lakhamshi,* AIR 1981 Guj 120.
627. *MLL Lakshmanan Chettiar v VAR Alagappa Chettiar,* (1981) 1 Mad LJ 232.

For the purposes of section 59A, the transfer may be a voluntary, or an involuntary transfer such as a court sale.[628]

A charge holder cannot be equated with a purchaser of mortgage-security. In a charge there is no transfer of any interest in the property, but only creation of a right of payment out of the property specified. Therefore, a subsequent charge-holder in respect of a mortgaged property is not 'a person deriving title from' the mortgagor within the meaning of section 59A so as to be liable to be sued in a suit for enforcement of the mortgage-security.[629]

Rights and Liabilities of Mortgagor

60. Right of mortgagor to redeem.—At any time after the principal money has become [630][due] the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee *(a)* to deliver [631][to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee] *(b)* where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and *(c)* at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished.

Provided that the right conferred by this section has not been extinguished by the act of the parties or by [632][decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.—Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except [633][only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

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628. *GR Rao v K Kancharywa,* (1975) 2 Andh WR 408.
629. *Calcutta Properties Ltd v SN Chakraborty,* AIR 1988 Cal 131, p 133; distinguishing *Parmeshwara v Krishna,* AIR 1953 Tr & Coch 473.
630. Subs. by Act 20 of 1929, sec. 22, for "payable".
631. Subs. by Act 20 of 1929, sec. 22, for "the mortgage-deed, if any to the mortgagor".
632. Subs. by Act 20 of 1929, sec. 22, for "order".
633. Ins. by Act 20 of 1929, sec. 22.

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(1) Amendment

The section has been amended by the amending Act 20 of 1929.

(2) Right of Redemption

The mortgagor in Indian law is the owner who had parted with some rights of ownership, and the right of redemption is a right which he exercises by virtue of his residuary ownership to resume what he has parted with.[634] The section affirms a right of redemption in all mortgages, and thus carries out the recommendation of the Privy Council in *Thumbuswamy's* case[635] that the legislature should intervene to recognize a right of redemption in mortgages by conditional sale. In India, this right of redemption is, however, a statutory one, and, therefore, a legal right as stated by the Judicial Committee and later re-affirmed by the Supreme Court.[636]

Section 60 provides that at any time after the money becomes due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money to require the mortgagee to deliver the mortgage deed and all documents relating to the mortgaged

634. *Ms L K Trust v EDC Ltd,* AIR 2011 SC 2060 : (2011) 6 SCC 780 : [2011] 7 SCR 569.
635. (1875) ILR 1 Mad 1 : 2 IA 241.
636. *Ms L K Trust v EDC Ltd,* AIR 2011 SC 2060 : (2011) 6 SCC 780 : [2011] 7 SCR 569.

property, and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor.[637] Such a right of the mortgagor is called, in English law, the equity of redemption. The mortgagor being an owner who has parted with some rights of ownership has a right to get back the mortgage deed or mortgaged property, in exercise of his right of ownership. The right of redemption recognised under the TP Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of mortgage as part of the mortgage consideration.[638] It is well settled that the right of the mortgagor to deal with the mortgaged property as well as the limitation to which it is subject depends upon the nature of this ownership which is not absolute, but qualified by reason of the right of the mortgagee to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed, or the estate is sold. Thus where in exercise of its right to sell the property of defaulting debtor, the Financial Corporation (mortgagee), accepted the offer of prospective purchaser but no sale deed was executed between the two, the right of the mortgagor to redeem the property is not lost.[639] The equitable right of redemption is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem, and on his fully performing his obligations under the mortgage.[640] A mortgagor has the right to make all efforts to save his right of redemption in the property.[641]

The right of redemption is an incident of a subsisting mortgage, and subsists so long as the mortgage itself subsists. It can be extinguished as provided in the section and when it is alleged to be extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose.[642] Dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a second suit for redemption so long as the mortgage subsists, and the right of redemption is not extinguished by the efflux of time, or by a decree of the court in the prescribed form.[643]

Right of redemption as a statutory right continues in mortgage even though the mortgagor fails to pay the debt on the due date. It is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists and stands extinguished on execution of conveyance and the registration of transfer of the mortgagor's interest by registered instrument or by decree of a court. The dismissal of an earlier suit for redemption does not debar the mortgagor from filing a second suit for redemption during subsistence of mortgage. If the right of redemption is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose. A borrower has a right to redeem the property at any time before the date the property is

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637. *Sarojni Prabhu v Papikutty Adiesian,* AIR 2007 Ker 44; *Harbans v Om Prakash,* (2006) 1 SCC 129 : AIR 2006 SC 686; *Rukmini Ammal v Jagdesha Gounder,* (2006) 1 SCC 65 : AIR 2006 SC 276; *Prabhakaran v Azagiri Pillai,* AIR 2006 SC 1567 : (2006) 4 SCC 484; *Mangal Prasad Tamoli v Narvedshwar Mishra,* (2005) 3 SCC 422 : (2005) 4 SLT 357; *Khirati Lal v Janak Raj,* AIR 2004 P&H 29 : (2004) 136 PLR 224; *Chandalal Keshwant v Balwant Singh,* AIR 2006 All 47 : (2006) 1 AWC 848 : (2006) 1 RD 245; *Yahsodaraib v S B Puyidwaru,* AIR 2006 Kant 123; *Sarmus Sab v Ismain Sab,* AIR 2006 Kant 107; *Shakeena v Bank of India,* AIR 2008 Mad 10 : (2007) 138 Comp Cas 976; *Ram Krishan Lal v Manohar Lal Gupta,* AIR 2008 (NOC) 845 (Pat); *Durga Prasad v Kallaram,* AIR 2005 MP 224 : (2005) 2 MPHT 351 : (2005) 2 MPLJ 545.

638. *Shivdev Singh v Sucha Singh,* (2000) 4 SCC 326, para 8 : AIR 2000 SC 1935; *Jaipal v State of HP,* AIR 2010 HP 7; *Allec Labb (Garages) Ltd v Total Oil (Great Britain) Ltd,* [1983] 1 All ER 944, p 965, and on appeal [1985] 1 All ER 303.

639. *Ms L K Trust v EDC Ltd,* AIR 2011 SC 2060 : (2011) 6 SCC 780.

640. *Achaldas Durgaji Oswal v Ramvilas Gangabisan Heda,* (2003) 3 SCC 614, para 10 : AIR 2003 SC 1017.

641 *Vasu P Shetty v Hotel Vandana Palace,* (2014) 5 SCC 660 : LNIND 2014 SC 97 : AIR 2014 SC 1947 : 2014 (5) SCALE 344 : JT 2014 (5) SC 385.

642. *Thota China Subba Rao v Mattapalli Raju,* (1949) FCR 484 : AIR 1950 FC 1.

643. *Teju v Bhadar,* AIR 1987 HP 25, p 31.

transferred to auction purchaser by confirmation of sale by secured creditor. The right of the mortgagor to redeem can be enforced in case of discharge of contract by accord and satisfaction. Where the bank entered into negotiation for settlement of debts owned by the company and accepted the sum offered by the company, the company in exercise of its rights of ownership has a right to get back the mortgage deed and /or other documents once the loan is liquidated and the bank has a corresponding statutory obligation to return such documents relating to mortgaged property and hypothecated goods and cannot withhold securities.[644] Where an application for passing final decree in first suit and condoning delay was dismissed, but the suit was within time, a second suit for redemption would be maintainable and would not be hit by the rule of res judicata. The mortgage debt is discharged and rights are determined and if transaction is within the period of limitation, any number of suits can be filed.[645] In absence of any evidence that the mortgage was for a fixed period, no limitation would apply to this right of the mortgagor to redeem the mortgaged property and the same can be redeemed at any time and the principle that once a mortgage always a mortgage would apply.[646]

A redemption pre-supposes the existence of a "mortgage". As defined in the TP Act, a mortgage is a transfer of an interest in immovable property for the purpose of securing the payment of a loan. It is created by the act of parties. In an usufructuary mortgage, a transfer is made of the right of possession and enjoyment of the usufruct. The rights of a usufructuary mortgagee forms part of the bundle which constitute ownership. The remainder still remains with the mortgagor, and can be transferred by him. The mortgagor's right is as indicated in section 60 of the TP Act, i.e., after the principal money has become due, the mortgagor has a right to pay the mortgage money and on such payment, he has the right to require the mortgagee to deliver possession.[647] This right cannot be extinguished except by the act of parties or by a decree of a court. This right is called the right to redeem, and a suit to enforce it, is called a suit for redemption. Thus, the scope of a suit for redemption is primarily to enforce the right to make a payment of the mortgage-money. A claim to redeem a mortgage actually does not attach to the land, although the decree passed in the suit may ultimately affect possession which is also an interest in land.[648]

The section is not prefaced by any such words as "in the absence of a contract to the contrary." The right of redemption is, therefore, a statutory right which cannot be fettered by any condition which impedes or prevents redemption.[649] The section further explains when the right of redemption arises; how the right of redemption is exercised, and what are the mortgagor's rights on redemption. Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specific period.[650] A mortgagee's suit for sale was compromised on terms that the mortgagor should pay within a specified time and that in default, the mortgagee should take possession as usufructuary mortgagee; and that thereafter the mortgagor should have a right to redeem at any time taking out execution. The Madras High Court held that

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644. *Indian Bank v Manilal Govindji Khona,* (2015) 3 SCC 712 : LNINDU 2015 SC 16 : AIR 2015 SC 1240 : 2015 (2) SCJ 402 : 2015 (2) SCALE 85.
645. *Gummuluru Sanyasinaidu v State Bank of India,* AIR 2011 AP 138.
646. *Shri Prakash Chand v Shri Amar Singh,* AIR 2011 HP 21 : (2011) 1 Shim LC 24.
647. *Gautum Lal v Sukhlal,* AIR 2011 Raj 57.
648. *Vora Aminbai Ibrahim v Vora Taherali Mohamed Ali,* AIR 1998 Guj 31.
649. *Mohammad Sher Khan v Seth Swami Dayal,* (1922) ILR 44 All 185 : 49 IA 60, p 65 : 66 IC 583 : AIR 1922 PC 142; *Seth Ganga Dhar v Shankar Lal,* [1959] SCR 509, p 513 : [1958] SCJ 935 : AIR 1958 SC 770.
650. *Seth Ganga Dhar v Shankar Lal,* [1959] SCR 509, p 513 : [1958] SCJ 935 : AIR 1958 SC 770; *Mangal Prasad Tamoli v Narvedshwar Mishra,* (2005) 3 SCC 422.

this term of the consent decree was invalid, as it had the effect of reducing the time for redemption from 60 years to three years.[651] On appeal to the Privy Council, the point did not arise as their Lordships held that on a proper construction of the decree, it did not exclude the mortgagor's remedy by suit.[652] A mere agreement between the mortgagor and the mortgagee by which the mortgagor agrees to convey certain lands to the mortgagee in satisfaction of the mortgage does not extinguish the mortgage.[653] The Supreme Court has held that the right of redemption under a mortgage deed can come to an end only in a manner known to law. A mortgagee in possession of the property will have to deliver possession to the mortgagor when a suit of redemption is filed, unless he is able to show that the right of redemption has come to an end, or that a suit is liable to be dismissed on some other valid ground.[654]

The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and at the proper place, of the mortgage money. When it is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. The expression "act of Parties" refers to some transaction subsequent to the mortgage, and standing apart from the mortgage transaction. A usufructuary mortgagee cannot by mere assertion of his own or by a unilateral action on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner.[655]The right to redeem follows the interest of the mortgagor, and can be exercised by him and also by those taking the whole of his interest, whether by assignment inter vivos, or by devolution on death.[656] In accordance with sections 47 and 48 of the Indian Succession Act, 1925, the right of redemption can be claimed after the death of the mortgagor by his legal heirs. Where the mortgagor, a Christian by religion, was not heard as alive for the past 15 years and his mother's sister's son applied as a relative in nearest degree of kindred to redeem the mortgage, he would be so entitled to do so.[657]

(3) Application of TP Act to Mortgages executed prior to the commencement of the Act

The Act is not applicable to the manner of execution of mortgage executed prior to the commencement of the Act. The right of redemption can always be exercised by the mortgagor and therefore a suit of mortgage filed in 1968 under a mortgage executed in 1880 would be decreed in his favour.[658] The doctrine of equity of redemption is applicable to a mortgage executed in 1924 in the erstwhile state of Talchir.[659]

(4) Right of Redemption and Right of Foreclosure Co-extensive

The mortgagor's right of redemption and the mortgagee's right of foreclosure or sale are co-extensive. When the mortgagor's right to redeem accrues, the mortgagee has a right to

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651. *Ambu Nair v Kelu Nair,* (1930) ILR 53 Mad 805 : 123 IC 584 : AIR 1930 Mad 305; on app 60 IA 266 : 65 Mad LJ 103 : 35 Bom LR 807 : 37 Cal WN 797 : 57 Cal LJ 454 : 143 IC 433 : AIR 1933 PC 167.
652. *Ambu Nair v Kelu Nair,* 60 IA 266 : 65 Mad LJ 103 : 35 Bom LR 807 : 37 Cal WN 797 : 57 Cal LJ 454 : 143 IC 433 : AIR 1933 PC 167.
653. *Dadoo v Venkatrao,* (1953) ILR Nag 797 : AIR 1954 Nag 84.
654. *Javasingh Dnyanu Mhoprekar v Krishna Balaji Patil,* AIR 1985 SC 1646, p 1648 : (1985) 4 SCC 162, p 167.
655. *Parichhan Mistry v Acchiabar Mistry,* AIR 1997 SC 456 : (1985) 4 SCC 162, p 167.
656. See for persons entitled to redeem, *Fisher and Lightwood's Law of Mortgage,* 10th edn, pp 554-558.
657. *Devaki Amma Kamalamma v Grace Appi Amma,* AIR 2017 (NOC) 886 (Ker).
658. *Shankarlal Nathumal Chandak v Balkrishna Jagannath Gujarathi,* AIR 2010 Bom 4, (2010) 3 Bom CR 747.
659. *Malika Rout v Gani Khan,* AIR 2014 Orissa 155 : 2014 (2) OLR 477 : 2014 (Supp. 2) OLR 477.

enforce his security.[660] The rule may be limited, however, by the terms of the mortgage and if the limitation is not oppressive or unreasonable, it will be given effect to. Thus, when a mortgage for a fixed term provided that the mortgagee might sue for sale before the expiry of the term if his security were jeopardised, it was held that the right of redemption was not accelerated.[661] It has been held that the mortgagor can adopt the course provided under section 60 only before the mortgagee has filed a suit for enforcement of the mortgage.[662] Where the right to repay the loan arises immediately after execution of mortgage, the right to foreclose it is also simultaneous and can be exercised within a period of 12 years from the date it arose failing which it would be barred by law of limitation.[663]

(5) Clog on Redemption

A mortgage being a security for the debt, the right of redemption continues, although the mortgagor fails to pay the debt at the due date. Any provision inserted to prevent, evade, or hamper redemption, is void.

The doctrine has been described as an anachronism by Pollock,[664] who suggested that it be moulded for modern conditions by limiting it to cases where there was something oppressive or unconscionable in the bargain. However, it is settled law in India (by statute) that a mortgage cannot be made altogether irredeemable (except companies), nor can the right of redemption be made illusory. The test suggested by Pollock has, however, been generally applied in determining whether conditions which directly or indirectly fetter or limit the right to redeem, violate the doctrine. In *Seth Ganga Dhar v ShankarLal*,[665] J Sarkar explained the basis of the right of the court to intervene thus:

> The reason then justifying the court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. Putting it in a more familiar language, the court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was attained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

The doctrine does not apply if the transaction is not in its essence a mortgage. Thus, where the transaction gives an option to purchase property, the sole consideration being the loan of a sum of money secured on the property during the continuance of the option, the transaction is the sale of an option, the consideration being the use of the money free of interest.[666]

The doctrine applies to anomalous mortgages.[667] There were some decisions to the contrary when the definition of anomalous mortgages was in a later section;[668] but these are

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660. *Sakharam v Vithu*, (1866) 2 Bom HC 225; *Vadju v Vadju*, (1881) ILR 5 Bom 22; *Raghubar Dayal v Budhu Lal*, (1886) ILR 8 All 95; *Tirugnana v Nallatarnbi*, (1893) ILR 16 Mad 486; *Syad Abdul Hak v Gulam Jilani*, (1896) ILR 20 Bom 677; *Sari v Motiram*, (1898) ILR 22 Bom 375; *Narasimha Rao v Seshayya*, (1925) 48 Mad LJ 363 : 90 IC 138 : AIR 1925 Mad 825; *Rahmat Ali v Shadi Ram*, 100 IC 625 : AIR 1927 Lah 226; *Shiam Lal v Jagdamba Prasad*, (1927) 25 All LJ 1051 : 108 IC 561 : AIR 1928 All 131; *Seth Ganga Dhar v Shankar Lal*, [1959] SCR 509 : [1958] SCJ 935 : AIR 1958 SC 770.
661. *Bhawani v Sheodihal*, (1905) ILR 26 All 479.
662. *Poulose v State Bank of Travancore*, AIR 1989 Ker 79, p 80; *Bank of Mysore v BD Naidu*, AIR 1959 Mys 168.
663. *Jaswant Kaur v Des Raj*, AIR 2010 HP 61 : (2010) 1 Shim LC 299.
664. (1903) 19 LQR 359 : Cf Meggary & Wade, *Law of Real Property*, 2nd edn, pp 893-4.
665. *Seth Ganga Dhar v ShankarLal*, [1959] SCR 509, p 517 : [1958] SCJ 935 : [1958] SCA 739 : AIR 1958 SC 770.
666. *London & Globe Furnace Corp Ltd v Montgomery*, (1902) 18 TLR 661; *Tularam v Kishorilal*, AIR 1956 MB 83.
667. *Raman Pillai v Gowri Pillai*, AIR 1954 Tr & Coch 7.
668. *Ma Min Byu v Maung Chit*, (1923) ILR 1 Rang 419 : 76 IC 665 : AIR 1924 Rang 83; *Hakeem Patte Muhammad v Shaik Davood*, (1915) ILR 39 Mad 1010 : 30 IC 569.

over ruled by the Privy Council in *Mohammed Sher Khan v Seth Swami Dayal.*[669] Even before this decision, the doctrine was applied to simple mortgages usufructuary, which were not then classed as anomalous.[670] This doctrine also applies to a transaction by which the mortgagor transferred his equity of redemption to the transferee in consideration of a loan; a clause in the said transaction by which the transferee had an option to purchase, was held void.[671]

(6) Companies

The Companies Act, 1956, provides that a debenture may be irredeemable, or redeemable only on the happening of a remote contingency or after a very long period. In view of the very wide definition of 'debenture' in the Companies Act, 1956, almost every kind of instrument executed by or on behalf of a company which acknowledges the indebtedness of the company, even if it does not create a security on the company's property, it would be a debenture. It follows, therefore, that any mortgage by a company would be a debenture, and that such mortgages may be irredeemable. This has been held by the House of Lords in *Knights-bridge Estates Trust v Byme*[672] where Lord Maugham expressed the view that there was nothing unfair in this exception. It is submitted that the same view would be adopted in India, as the provisions of the Companies Act, 1956, being both a later Act and a special Act, would prevail over section 60 of the TP Act.[673]

(7) Doctrine of Clog on Equity

The doctrine of a clog on the equity of redemption is a rule of justice, equity, and good conscience—this has been reaffirmed by the Supreme Court in *Murarilal v Dev Karan.*[674] Chief Justice Gajendragadkar delivering the judgment of the court, observed that there was a long line of authorities in India in which it had been so held, notwithstanding the decisions of the Privy Council in two cases.[675] It follows that the doctrine is applicable in an area where the TP Act is not in force.[676] The Supreme Court has held that, it is a settled law in England and in India that a mortgage cannot be made altogether irredeemable, or redemption made illusory. The law must respond, and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just; unless there is anything to the contrary in the statute. Law must take cognisance of that fact, and act accordingly. In the context of fast changing circumstances and economic stability, a long term for redemption makes an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity of redemption should be judged.[677]

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669. *Mohammed Sher Khan v Seth Swami Dayal,* (1922) ILR 44 All 185 : 49 IA 60 : 66 IC 583 : AIR 1922 PC 17; *Chellakutti v Vengappa,* 82 IC 809 : AIR 1925 Mad 366.
670. *Kandula Venkiah v Donga Pallaya,* (1920) ILR 43 Mad 589 : 57 IC 724; *Srinivasa v Radhakrishnam,* (1915) ILR 38 Mad 667 : 22 IC 54; *Pandiyan v Vellayappa,* (1917) 33 Mad LJ 316 : 42 IC 38.
671. *Lewis v Frank Love Ltd,* [1961] 1 All ER 446 : (1961) 1 WLR 261.
672. *Knights-bridge Estates Trust v Byme,* (1940) AC 613 : [1940] 2 All ER 401.
673. This point was not considered in *LV Apte v Price,* AIR 1962 AP 274, p 289.
674. *Murarilal v Dev Karan,* [1964] 8 SCR 239 : AIR 1965 SC 225 : [1965] 2 SCJ 106. *Pormal Kanji Govindji v Vrajlal Karsandas Purohit,* AIR 1989 SC 436, p 446; *Patel Naranbhai Marghabhaiv Dhulabhai Galabhai,* (1992) 4 SCC 264, p 268; *Ismail Nathabhai Khatri v Muljibhai Shankerbhai Bhramabhatt,* AIR 1994 Guj 8, p 14.
675. *Pattabhiramier v Vencatarow,* (1870) 13 Mad IA 560; *Thumbuswamy v Mahomed Hoosain,* (1875) ILR 1 Mad 1 : 2 IA 241.
676. *Mehrban Khan v Makhna,* (1930) ILR 11 Lah 251 : 57 IA 168 : 123 IC 554 : AIR 1930 PC 142; *Jagjivan v Jinuba,* AIR 1951 Sau 53; *Nainu v Kishan Singh,* AIR 1957 HP 46; *Ambalal Jasraj v Ambalal Badarwal,* (1957) ILR 7 Raj 964 : AIR 1957 Raj 321.
677. *Pomal Kanji Govindji v Vrajlal Karsandas Purohit,* AIR 1989 SC 436, p 448.

Though the TP Act does not apply to Sikkim, the courts should apply the principle contained in section 60 and strike down a clog on the right of redemption, since the principle 'once a mortgage always a mortgage' is a rule of justice, equity, and good conscience.[678]

The term in the mortgage deed that the land is irredeemable for 95 years is a clog on the equity of redemption.[679] In *Shivdev Singh v Sucha Singh*[680] the Supreme Court refused to interfere with the finding of the High Court holding that on the facts of the case, the mortgage deed providing a period of 99 years was a clog on equity of redemption. Whether in a particular transaction there is a clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor and his relationship vis-a-vis him and the mortgagee, the economic and social conditions in a particular country at a particular point of time, custom, if any prevalent in the community or the society in which the transaction takes place, and the totality of the circumstances under which a mortgage is created, namely, circumstances of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligation of the mortgagee to construct or repair or maintain the mortgaged property in cases of usufructuary mortgage, to manage as a matter of prudent management; these factors must be correlated to each other and viewed in a comprehensive conspectus in the background of the facts and circumstances of each case, to determine whether there are clogs on equity of redemption.[681] A long term of redemption is not necessarily a clog; whether a particular term of redemption operates as a clog is to be considered having regard to the circumstances of the case.[682]

The decision as to what amounts to a clog on the equity of redemption is a question of fact in each case.

(8) Condition of Sale in Default

A condition converting a mortgage into a sale is invalid as a clog on the equity of redemption.[683] In a case before the Supreme Court relating to a mortgage by conditional sale, the mortgagor was given four years' time from the date of execution of the deed of mortgage to repay the same. However, another clause provided that if the mortgagee received notice of re-entry from a public authority for breach of covenants of the lease before the expiry of four years, then the transfer in favour of the mortgagee shall be made absolute, and the expenses shall be borne by the mortgagor. This was held to be a clog on the equity of redemption.[684] A condition that 'if we do not pay your amount by the due date, we agree to this document being treated as a sale deed', was held to be a clog on the equity of redemption, and the document was held to be a mortgage.[685] A stipulation in a mortgage deed, that if the property is not redeemed within one year then, the mortgage shall be turned into a sale,[686] or an

678. *Bishnu Kala Karki Dholi v Bishnu Maya Darjeeni,* AIR 1980 Sikkim 1.
679. *Ajit Singh v Kakhbir Singh,* AIR 1992 P & H 193, p 194.
680. *Shivdev Singh v Sucha Singh,* (2000) 4 SCC 326.
681. *Pomal Kanji Govindji v Vrajlal Karsandas Purohit,* AIR 1989 SC 436, pp 447-448; *Gangadhar v Shankar Lal,* AIR 1958 SC 770.
682. *Soni Chaganlal Jethalal v Gopaldas Mansukh,* (1950) ILR Bom 733 : 53 Bom LR 452 : AIR 1953 Bom 408; *Pomal Kanji Govindji v Vrajlal Karsandas Purohit,* AIR 1989 SC 436, p 447.
683. See *Gangadhar v Shankarlal,* AIR 1958 SC 770; *Rama Shankar Singh v Silver Screen Corporation (P) Ltd,* AIR 1988 Cal 46, p 53; *Mannathan v Chinnu,* AIR 2012 Mad 210.
684. *Gulab Chand Sharma v Saraswati Devi,* AIR 1977 SC 242; (1977) 2 SCC 71.
685. *Jadam Jampura Bai v Jinki Siddappa,* AIR 1944 Mad 237; *Rupeshwari v Girdhari,* AIR 1952 Assam 19; *Jang Singh v Jewa Singh,* AIR 1962 Punj 478; *Dhanalakshmi Ammal v G Anthuraj,* AIR 1972 Mad 185.
686. *Banarsilal v Puranchand,* AIR 1985 P&H 189.

agreement that in default of payment on the date fixed, the mortgagor shall sell the property to the mortgagee at a price to be fixed by an umpire is invalid as a clog on the equity of redemption,[687] or a stipulation in a mortgage deed giving a right to the mortgagee to purchase a part or interest in the mortgaged property, or a stipulation giving him a right of pre-emption at a fixed price which is not fair, is a clog on the equity of redemption.[688] Similarly, a condition allowing the mortgagee to enter into possession as a tenant in case of default,[689] or a condition in a usufructuary mortgage for a fixed term that in default it should work itself out into a sale,[690] or that part of the land mortgaged should not be returned on redemption,[691] or that the mortgagor shall not be entitled to get possession of the property mortgaged under a previous usufructuary mortgage, unless he paid the money due under the subsequent mortgage[692] would be a condition preventing redemption and therefore void. A condition of mortgagee getting his name mutated if the mortgage is not redeemed within four months, is a clog on equity of redemption.[693]

A clause in a compromise decree in a mortgage suit under which the mortgagee was entitled to take possession if payment was not made in eight months was held not to be a clog, as the Code of Civil Procedure provided a period of six months.[694] A stipulation in a mortgage deed that after the deposit of the title deeds in suits in which the mortgaged property was involved, the mortgagor would execute a deed of sale in favour of the mortgagee, failing which the mortgagee can have the sale deed executed in his favour through the court, is a clog, and is void.[695] Where a provision in a mortgage deed being a clog on the equity of redemption is void and unenforceable as against the mortgagor, it can have no more binding force against the assignee of the mortgagor.[696]

(9) Subsequent Sale Valid

A condition of sale is a clog, if it is part and parcel of the mortgage transaction. However, subsequent to the mortgage, the mortgagee may stipulate for the purchase of the property from the mortgagor.[697] In *Shankar Din v Gokal Prasad,*[698] the Privy Council said that there was nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right of redemption. A separate transaction dehors the mortgage, and is not a clog and may have the effect of extinguishing the equity of redemption.[699]

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687. *Kanaran v Kuttooly,* (1898) ILR 21 Mad 110; *Jadam Jampura Bai v Jinki Siddappa,* AIR 1944 Mad 237.
688. *FX D'Pinto v Cheenappa,* (1950) 2 Mad LJ 169 : AIR 1950 Mad 524.
689. *Ramlochan Singh v Pradip Singh,* AIR 1959 Pat 230.
690. *Mehrban Khan v Makhna,* (1930) ILR 11 Lah 251 : 123 IC 554 : AIR 1930 PC 142; *Srinivasa v Radhakrishnam,* (1915) ILR 38 Mad 667 : 22 IC 54; *Pandiyan v Vellayappa,* (1917) 33 Mad LJ 316 : 42 IC 438; *Kandula Venkiah vDonga Pallaya,* (1920) ILR 43 Mad 589 : 57 IC 724; *Vaddiparthi v Appalanarasimbhula,* (1921) 41 Mad LJ 563 : 68 IC 717 : AIR 1921 Mad 517; *Chellakutti v Vengappa,* 82 IC 809 : AIR 1925 Mad 366; *Athan Kutti v Subhadra,* (1917) 32 Mad LJ 317 : 37 IC 756; *Ram Ganesh v Rup Narain,* 80 IC 944 : AIR 1925 All 34; *Ram Bali v Ram Asre,* 86 IC 686 : AIR 1925 Oudh 386; *Rocky Flora v Parvathy Ammal,* (1957) ILR Ker 492 : AIR 1957 Ker 175; *Lewis v Frank Love Ltd,* [1961] 1 All ER 446 : (1961) 1 WLR 261; *Srinivas v Satyanand,* AIR 1969 Pat 64.
691. *Sapenswar v Brindiban,* 148 IC 429 : AIR 1934 Pat 397.
692. *Rangili v Pearey Lal,* AIR 1940 All 101.
693. *Serajuddin v Abdul Khalique,* AIR 2004 Gau 126.
694. *Prahlad v Saleswar Mahadev,* AIR 1962 Ori 162.
695. *Manekchand v Baldeo Chaudhary,* AIR 1951 Pat 327.
696. *Sunder Singh v Lachman Singh,* AIR 1948 East Punj 17.
697. *Kanhayalal v Narhar,* (1903) ILR 27 Bom 297; *Shankar v Yeshwant,* (1920) 22 Bom LR 965 : 58 IC 384.
698. (1912) ILR 34 All 620 : 16 IC 78 (PC); *Usman Khan v Dasanna,* (1914) ILR 37 Mad 545 : 16 IC 694.
699. *Ramalinga Mudaliar v Arunachala,* 93 IC 338 : AIR 1926 Mad 386; *Jalappa v Narasimha Setty,* (1962) ILR AP 1054 : AIR 1963 AP 420.

ILLUSTRATIONS

(1) *A* mortgaged his land to *B* with possession for five years the rents and profits to be set off against interest. The mortgage further provided that if the mortgage was not redeemed within a period of 20 years from the due date, the mortgagee should treat the land as sold to him absolutely. This provision was invalid as a clog on the equity of redemption and the mortgage was redeemable even after the period of 20 years.[700]

(2) *A* mortgaged his land to *B* with possession and the mortgage provided that in default of redemption after 20 years, *B* should be owner of half the land. This provision was a clog on the equity of redemption. But four years after the expiry of the period of 20 years while *B* was still in possession, *A* executed a deed by which half the land was conveyed to *B*, and *B* released the other half from the mortgage. This was an arrangement for the discharge of the mortgage and was valid.[701]

In a case where the mortgage provided that in default of payment, the mortgagee should become absolute owner and the mortgagor in ignorance of his rights, surrendered the land to the mortgagee, the court could, give no relief. This was really a surrender subsequent to the mortgage, which the court could not set aside as there was no fraud.[702]But a mere admission that the mortgagee had become owner will not destroy the equity of redemption.[703]Nor is the mortgage extinguished by an understanding that the mortgage has been converted into a sale, if such understanding and conduct is solely due to the *gahan lahan* clause, and not any transaction independent of the mortgage.[704]

(10) Stipulation to Demolish Structure

A stipulation in the mortgage deed authorizing the mortgagee to demolish the existing structure and construct new ones at the cost of the mortgagor may amount to clog. In *Pomal Kanji Govindji v Vrajlal Karsandas Purohit,*[705]the mortgagee was, by the mortgage, given the right to demolish the existing structure and to construct a new one, the expenses to be reimbursed by the mortgagor at the time of redemption. It was found that the mortgagor was financially hard-pressed. The terms were held to be unreasonable and unconscionable, and to constitute a clog on the equity of redemption, and therefore, not binding.[706]

(11) Condition Postponing Redemption in Case of Default

Conditions postponing redemption in case of default is a clog on the equity of redemption, and is invalid. In *Mohammed Sher Khan v Seth Swami Dayal,*[707] the mortgage was for a term of five years with a condition that if the money was not paid, the mortgagee might enter into possession for a period of 12 years during which the mortgagor could not redeem. The Privy Council held that the condition hindered an existing right to redeem and was, therefore, invalid. Again, a condition that in default the mortgage should be renewed for a period of 40 years, is invalid.[708]The Allahabad High Court has said that no hard and fast rule can be laid down as to what is improper restraint on alienation, and upheld a condition

700. *Vaddiparthi v Appalanarasimhulu,* (1921) 41 Mad LJ 563 : 68 IC 717 : AIR 1921 Mad 517.
701. *Shankar v Yeshwant,* (1920) 22 Bom LR 965 : 58 IC 384.
702. *Vishnu Sakharam v Kashinath,* (1887) ILR 11 Bom 174.
703. *Ram Singh v Baij Nath,* (1919) 17 All LJ 117 : 49 IC 353.
704. *Abdul Rahim v Madhavrao,* (1960) ILR 14 Bom 78; *Kanhaylal v Narhar,* (1960) ILR 27 Bom 297; *cf Ramshet Badhashet v Srinath,* (1871) 8 Bom HC 236.
705. *Pomal Kanji Govindji v Vrajlal Karsandas Purohit,* AIR 1989 SC 436, pp 449 : 450, (1989) 1 SCC 458.
706. *Khatubai v Rajgor,* AIR 1979 Guj 171 approvingly referred in *Pomal Kanji Govindji v Vrajlal Karsandas Purohit,* AIR 1989 SC 436, pp 449, 450.
707. *Mohammed Sher Khan v Seth Swami Dayal,* (1922) ILR 44 All 185 : 49 IA 60 : 66 IC 858 : AIR 1922 PC 17.
708. *Sarbdawan v Bijai Singh,* (1914) ILR 36 All 551 : 24 IC 705.

that in default of redemption on due date, the mortgage should not be redeemable for a further period of 20 years.[709] It is submitted that this decision is inconsistent with *Mohammed Sher Khan's* case.[710] In a Bombay case,[711] the mortgage was for a term of 21 years in order that the mortgagee should plant an orchard, but there was a condition that in default of redemption at the expiry of 21 years, the mortgagee should be allowed to retain possession as long as the trees bore fruit. The condition was not enforced as the mortgagor was an agriculturist within the Dakkan Agriculturists' Relief Act.

(12) Terms for Redemption

Where the mortgagor allows the normal limitation period to expire, he can then only file a suit on the basis of deferred date of redemption. But he will be precluded from saying that the deferred date amounts to clog on redemption.[712]

(13) Penalty in Case of Default

A stipulation for a penalty in case of default is relieved against. Thus, a stipulation that in case of default one *murra* of rice was to be paid for every rupee of the debt, was set aside as unreasonable.[713] But if there is no question of penalty, stipulation for enhanced interest or for compound interest from date of default are valid;[714] but if the original rate of interest is high, a stipulation for compound interest in default may be a penalty.[715] A stipulation for enhanced interest from the date of the bond would always be a penalty.[716]

If there is no undue influence or unfair dealing, a high rate of interest is not a clog.[717] The court cannot, except under the provisions of The Usurious Loans Act, 1918, give relief against excessive interest.[718] However, 24 per cent with six-monthly interest in a deed of further charge, has been relieved against;[719] so also, where the interest at 24 per cent was coupled with a long term (49 years).[720] A usufructuary mortgagee may of course, stipulate for interest as well as for profits.[721]

(14) Restraint of Alienation

A condition restraining alienation by the mortgagor is a clog on the equity of redemption, for it will not recognize the transferee as having acquired the right of redemption.[722] So also is a stipulation that the mortgagor shall redeem without having recourse to a loan from

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709. *Narsingh Prasad v Rupan Singh,* (1929) 27 All LJ 606 : 116 IC 876 : AIR 1929 All 388. See also *Rambaran Singh v Ramker Singh,* 10 IC 243.
710. (1922) ILR 44 All 185 : 49 IA 60 : 66 IC 853 : AIR 1922 PC 17.
711. *Genu v Narayan,* (1921) ILR 45 Bom 117 : 59 IC 258 : AIR 1921 Bom 51.
712. *Parmanand v Babu Ram,* AIR 1986 P&H 233; see also *Gangadhar v Shankar Lal,* AIR 1958 SC 770 : [1959] 1 SCR 509.
713. *Mayilaraya v Subbaraya,* (1862) 1 Mad HC 81.
714. *Surya Narain v Jogendra Narain,* (1892) ILR 20 Cal 360; *Gunga Pershad v Land Mortgage Bank,* (1894) ILR 21 Cal 366 : 21 IA 1; *Ram Charan v Bhagwan Dei,* AIR 1955 All 339.
715. *Rama Krishnayya v Venkata Somayaajulu,* 148 IC 467 : AIR 1934 Mad 31.
716. *Sunder Koer v Sham Krishen,* (1906) ILR 34 Cal 150 : 34 IA 9, 17. See *Pollock and Mulla's Contract Act.*
717. *Sarfraz Singh v Udwat Singh,* (1929) ILR 4 Luck 147 : 118 IC 46 : AIR 1929 Oudh 30; *Sahib Baksh v Mohamad Ali,* 58 IC 115.
718. *Ram Krishna v Heramba,* (1929) ILR 56 Cal 960 : 122 IC 212 : AIR 1930 Cal 207; *Shubratan v Dhanpat Godaraiyu,* (1932) ILR 54 All 1041 : 1932 All LJ 1021 : 143 IC 409 : AIR 1933 All 70; see also *Nathu Ram v Shadi Ram,* 49 IC 946.
719. *Gajraj Singh v Maharaj Munnu Lal,* (1929) ILR 4 Luck 415 : 126 IC 673 : AIR 1930 Oudh 173.
720. *Sarju Ram v Taji Bibi,* (1962) All LJ 459 : AIR 1962 All 422.
721. *Sarfraz Singh v Udwat Singh,* AIR 1929 Oudh 30; *Gokul Prasad v Goitri Prasad,* 100 IC 180 : AIR 1927 Oudh 595.
722. *Ram Saran v Amrita,* (1880) ILR 3 All 369.

anybody.[723] However, a stipulation that the mortgagor might redeem before due date, if he could do so without alienating other property was upheld as a special concession personal to the mortgagor, and not available to his assignee.[724]

(15) Long Term

A long term for redemption is not necessarily a clog on the equity of redemption.[725] Indeed, a long term may suit both parties, relieving the mortgagor of the necessity of finding another creditor, and being a long-term investment for the mortgagee.In India, terms of a longer duration have been upheld, and this principle has been reaffirmed by the Supreme Court in *Seth Ganga Dhar v Shankar Lal,*[726] in which a term of 85 years was upheld. Instances of other cases are set out below.[727] However, a term of 200 years has been held to be a clog.[728] But if there are circumstances which indicate that the length of the term is unreasonable or oppressive, redemption has been allowed before the expiry of the term.[729]A mere long period for redemption would not amount to a clog on the equity of redemption, in the absence of other evidence showing that the mortgagee had taken undue advantage of his position as lender.[730]Mortgage deed providing for a redemption period of 99 years is not per se void ab initio. On the facts of the case, the court on being approached may hold it to be unequitable, and declare it to be a clog on the equity of redemption.[731] In a 99-years mortgage, a suit filed before 99 years but after 30 years from the date of mortgage deed and without any prayer for lifting of clog on equity of redemption, could be resisted by the mortgagee only on the ground that it was premature.[732] In a Punjab and Haryana case, there was a usufructuary mortgage of land with possession. The mortgagor was allowed to redeem only after 90 years. The mortgage amount was not less than the market value of the land at

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723. Ibid; *Trimbak Jivaji v Sakharam,* (1892) ILR 16 Bom 599; *Visvanathan v Ethirajulu,* (1923) 45 Mad LJ 389, 76 IC 467 : AIR 1924 Mad 57; *Ram Ganesh v Rup Narain,* 80 IC 944 : AIR 1925 All 34; *Kudai Lal v Aisha Jehan,* (1927) ILR 2 Luck 564 : 102 IC 263 : AIR 1927 Oudh 199; *Kirpal Singh v Sheoambar,* (1930) 28 All LJ 610 : 126 IC 366 : AIR 1930 All 283.
724. *Shiam Lal v Jagdamba Prasad,* (1927) 25 All LJ 1051 : 108 IC 561 : AIR 1928 All 131.
725. *Hira v Sitaram,* (1949) ILR Nag 12 : AIR 1949 Nag 12; *Hazarali v Ajadhaya Sana,* (1950) ILR AP 176.
726. *Seth Ganga Dhar v Shankar Lal,* [1959] SCR 509 : [1958] SCJ 935 : [1958] SCA 739 : AIR 1958 SC 770.
727. *Lila Morji v Vasudeo,* (1875) 11 Bom HC 283 (15 years); *Govindrao v Annaji,* (1891) PJ 241 (27 years); *Muhammad Ibrahim v Muhammad Aziz,* (1910) Mad WN 792 : 8 IC 1068 (90 years); *Dalthamman v Amardeo,* (1914) 12 All LJ 492 : 23 IC 926 (30 years); *Ago Muhammadally v Venkatappayya,* (1918) 35 Mad LJ 287 : 48 IC 379 (37 years) with an option of redemption after 10 years; *Sarban Singh v Bhagwan,* (1926) 8 Lah LJ 235 : 96 IC 467 : AIR 1926 Lah 457 (20 years); *Bansilal v Sawanu,* 145 IC 1016 : AIR 1933 Lah 373 (50 years); *Sayad Abdul Hak v Gulam Jilani,* (1896) ILR 20 Bom 677 (50 years); *Narain v Jagan,* 80 IC 728 : AIR 1925 All 42 (60 years); *Mela Ram v Prithvi Chand,* 116 IC 609 : AIR 1926 Lah 523 (60 years); *Lal Singh v Kartar Singh,* 130 IC 57 : AIR 1930 Lah 1060 (40 years); *Sarfraz Singh v Udwat Singh,* AIR 1929 Oudh 30 (35 years); *Abdulla v Saadulla,* 15 IC 917 (150 years); *Jagannadhan v Narsimhan,* AIR 1944 Mad 501; *Ramkhilavan v Mullo,* AIR 1957 MP 200 (80 years); *Seth Ganga Dhar v Shankar Lal,* [1959] SCR 509 : [1958] SCJ 935 : [1958] SCA 739 : AIR 1958 All SC 770 (85 years); *Saleh Raj v Chandan Mal,* (1960) ILR 10 Raj 88 : AIR 1960 Raj 47 overruling (1958) ILR 8 Raj 258 : AIR 1958 Raj 298 (99 years); *Sarjug Mahto v Devrup Devi,* AIR 1963 Rang 114 (99 years); *Chaturbhai Valdas v Bai Jivi,* AIR 1973 Guj 73.
728. *Fateh Mahomed v Ram Dayal,* (1927) ILR 2 Luck 588 : 102 IC 160 : AIR 1927 Oudh 224.
729. *Abdul Hakim v Sajjad Husain,* (1923) 26 OC 209 : 74 IC 304, AIR 1923 Oudh 209; *Cowdry v Day,* (1859) 1 Giff 316 (term of 20 years and mortgagee solicitor of mortgagor); see *Shivdev Singh v Sucha Singh,* (2000) 4 SCC 326 wherein a mortgage period of 99 years has been found to be a clog on the equity of redemption.
730. *Chaturbhai Valdas v Bai Jivi,* AIR 1973 Guj 93.
731. *Sanjar Gagu Dhula v Shah Laxmiben Tejshi,* AIR 2001 Guj 329.
732. Ibid, p 339.

the relevant time. There was no allegation of fraud, or undue influence. It was held that in these circumstances, the long term of 90 years was not a clog on the equity of redemption.[733]

Postponement or redemption for a long time, may constitute a clog on the equity of redemption depending upon the facts and circumstances of a case. It will be necessary in this context to consider, besides other factors, the amount advanced under the mortgage, the nature of the security offered by the mortgagor, the circumstances in which the mortgagor was compelled to secure the amount, the terms and conditions on which the amount was, in fact, advanced and the other alternatives to which the mortgagor could have taken recourse for obtaining the same advance. Applying this test, in a Gujarat case, a condition postponing redemption was held to be a clog on the facts of the case. The mortgagor was a childless widow, who had mortgaged the property in question for 199 years to secure a debt of ₹ 61 in 1909, although it was not customary or necessary to submit to such a long term. The mortgagee, who was the owner of the adjacent property, obtained a collateral advantage of beneficial enjoyment in respect of his own property for a long period of time, to the detriment of the mortgagor. Further, under the mortgage, the mortgagee was entitled to raise any construction and the mortgagor was, at the time of redemption, bound to pay the costs of the construction. Viewed along with all these circumstances, the longtime of redemption, being unconscionable, was held to constitute a clog.[734]

ILLUSTRATION

> *A* mortgaged his property to *B* by an usufructuary mortgage for a term of 101 years. The mortgage provided that *A* should be liable for interest at 8 ½ per cent and that *B* should take the rents and profits; that if the rents and profits exceed the interest, *B* should take the surplus but that if the rents and profits were less than the interest, *A* was liable for the deficit; and that at the expiry of the term, *A* should be entitled to redeem on payment of three times the principal money. These provisions rendered redemption onerous and difficult without any corresponding benefit to the mortgagor. *A* was entitled to an account and redemption before the expiry of the term.[735]

On the other hand, the Allahabad High Court had held that a long period even though coupled with onerous and oppressive terms, affords no ground for interference, unless there has been coercion, fraud or undue influence.[736] This decision is no longer good law in view of the decision of the Supreme Court in *Seth Ganga Dhar v Shankar Lal.*[737] In another case, the same High Court held that a condition in a mortgage that if the mortgagee construed a new

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733. *Massa Singh v Gopal Singh,* AIR 1983 P&H 437.

734. *Maganlal Chhotalal Chhatrapati v Bhalchand Chhaganlal Shah,* (1974) 15 Guj LR 193; *Raza Mohammad v Ram Lal,* 88 IC 201 : AIR 1925 Oudh 406; *Bachu Upadya v Parbhu,* 93 IC 329 : AIR 1926 Oudh 356; *Balbhaddar v Danpat Dayal,* 80 IC 213 : AIR 1924 Oudh 193 (property worth ₹ 9,000 to be redeemed after 50 years for ₹ 2.5 lacs) followed in *Baldeo v Losai,* (1929) ILR 4 Lah 203 : 114 IC 811 : AIR 1929 Oudh 54; *Har Dayal Singh v Raja Ram Singh,* (1933) ILR 9 Luck 151 : 145 IC 669 : AIR 1933 Oudh 460 and in *Faujadar Khan v Abdul Samad,* (1924) 5 Lah LJ 394 : 76 IC 445 : AIR 1924 Lah 129 (usufructuary mortgage of a minor's property for 51 years, the mortgagee to take the rents and profits as well as interest and to spend as much money as he liked on improvements); *Durga Singh v Nawab Mirza Muhammad Raza,* (1914) 17 OC 313 : 25 IC 912; *Darghahi Lal v Rafiqunnissa,* 102 IC 62 : AIR 1927 Oudh 237; *Sohan Lal v Kanwar,* 61 IC 962; *Mahdo Singh v Lachhmin,* 87 IC 909 : AIR 1925 Oudh 720; *Mathura Prasad v Harakh Narain,* (1919) 22 OC 191 : 53 IC 770; *Ram Das v Swami Dayal,* (1920) 23 OC 108 : 57 IC 553; *Sarju Ram v Taji Bibi,* (1962) All LJ 459 : AIR 1962 All 422 (term of 49 years and interest at 24 per cent); *Panchoolal v Kesharimal,* AIR 1972 Raj 293; *Sukhraj v Ram Bab,* AIR 1973 All 79.

735. *Abdul Hakim v Sajjad Husain,* (1923) 26 OC 209 : 74 IC 304 : AIR 1923 Oudh 209.

736. *Shubratan v Dhanpat Godaraiyu,* (1932) ILR 54 All 1041 : 1932 All LJ 1021 : 143 IC 409 : AIR 1933 All 70.

737. *Seth Ganga Dhar v Shankar Lal,* [1959] SCR 509 : [1958] SCJ 935 : [1958] SCA 739 : AIR 1958 SC 770; *Sarju Ram v Taji Bibi,* (1962) All LJ 459 : AIR 1962 All 422.

building by demolishing an old one which was a *kutcha* structure, the mortgagor would pay the cost of its construction at the time of redemption, was not a clog.[738] If there is a long term without a mutual provision for the continuance of the loan, as when the right of redemption is postponed and the mortgagee is given the right to call in his money at any time, the stipulation for postponement becomes unilateral, void of consideration and invalid. This is because the right of redemption and the right for foreclosure, are coextensive.[739] So an arbitrary stipulation that the mortgagor shall redeem only when the mortgagee demands his money is void;[740] and a covenant by the mortgagor for the perpetual renewal of the mortgage is inoperative.[741]

In *Hira Kuar v Gambhir Singh,*[742] a mortgage for a term of 40 years stipulated that in default of payment of interest for any one year, the mortgagee would be entitled to sue at once for the mortgage money, and it was held that this provision gave the mortgagor, a right to redeem before the expiry of the fixed period. So also, a condition in a mortgage deed that so long as the mortgage money was kept with the mortgagor, he would pay interest to the mortgagee's wife, did not preclude the mortgagor from filing a suit for redemption earlier.[743]

However, a right to sue for the mortgage-money in case the security is endangered, is not oppressive so as to accelerate the right of redemption.[744]

It has been said that a long term in a usufructuary mortgage is less likely to operate as a clog on redemption, as redemption is effected upon payment of a fixed sum, and there is no danger of arrears of interest exceeding the value of the property.[745] A term of 95 years with a condition that interest should be paid only with the principal,[746] or a condition that a usufructuary mortgage should be redeemed on a particular day 60 years later, and on no other day, is void as a clog on redemption.[747]However, a condition that the mortgage could only be redeemed during the month of *Vaisakh* was upheld.[748] A covenant in a mortgage for possession for 51 years, together with a high rate of interest and also a covenant that the expenses of repairs be added to the mortgage-money, were not held to be a clog on redemption.[749]A condition in a mortgage which seeks to take away the right of redemption even before the period of four years within which the mortgagor was entitled to pay off the mortgage debt had run out, is obviously a clog on the equity of redemption. In this case, the condition was that on the mortgagor receiving notice of re-entry from the land and development officer or any such authority for breach of a covenant of the lease before the said period of four years, "the transfer hereby made shall be absolutely in favour of the

738. *Cheddi Lal v Balu Nandan,* AIR 1944 All 204.
739. *Sakharam v Vithu,* (1866) 2 Bom HC 225; *Vadju v Vadju,* (1881) ILR 5 Bom 22; *Raghubar Dayal v Budhu Lal,* (1886) ILR 8 All 95; *Tirugnana v Nallatambi,* (1893) ILR 16 Mad 486; *Sayad Abdul Haq v Gulam Jilani,* (1896) ILR 20 Bom 677; *Sari v Motiram,* (1898) ILR 22 Bom 375; *Rahmat Ali v Shadi Ram,* 100 IC 625 : AIR 1927 Lah 226; *Shiam Lal v Jagdamba Prasad,* (1927) 25 All LJ 1051 : 108 IC 561 : AIR 1928 All 131. See *Gobind Ram v Rajphul Singh,* AIR 1973 P & H 94.
740. *Narayan v Rowji,* (1884) PJ 254; *Sari v Motiram,* (1898) ILR 22 Bom 375.
741. *Neelakhandhan v Ananthakrishna,* (1907) ILR 30 Mad 61.
742. *Hira Kuar v Gambhir Singh,* (1921) 19 All LJ 460 : 62 IC 985 : AIR 1921 All 143; *Rahmat Ali v Shadi Ram,* AIR 1927 Lah 226.
743. *Ponna Vyyanna Sarma v Reddi Manikyam,* AIR 1949 Mad 768.
744. *Bhawni v Sheodihal,* (1904) ILR 26 All 479.
745. *Zulfiquar Ali v Suraj Prasad,* 68 IC 998 : AIR 1922 Oudh 221; *Narasimha Rao v Seshayya,* (1925) 48 Mad LJ 363 : 90 IC 138 : AIR 1925 Mad 825.
746. *Rajai Singh v Randhir Singh,* 87 IC 30 : AIR 1925 All 643; *Kunj Behari Lal v Pandit Prag Narain,* 68 IC 529 : AIR 1922 Oudh 283.
747. *Bhullan v Bachcha,* AIR 1931 All 380.
748. *Ramkhilawan v Mullo,* AIR 1957 MP 200.
749. *Sheikh Abdur Rahman v Ram Padarnath,* AIR 1945 Oudh 113.

mortgagee...".[750] A mere long term of redemption postponing the right of redemption for a given number of years may not, in itself, amount to a clog on the equity of redemption. But such a term, if coupled with any other condition that authorises the mortgagee in possession so to convert the property mortgaged in the meantime as to make it practically impossible for the original mortgagor to redeem the property, may be regarded as a clog.[751]

The later pronouncements appear to be in favour of treating long term mortgages as clog on the right of the mortgagor to redeem his property. The apex court has observed,[752]

A mortgage cannot be made altogether irredeemable or redemption made illusory. In the context of fast changing circumstances and economic stability, long-term for redemption makes a mortgage an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity of redemption should be judged.

(16) Collateral Benefit to the Mortgagee

A collateral stipulation is objectionable only if it is unfair and unconscionable, i.e., imposed in a merely reprehensible manner, and not merely if it is unreasonable. A stipulation for repayment in foreign currency is not a clog, even if the value of the named foreign currency has multiplied.[753]

In India, a collateral advantage that extends beyond the period of redemption is invalid. Chief Justice Sargent set aside a permanent lease granted by a mortgagor to a mortgagee on the ground that the parties were not in a position to deal on equal terms.[754] A condition that after redemption the mortgagee should continue in possession as a permanent tenant is invalid, as it prevents the mortgagor from getting back the property free and unfettered.[755] Such a condition is a clog on the equity of redemption, and it does not cease to be a clog merely because the mortgagor was not in a difficult or embarrassed situation, or because those conditions were not imposed by the mortgagee forcibly.[756] A mortgagee tenant cannot be permitted to act contrary to terms and conditions of mortgage deed. When at the time of the execution of the mortgage deed, it was agreed by the parties that at the time of the redemption of mortgage, the mortgagee would hand over the possession, he would be bound by it and the court would pass a decree of redemption against such mortgagee directing him to take the mortgage money and hand over the possession of shop to the mortgagor.[757] Similarly, where the mortgage deed contained a specific statement that the tenant had surrendered the tenancy rights and become mortgagees of the property and thus the substance of the mortgage deed clearly established that effects of this deed was inconsistent with continuance or subsistence of the lease, upon redemption, the mortgagor has a right to

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750. *Gulab Chand Sharma v Saraswati Devi,* AIR 1977 SC 242.
751. *Soni Bhailal Danji v Hiralal Lakhamshi,* AIR 1981 Guj 120.
752. *Thakar Singh v Mula Singh,* (2015) 5 SCC 209 : LNIND 2014 SC 888 : AIR 2015 SC 1 : 2014 AIR SCW 6059 : AIR SC (Civ) 2015 SC 169.
753. *Multi Service Book Binding v Morden,* (1978) 2 WLR 535.
754. *Subrao v Munjapa,* (1892) ILR 16 Bom 705, followed in *Parsharam v Laxmibai,* (1929) ILR 53 Bom 860 : 115 IC 405 : AIR 1929 Bom 186, on app (1931) 33 Bom LR 755 : 134 IC 701 : AIR 1931 Bom 399; *Govindrao v Anaji,* (1891) PJ 241; *Narsing v Narayan,* (1890) PJ 211.
755. *Mahomed Muse v Jijibhan,* (1885) ILR 9 Bom 524; *Parmanand Pandit v Mala Din,* (1925) ILR 47 All 582, 87 IC 477; *Ram Narain Pathak v Surathnath,* (1920) 5 Pat LJ 423 : 57 IC 327; *Sheo Singh v Birbahadar Singh,* 6 IC 707; *Aukinidu v Subbiah,* (1912) ILR 35 Mad 744 : 12 IC 382; *Daolal Rai v Sheikh Chand,* (1915) 11 Nag LR 180 : 31 IC 869; *Satyavatamma v Padmanabhan,* AIR 1957 AP 30; *Bhimrao v Sakharam,* (1922) ILR 46 Bom 409 : 64 IC 612 : AIR 1922 Bom 277; *Maina Devi v Thakur Mansinh,* AIR 1986 Raj 44, p 48.
756. *Gobind Ram v Rajphul Singh,* AIR 1973 P & H 94.
757. *Gautam Lal v Sukhlal,* AIR 2011 Raj 57.

recover possession both in terms of the mortgage deed as also the principle of this section.[758] Where the premises in possession of the tenant were mortgaged to him, and the tenant did not opt for any revival of leasehold rights in respect of the mortgage deed, it was held that since the lease was earlier to mortgage, it will not revive on redemption and the owner/mortgagor would be entitled to restoration of possession upon redemption.[759] However, if the mortgagee is permitted to continue in possession of the property after redemption of a usufructuary mortgage in accordance with the terms and agreement of the original lease agreement executed prior to effecting a mortgage, the revival of tenancy would be valid,[760] if the intention of the parties was to keep the tenancy alive,[761] but not where the original occupancy was under an unregistered lease.[762]

In view of the legislation in this country providing security of tenancies, the chances of the mortgagee being evicted from such property become very bleak, and the condition would be very harsh and burdensome. If the mortgagee, in exercise of a power given to him by the mortgage, has leased out the property then, when the mortgage is redeemed, the only possession that could be decreed is possession through the tenant, and not *khas* possession.[763] A lease by a mortgagor to a mortgagee to last during the pendency of the mortgage is valid.[764] But in another case,[765] the Bombay High Court held that an agreement to pay remuneration to a mortgagee mill manager was not a clog on redemption, although the same court had said seven years previously, apparently with reference to the early English case, that it was a well-established principle that a mortgagee cannot charge for his personal services.[766] In *Chalikani Venkatarayanim v Zamindar of Tuni,*[767] the Privy Council held that an agreement that a mortgagee in possession should charge a fixed sum annually for repairs and contingent charges, was not a clog on redemption. In Oudh, a stipulation that the mortgagor should pay on redemption *deorha,* i.e., the principal and half as much again, has been held to be valid.[768]

A condition for pre-emption in favour of the mortgagee is, it is submitted, a clog on redemption, for the mortgagor gets back his property on redemption fettered with this stipulation.[769] The cases on the subject are not consistent. In a Madras case,[770] J Bhashyam Ayyangar suggests that if the price is not fixed and if the right of pre-emption does not continue after redemption, there is no clog as the mortgagor may sell or not as he pleases. In a later case, the same High Court following the decision of the House of Lords in *Samuel v Jarrah, Timber & Wood Paving Corp,*[771] held that an agreement incorporated in a mortgage deed to sell the property to the mortgagee for the price already agreed upon operated as a clog on the equity of redemption.[772]

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758. *Haji Isufali Abdullabha Jinia v Fijabhai Fakruddin Challawala,* AIR 2011 Guj 61 : (2011) 52 GLR 220.
759. *S R Sripathi v Narayana Kanginaya,* AIR 2011 Kant 134.
760. *Hastimal v P Tej Ram Sharma,* AIR 2007 SC 3246 : (2007) 11 SCC 87.
761. *Sakinabi Sirajuddin Kanchwala v Srilal Hansraj Shrma,* AIR 2010 (NOC) 831 (Bom).
762. *Chandrakant Shankar Rao Mochali v Parubai Bhairu Mohite,* AIR 2008 SC 3255 : (2008) 6 SCC 745.
763. *V Habra v Chhaganlal,* AIR 1970 Guj 203.
764. *Mahomed v Ezekiel,* (1905) 7 Bom LR 772.
765. *Hope Mills Ltd v Cawasji,* (1911) 13 Bom LR 162 : 10 IC 749.
766. *Mahadeo v Ramchandra,* (1904) 6 Bom LR 590.
767. *Chalikani Venkatarayanim v Zamindar of Tuni,* (1923) ILR 46 Mad 108 : 50 IA 41 : 71 IC 1035 : AIR 1923 PC 26; *Bisheshwar Dayal v Chedi Singh,* 156 IC 926 : AIR 1935 Pat 157.
768. *Lala v Hirajan,* 96 IC 538 : AIR 1976 Oudh 502; *Miran Baksh v Bajrang,* (1907) 10 OC 214.
769. See *Rangayya Chetti v Raghavacharlu,* (1929) ILR 52 Mad 300 : 121 IC 753 : AIR 1929 Mad 243.
770. *Ramasami v Chinnan,* (1901) ILR 24 Mad 449; approved in *Kurri Veerareddi v Kurri Bapireddi,* (1906) ILR 29 Mad 336.
771. (1904) AC 323.
772. *Malisetti Viranna v Pallayya,* AIR 1948 Mad 7.

In 1948, the Madras High Court held[773] that an agreement incorporated in a mortgage deed to sell the property to the mortgagee for the price already agreed upon, was held as operating as a clog on the equity of redemption. The Allahabad and Patna High Courts have said of a covenant for pre-emption at a fixed price that the covenant for pre-emption was enforceable if the bargain was not unconscionable, and if the right did not continue after redemption.[774]The Calcutta High Court has held that a stipulation for pre-emption is valid, and not contrary to public policy.[775] The Madras High Court has observed that the relaxation of the rule of equity in *Kreglinger's* case does not affect the construction of a statutory enactment such as this section.[776]But the tendency to restore freedom of contract between the mortgagor and the mortgagee which that case discloses, and which is apparent in the protests of Lord Halsbury and Macnaghten in *Samuel v Jarrah, Timber & Wood Paving Corp*,[777] may also be observed in the judgment of the Judicial Committee in *Kanhaya Lal v National Bank of India*.[778] Indian cases were cited to show the necessity to protect mortgagors from a power of sale without the intervention of the court, and their Lordships said it was absurd to apply the reasoning of those cases to a transaction between a limited company, and the trustees of debenture holders.[779] In a case the plaintiff, a private company, with a view to construct a cinema hall on the land purchased by it and to liquidate the earlier mortgage debt executed a mortgage-deed with the condition that the amount of loan after paying for the earlier mortgage will remain with the defendants who had agreed to advance it only if the contract of construction of the cinema house was made with them, to construct the cinema house for the plaintiff. Simultaneously, a deed of partnership was also executed between the parties at the instance of the defendants which according to the plaintiff was not intended to be acted upon, and was only intended to provide security to the defendant for the expenses that they may have to incur in connection with the construction work over and above the sum retained by the defendants, who on the other hand asserted that they were partners of a lawfully constituted firm for running the cinema business. The defendants did not invest any amount in the partnership business, nor did they actually pay any sum to the plaintiff. Under the terms of the partnership deed, the plaintiff forfeited all their rights even to carry out business. The most eloquent proof of the terms being unreasonable was the fact that the defendants were not to contribute anything to the partnership business, but were entitled to run it in any manner they liked to the exclusion of the plaintiff. The court held that the terms of the partnership deed which specifically referred to the mortgage transaction and sought to establish claims of the defendants arising out of the mortgage transaction stipulating first charge in respect of advances made by the defendants towards the construction of a cinema hall, were oppressive and unconscionable, and constituted a fetter on the equity of redemption.[780]

(17) Subsequent Agreement Postponing Redemption

A subsequent agreement which has the effect of postponing redemption, or which postpones redemption may be either (1) an agreement which creates a personal obligation; or (2) a charge or a mortgage creating a right in rem.

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773. *Ibid.*
774. *Bimal Jati v Biranja,* (1900) ILR 22 All 238; followed in *Matura Subbu v Surrendranath,* (1929) ILR 8 Pat 243 : 113 IC 106 : AIR 1928 Pat 637.
775. *Haris Paik v Jahuruddi,*(1897) 2 Cal WN 575.
776. *Ambu Nair v Kelu Nair,* (1930) ILR 53 Mad 805 : 123 IC 584 : AIR 1930 Mad 305; on app 60 IA 266 : 65 Mad LJ 103 : 35 Bom LR 807 : 37 Cal WN 797 : 57 Cal LJ 454 : 143 IC 433 : AIR 1933 PC 167.
777. *Samuel v Jarrah, Timber & Wood Paving Corp,* (1904) AC 323.
778. *Kanhaya Lal v National Bank of India,* (1923) ILR 4 Lah 284 : 50 IA 162 : 75 IC 7 : AIR 1923 PC 114.
779. For the effect of section 120 of the Companies Act 1956, see note above.
780. *Rama Shankar Singh v Silver Screen Corporation, (P) Ltd,* AIR 1988 Cal 46, p 54.

If the agreement creates only a personal obligation, it is a clog on redemption, for the mortgagor is entitled to get back his land on payment of the debt secured upon it. So if the mortgagor borrows a fresh sum, and executes a money bond agreeing not to redeem the mortgage until the bond is paid off, the agreement is invalid.[781] So also, a condition in a mortgage bond that the mortgage shall not be redeemed until a previous personal loan is paid off, is a clog on redemption; but the Bombay High Court has said that this was not so in cases before the TP Act.[782] On the other hand, if the mortgaged property is made security for the repayment of the further advances, the agreement not to redeem the first mortgage until the second debt is paid off is valid, for the agreement operates as a deed of further charge, and the mortgagor can redeem only on payment of all the moneys secured.[783] In a case where some of the mortgagors have executed deeds creating a further charge in favour of the mortgagee, he cannot in a suit for the redemption of the mortgage, compel the payment of the sum due in respect of the further charge. He can enforce that right in a separate suit.[784]

No hard and fast rule can be laid down as to whether the agreement operates as a further charge, and each case must be decided on the construction of the particular document.[785] Thus, a clause in a mortgage which did not clearly operate as a stipulation for the renewal of the mortgage, was held as not barring a suit for redemption.[786]

ILLUSTRATIONS

(1) *A* borrows money from *B.* and executes a usufructuary mortgage for the amount redeemable in any month of Jeth. *A* then borrows a further sum from *B* and executes a simple money bond in which he covenants not to redeem the mortgage until the money due on the latter bond is paid. This covenant is invalid as a clog on the equity of redemption.[787]

(2) *A* borrows ₹ 500 from *B* and executes a usufructuary mortgage for ₹ 300, the rents and profits to be taken in lieu of interest. *A* covenants in the deed that the payment of the balance of ₹ 200 with interest at 2 per cent per mensem would be compulsory at the time of redemption. The covenant is not a clog on redemption, but creates a further charge for ₹ 200.[788]

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781. *Rama v Martand,* (1885) ILR 9 Bom 236; *Chhotalal Govindram v Mathur,* (1893) ILR 18 Bom 591; *Rajmal v Shivaji,* (1902) ILR 27 Bom 154; *Rugad Singh v Sat Narain,* (1905) ILR 27 All 178; *Sheo Shankar v Parma Mahton,* (1904) ILR 26 All 559; *Durga Prasad v Dukhi Roy,* (1905) 9 Cal WN 789; *Radhasoami S Sabha v Hanskumar,* AIR 1959 MP 172.
782. *Hiralal v Narsilal,* (1909) 11 Bom LR 318 : 2 IC 469.
783 *Durga Pershad v Dukhi Roy,* (1904) 9 Cal WN 789; *Muhammed Abdul v Jairajmal,* (1909) 3 All LJ 768; *Ranjit Khan v Ramdhan,* (1909) ILR 31 All 482 : 2 IC 859; *Bikhan Singh v Shankar,* (1909) 6 All LJ 255 : 1 IC 345; *Ulfat Rai v Kanhaiya Lal,* (1922) 20 All LJ 86 : 65 IC 819 : AIR 1922 All 41; *Jiwan v Tahal Singh,* (1930) 12 Lah LJ 144; *Har Prasad v Ram Chandar,* (1922) ILR 44 All 37 : 63 IC 750 : AIR 1922 All 174 following *Rais-un-nissa v Zorawar,* (1926) ILR 1 Luck 92 : 92 IC 675 : AIR 1926 Oudh 228; *Jeut Koeri v Mathura,* (1926) 24 All LJ 125 : 90 IC 787 : AIR 1926 All 171; *Ashraf Ali v Chandrapal Singh,* 89 IC 563 : AIR 1925 Oudh 506; *Brij Lal v Bhawani Singh,* (1910) 32 All 651 : 7 IC 115; *Shib Narain v Gajadhar,* (1926) ILR 48 All 292 : 92 IC 772 : AIR 1926 All 506; *Sita Ram v Sheo Darshan,* 96 IC 197; *Lal Bahadur Singh v Rameshwar Prasad,* (1928) ILR 3 Luck 113 : 105 IC 581 : AIR 1927 Oudh 510; *Ram Kishore v Ram Nandan,* (1927) 25 All LJ 1086 : 108 IC 149 : AIR 1928 All 99; *Sheo Kumar Upadhya v Jittu Singh,* 9 IC 52; *Hargobind v Tula Ram,* 10 IC 222; *Chauharja Baksh v Ram Harakh,* 32 IC 740; *Radha Krishna v Sheo Dial,* (1905) 8 OC 132; *Naunidh v Mahadeo Singh,* (1922) 25 OC 134 : 65 IC 401; *Goya Din v Gajadhar,* 24 IC 611; *Ramcharan v Jagan Behari Lal,* 24 IC 737; *Gaya Prasad v Rachpal,* 70 IC 66 : AIR 1923 Oudh 24; *Jugeshri Kuer v Aftab Chand,* (1929) ILR 8 Pat 68 : 112 IC 655 : AIR 1928 Pat 582.
784. *Kenak Singh v Gujraj Singh,* 160 IC 890 : AIR 1936 Oudh 202.
785. *Har Prasad v Ram Chandar,* (1922) ILR 44 All 37 : 63 IC 750 : AIR 1922 All 174.
786. *Kurian v Lakshmi,* AIR 1951 Tr & Coch 71.
787. *Sheo Shankar v Parma Mahton,* (1904) ILR 26 All 559.
788. *Jeut Koeri v Mathura,* (1926) 24 All LJ 125 : 90 IC 787 : AIR 1926 All 171.

(3) *A* borrows ₹ 500 from *B* and executes a usufructuary mortgage in his favour. *A* then borrows a further sum of ₹ 50 from *B* and executes a *mashral- ul-rahn* (or additional mortgage), containing the following covenant:

the stipulation is that when I shall redeem the land mortgaged I shall also pay the said amount, with interest at the stipulated rate, and the mortgaged property shall be redeemed. Without payment of the said sum, the property shall not be redeemed.

It was held that the covenant was not a clog on redemption, but created a further charge.[789]

(4) A borrowed ₹ 1,500 from *B* and executed a mortgage for ₹ 1,500. The mortgage bond recited that ₹ 5,000 was due on a previous *Khata,* and *A* promised to pay this sum and covenanted not to redeem the mortgage till both sums of ₹ 1,500 and ₹ 5,000 were paid. The deed was stamped for ₹ 6,500. It was held that ₹ 5,000 were also secured by way of mortgage, and that there was no question of a clog on redemption.[790]

If a person executes two successive mortgages of his property, in favour of another to secure separate debts, a stipulation in the second mortgage that the mortgagor shall not be entitled to redeem the first mortgage, unless he also paid the debt secured by the second mortgage, is perfectly valid.[791] The mortgagee is entitled in such a case to resist redemption of the first mortgage, unless the second debt is discharged even if his right to enforce the second mortgage is barred by limitation.[792] The rule, however, does not apply when the mortgagees are different. Thus, if *A* mortgages to a firm and then for a further advance makes a second mortgage to a part in that firm stipulating that he will not redeem the partnership mortgage before paying the personal debt, that stipulation will not prevent him from redeeming the partnership mortgage first.[793] Again, if the previous advance, whether secured or unsecured, is secured on the mortgage given at the time of second advance, the case is different because both the transactions become merged in one mortgage.[794] However, one mortgagor cannot by executing a mortgage affect the right of his co-mortgagors to redeem. Thus, in a case where *K* and *L* in 1876 executed a mortgage to *T,* and then *K* alone in 1891 executed a second mortgage to *T* which contained a condition that he would not redeem it without at the same time redeeming the mortgage of 1876; *L* was allowed to redeem the first mortgage without redeeming the second.[795]

(18) When the Right of Redemption Arises

The right of redemption arises when the principal money secured by the mortgage has become due and may be exercised at any time thereafter, subject of course to the law of limitation. There were a considerable number of Indian cases in which it was held that the time fixed in the deed was fixed for the convenience of the mortgagor, and that he could

789. *Har Prasad v Ram Chandar,* (1922) ILR 44 All 37 : 63 IC 750 : AIR 1922 All 174.
790. *Hari v Vishnu,* (1904) ILR 28 Bom 349.
791. *Punnu Ram v Ghulam Hussain,* (1926) ILR 7 Lah 297 : 96 IC 630 : AIR 1926 Lah 494; *Mohammad Khan v Chandi Shah,* 147 IC 193 : AIR 1933 Lah 864; *Ganpat Raoji v Abdulji Chandji,* 169 IC 23 : AIR 1937 Nag; *Jai Narain v Gokul Singh,* 168 IC 40 : AIR 1937 Oudh 321.
792. *Nathwa v Kanhiya,* (1921) 3 Lah LJ 432 : 65 IC 642 : AIR 1921 Lah 170; *Neba Ram v Muhammad Hussain,* 89 IC 871 : AIR 1926 Lah 90; *Ram Kishore v Ram Nandan,* (1927) 25 All LJ 1086 : 108 IC 149 : AIR 1928 All 99; *Sultan Muhammed v Ladha,* 96 IC 844 : AIR 1926 Lah 633; *Jokhu Bhunja v Sitla Bakhsh,* (1930) ILR 52 All 539 : 122 IC 411 : AIR 1930 All 416.The contrary decisions in *Kesar Kunwar v Kashi Ram,* (1915) ILR 37 All 634 : 30 IC 777 and *Ramakrishna v Nekker,* (1917) 33 Mad LJ 581 : 43 IC 286, are incorrect.
793. *Chhotalal Govindram v Mathur,* (1893) ILR 18 Bom 591.
794. *Hari v Vishnu,* (1904) ILR 28 Bom 349.
795. *Tarkeshwar v Kalka Pathak,* 98 IC 499 : AIR 1927 All 144; following *Muhammed Husain v Sheodarshan Das,* (1907) 4 All LJ 176; *Kalaperumal v Ulakudayaperumal,* AIR 1955 Tr & Co 232.

redeem before that time, unless there was an express stipulation to the contrary.[796] These cases are bad law, for the view taken in other cases[797] that the mortgagor cannot redeem before the time fixed for payment is confirmed by the decision of the Judicial Committee in *Bakhtawar Begam v Husaini Khanam.*[798] Their Lordships said that ordinarily, in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period; but that there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period, and take back the property, such a provision being usually to the advantage of the mortgagor.[799] The time for payment is sometimes expressed to be within a certain number of years. There is a conflict of decisions as to whether this imports a right to redeem earlier.[800] It is submitted that this is purely a matter of construction of the deed. In the case of *Hewanchal v Jawahir,*[801] the mortgage was for eight years with a condition that the mortgagor might redeem on payment of the whole amount due at the second, fourth, and the eighth years. If the mortgage fixes no time for payment, the mortgagor may redeem at any time.[802] A mortgagor is not entitled to redeem before the expiry of the stipulated period merely on the ground that the mortgagee in possession has done something which he was not authorised to do.[803] A condition in a mortgage allowing the mortgagee to plant trees and to recover compensation, therefore, at a certain rate for a number of years, would not entitle the mortgagor to sue for redemption before the expiry of the said period.[804] In an usufructuary mortgage, there can be a term fixed for the mortgagee's enjoyment during which redemption cannot take place.[805] Where the mortgage-deed provided that it could be redeemed 12 years after the mortgagee obtained possession of all the lands, some of which were in the possession of tenants, and subsequent events made it impossible to obtain such possession, it was held that the mortgage could be redeemed any time after the expiry of 12 years.[806]

In some agricultural tenancies, time is of the essence of the contract, for redemption at any other time would prejudice agricultural operations. So when a mortgage was redeemable

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796. *Dorappa v Kundukuri,* (1867) 3 Mad HC 363; *Mashook v Marem,* (1875) 8 Mad HC 31; *Sri Raja Setrucherla v Sri Raja Vairicherla,* (1880) ILR 2 Mad 314; *Rose Ammal v Rajarathnam,* (1900) ILR 23 Mad 33; *Bhagwat Das v Parshad Singh,* (1888) ILR 10 All 602.
797. *Sakkaram v Vithu,* (1866) 2 Bom HC 225; *Raghubar Dayal v Budhu Lal,* (1886) ILR 8 All 95; *Vadju v Vadju,* (1881) ILR 5 Bom 22; *Sayad Abdul Hak v Gulam,* (1896) ILR 20 Bom 677; *Tirugnana v Nallatambi,* (1892) ILR 16 Mad 486; *Husaini Khanum v Husain Khan,* (1907) ILR 29 All 471.
798. *Bakhtawar Begam v Husaini Khanam,* (1914) ILR 36 All 195 : 41 IA 84 : 23 IC 355 followed in *Bir Mohamad v Nagoor,* (1914) 27 Mad LJ 483 : 25 IC 576 which treats *Rose Ammal v Rajarathnam,* (1900) ILR 23 Mad 33 as overruled; but apparently overlooked by the chief court of Lucknow in *Hardeo Bakhsh v Deputy Commr,* (1926) ILR 1 Luck 367 : 98 IC 542 : AIR 1976 Oudh 281; *Jodhiram v Harihar,* AIR 1958 Pat 464.
799. See for instance *Kudai Lal v Aisha Jehan,* (1927) ILR 2 Luck 564 : 102 IC 263 : AIR 1927 Oudh 199.
800. The right was given in *Purna Chandra v Peary Mohan,* (1912) ILR 39 Cal 828 : 15 IC 287; following *Rose Ammal v Rajarathnam,* (1900) ILR 23 Mad 33; *Chinnasami Reddiar v Krishna,* (1906) 16 Mad LJ 146; *Radha Krishna v Madhava,* (1907) 17 Mad LJ 83; *Chandu v Koaja,* (1915) 29 Mad LJ 86 : 30 IC 370; *Satyavatamma v Padmavatamma,* AIR 1957 AP 30. The right was not given, in *Vadju v Vadju,* (1881) ILR 5 Bom 22; *Raghubar v Budhu Lat,* (1886) ILR 8 All 95; *Shiam Lal v Jagdamba Prasad,* (1927) 25 All LJ 1051 : 108 IC 660 : AIR 1928 All 131; *Akbar Husain v Shah Ahsanul,* 134 IC 549 : AIR 1932 All 155.
801. *Hewanchal v Jawahir,* (1889) ILR 16 Cal 307 (PC).
802. *Chengiah v Pichayya,* (1907) 17 Mad LJ 177.
803. *Har Baksh Singh v Mahabir Singh,* 159 IC 1052 : AIR 1936 Oudh 160.
804. *Savarimuthu v Manhandan Nadar,* AIR 1951 Tr & Coch 170; *Bhagurathi Pillai v Keshav Nadar,* AIR 1952 Tr & Coch 286.
805. *Kishan Singh v Nathu Ram,* AIR 1939 Lah 235 : 41 Punj LR 270.
806. *Sankara Pillai v Mathunni,* AIR 1958 Ker 245.

in *Jeth* of any year, it cannot be redeemed in any other month.[807] When the mortgage-money was deposited in the month of *Jeth*, that is at harvest time, but too late for notice to be served on the mortgagee in that month, the Allahabad High Court treated it as available for redemption from the month of *Jeth* of the next year.[808]

The mortgagor may on equitable grounds, be allowed to redeem before the expiry of the term on account of a default of the mortgagee. Thus, in *Chhatku Rai v Baldeo*[809] the mortgage was for ₹ 599.15, and the mortgagee was to discharge prior encumbrances out of the mortgage money. The mortgagee only advanced ₹ 50.15, and did not discharge the encumbrances. The assignee of the mortgagor was allowed to redeem before the expiry of the term. On the other hand, in order to avoid multiplicity of actions, the mortgagor may in some cases be refused redemption, unless he at the same time pays an unsecured debt. If the mortgaged property is in the hands of an heir or devisee of the mortgagor as assets for the payment of an unsecured debt, the mortgagee may if the assets are sufficient for the payment of all creditors tack the unsecured debt to his mortgage debt[810]—but not if the estate is insolvent.[811] Such tacking was permitted in a Bombay case[812] where the mortgagor had in his lifetime assigned his whole estate to the plaintiff with an obligation to pay his debts, and the plaintiff was not allowed to redeem the mortgage without paying an unsecured debt also.

(19) Exercise of Right of Redemption

The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time, and at the proper place of the mortgage-money. A right to redeem can be extinguished by the act of the parties, or by a decree of the court, or also by the operation of law. When it is extinguished by the act of parties, the act must take the shape and observe the formalities which the law prescribes. For instance, if the extinguishment is by payment in cash or by a transfer of property which does not require registration, then no formality beyond the delivery of possession, and the occupation by the mortgagee in full and proper discharge is necessary. However, if the agreement is to transfer immovable property exceeding ₹ 100 in value, then a writing and registration are necessary because in that case the title cannot pass by mere delivery of possession.[813] The discharge of a debt by the operation of a statute does not amount to the redemption of the mortgage, to make the continuance of possession by the mortgagee adverse to the mortgagor.[814] Pursuant to section 60, the continuance in possession of a mortgagee after the period of redemption cannot necessarily be adverse to that of the owner. The question is always one of the intention of the parties concerned.[815]

Once the mortgage money has been paid, the mortgage comes to an end, though the statutory right to recover possession survives.[816] A conjoint reading of section 60, section 76(h)

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807. *Bansi v Girdhar Lal*, (1894) All WN 143.
808. *Saiyid Ahmad v Dharmun*, (1921) ILR 43 All 424 : 60 IC 760 : AIR 1921 All 71; *Kirpal Singh v Sheoambar*, (1930) 28 All LJ 610 : 126 IC 366 : AIR 1930 All 283; *Narasingh v Achhaibar Singh*, (1914) ILR 36 All 36, 22 IC 539; *Muhammad Ali v Baldeo*, (1916) ILR 38 All 148 : 34 IC 183; *Shib Narain v Chitru*, AIR 1949 East Punj 389.
809. *Chhatku Rai v Baldeo*, (1912) ILR 34 All 659 : 17 IC 340; *Sanwaley Prasad v Sheo Sarup*, (1927) ILR 2 Luck 279 : 98 IC 770 : AIR 1927 Oudh 12; *Narasimha Rao v Seshayya*, (1925) 48 Mad LJ 363 : 90 IC 138 : AIR 1925 Mad 825; *Durga Charan v Poresh*, 76 IC 336 : AIR 1925 Cal 105; but see *Manicka Nadar v Aramugha Sundara*, AIR 1945 Mad 340.
810. *Rolfe v Chester*, (1855) 20 Beav 610.
811. *Talbot v Frere*, (1878) 9 Ch D 568.
812. *Ragho Govind v Balvant*, (1883) ILR 7 Bom 101.
813. *Balkrishna v Rangnath*, (1950) ILR Nag 618 : AIR 1951 Nag 171.
814. *Mulchand v Ganga*, (1950) ILR Nag 68.
815. *Amina Bee v Khamurunnissa*, AIR 1974 Mad 54; (1973) 2 Mad LJ 314.
816. *Prithi Nath v Suraj Ahir*, AIR 1963 SC 1041; *Kunjayamma v Kunchali*, AIR 1970 Ker 289; *Samadh Baba Narain Dass v Surta*, AIR 2002 P&H 108.

read with section 83 of the TP Act would amplify that on deposit of the mortgage amount, the contractual relationship of the mortgagor and mortgagee ceases.[817] A mortgage was effected by *A* of his property in favour of *B*. The son of *A* filed a suit for redemption of the property as against the successor of *B*, *C*. The trial court granted S, the time of three months to deposit the money in court. However, an appeal was filed as against this order of the trial court and the appellate court stayed the order. S was not able to deposit the amount due to this reason and comply with the order of the trial court.It was held that as the failure to deposit the amount was not wilful, but was owing to the stay granted by the court, the plaintiff, *S* is entitled to a right of redemption and has not lost it through wilful disobedience.[818]

(20) Payment

Payment may be made not only to the mortgagee, but also to an authorised agent of the mortgagee, e.g. the mortgagee's solicitor,[819] but a payment to an agent who disclaims authority is made at the payer's risk.[820] Where there are several mortgagees, there is a conflict of decisions as to whether payment to one is valid. The Madras High Court has held that payment to one of several mortgagees is a valid discharge.[821] This was doubted in several Madras cases,[822] and was not followed in Bombay and Calcutta.[823] In *Annapurnamma v Akkayya*,[824] a Full Bench of the Madras High Court held that one of the several payees of a negotiable instrument can give a valid discharge of the entire debt, but CJ White in a dissenting judgment was of opinion that the equitable presumption of a tenancy in common should prevail. This opinion has since been followed,[825] and it is unquestionably correct, for the security being in favour of several mortgagees cannot be re-transferred by any one of them and, therefore, the mortgage cannot be discharged except by payment to all. In an Allahabad case,[826] a full discharge given by one of two joint mortgagees was held to operate in respect of his share only. The Judicial Committee in *Shrinivasdas Bavri v Meherbai*[827] held that one of two mortgagees was not bound by a recital of a release given by the other, and this decision in effect overrules *Barber Maran v Ramana*.[828] But even after this decision, the Madras High Court has held that a purchase by one of several co-mortgagees of the equity of redemption has the effect of extinguishing the mortgage,[829] and that the appropriation of the income by a co-mortgagee in possession was a valid discharge of the mortgagee.[830] The Bombay High Court has held that in the case of payment to the heirs of a mortgagee,

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817. *Parameswaran Govindan v Krishnan Bhaskaran*, AIR 1992 SC 1135, p 1137.
818. *Tripta Devi v Chuni Lal*, AIR 2017 HP 126.
819. *Bouston v Williams*, (1870) 5 Ch App 655.
820. *Bai Ruttonbai v Eraser Ice Factory*, (1909) ILR 32 Bom 521.
821. *Barber Maran v Ramana*, (1897) ILR 20 Mad 461.
822. *Ahinsa v Abdul Kader*, (1902) ILR 25 Mad 26, p 38; *Ramasami v Muniyandi*, (1910) 20 Mad LJ 709 : 5 IC 343; *Sheik Ibrahim v Rama Aiyar*, (1911) ILR 35 Mad 685, p 687 : 10 IC 874.
823. *Sitaram v Shridhar*, (1903) ILR 27 Bom 292, p 294; *Jagat Tarini v Naba Gopal*, (1907) ILR 34 Cal 305, p 321; *Hossainara v Rahimannessa*, (1911) ILR 38 Cal 342, p 349 : 8 IC 837; *Harihar Pershad v Bholi Pershad*, (1907) 6 Cal LJ 383, p 394.
824. *Annapurnamma v Akkayya*, (1913) ILR 36 Mad 544 : 19 IC 12.
825. *Mathra Das v Nizam Din*, (1917) PR 68 : 41 IC 921; *Shaikh Hakim v Adwaita Chandra*, (1917) 22 Cal WN 1021 : 49 IC 63; *Umes Chandra v Dinabandhu*, (1915) 21 Cal LJ 570 : 29 IC 956; *Ray Satindra v Ray Jatindra*, (1927) 31 Cal WN 374 : 101 IC 530 : AIR 1977 Cal 425; *Syed Abbas Ali v Misri Lall*, (1920) 5 Pat LJ 376 : 56 IC 403; *Banamali Satpathi v Talna Ramhari*, (1920) 5 Pat LJ 151 : 55 IC 841 — Contra *Purbhu Ram v Jhalu Kuer*, (1917) 2 Pat LJ 520 : 42 IC 408 overruled; *Mahadeo Singh v Balmukund*, (1947) ILR Nag 583 : AIR 1948 Nag 248.
826. *Janhari Singh v Ganga*, (1919) ILR 41 All 631 : 51 IC107.
827. *Shrinivasdas Bavri v Meherbai*, (1917) ILR 41 Bom 300 : 44 IA 36 : 39 IC 627.
828. *Barber Maran v Ramana*, (1897) ILR 20 Mad 461.
829. *Follesatha v Md Rashiuddin*, 153 IC 462 : AIR 1934 Mad 656.
830. *Sakkarama Rao v Nagasami Rao*, (1957) 1 Mad LJ 17 : AIR 1957 Mad 191.

payment must be made to all, unless they have constituted one of their members as *karta* or manager;[831] or, according to the Patna High Court,[832] the manager's agent. It was also held in the Patna case that even where the mortgage deed contained a stipulation that the only evidence which the parties could rely upon in support of any payments made in satisfaction of the mortgage debt would be payments endorsed on the mortgage-deed itself, it was open to the mortgagor to rely upon evidence other than the endorsements on the mortgage bond, such as a receipt signed by the mortgagee or his agent.

Payment must be made in the current coin of the realm or currency notes, unless the mortgagee accepts some other form of payment.[833] If the debt is contracted in any particular currency, it must be repaid in that currency or its equivalent.[834] A mortgagor is not bound to pay the executors of a mortgagee, until they obtain probate.[835] If the mortgagee recovers more than is due, the mortgagor may recover the overpayment as money received by the mortgagee to his use, or, alternatively, money paid by mistake, or alternatively by tracing.[836] If the redemption amount paid is less than the figure actually due, the mortgagee can claim the deficiency subject to any issue of estoppel.[837]

(21) Tender Must be Unconditional

In a case where the purchaser of the equity of redemption made a tender conditional on the delivery of the title deeds to him, the tender was held to be conditional and void.[838]It is submitted, however, that a tender coupled with a demand for something which the creditor is bound in law to perform on being paid, is not conditional.[839] The law as enacted in section 38 of the Indian Contract Act, 1872 is less rigid than the English law.[840]A tender under protest is a valid tender, for the protest is not a condition, but merely a notice that the tender is not an admission, and the creditor had only to say, "I take the money; protest as much as you please".[841]Tender must be in current coin or currency notes. The old rule that the money must be shown to the creditor to tempt him[842] is now obsolete and if the debtor is ready to produce the money and offers to pay it, and the creditor dispenses with production at the time that is sufficient. In a case before the Privy Council,[843] their Lordships quoted with approval the following passage from the judgment of Vice- Chancellor Wigram in *Hunter v Daniel*: [844]

> The practice of the courts is not to require a party to make a formal tender where from the facts stated in the bill or from the evidence it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money.

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831. *Ahinsa Bibi v Abdul Kadar*, (1902) ILR 25 Mad 26; *Sitaram v Shridhar*, (1903) ILR 27 Bom 292.
832. *Ram Kirpal v Baleshwar*, 192 IC 861 : AIR 1941 Pat 246. See also *Gopaljee Jha v Upendranaram Jha*, 202 IC 495 : AIR 1942 Pat 408.
833. *Ragho v Hari*, (1900) ILR 24 Bom 619; *Jugat Tarini v Naba Gopal*, (1907) ILR 34 Cal 305; *Bolye Chund v Moulard*, (1877) ILR 4 Cal 572.
834. *Trimbak Jivaji v Sakharam*, (1892) ILR 16 Bom 599.
835. *Pandurang v Dadabhoy*, (1902) ILR 26 Bom 643.
836. *Chase Manhattan Bank N A v Israel British Bank, (London) Ltd* (1981) Ch 105 : [1979] 33 All ER 1025; *Royal Bank ofCanada v LVG Auctions Ltd*, (1984) 2 DLR 95 (on unjust enrichment);*National Westminister Bank Ltd v Barclays Bank International Ltd*, [1974] 3 All ER 834; *Barclays Bank Ltd v WJ Simms Son & Cook (Southern) Ltd*, [1980] QB 677 : [1979] 3 All ER 522.
837. See *United Overseas Bank v Jiwani*, [1977] 1 All ER 733; *Avon County Council v Hewlett*, [1983] All ER 1073 (CA).
838. *Varadarajulu v Dhanalakshmi*, (1914) 16 Mad LT 365 : 26 IC 184.
839. *Cf Rourke v Robinson*, (1911) 1 Ch 480.
840. *Kanhayalal v Khuttermoney*, (1880) 5 Cal LR 105.
841. *Scott v Uxbridge, etc*, (1866) LR 1 CP 596.
842. *Ex parte Danks*, (1852) 2 De GM & G 936.
843. *Chalikani Venkatarayanim v Zamindar of Tuni*, (1923) ILR 46 Mad 108, p 115 : 50 IA 41, p 46 : 71 IC 1035 : AIR 1923 PC 26.
844. *Hunter v Daniel*, (1845) 4 Hare 420, p 423.

In the case before the Privy Council, a purchaser of the equity of redemption wrote a letter asking to be informed of the amount of the balance due, and promising to send the money on receipt of a reply. The mortgagee replied that there was no need for him to pay as there was a covenant against alienation in the mortgage-deed, but at the conclusion, the letter stated what was the balance due on the mortgage. The covenant against alienation was of course invalid and as the mortgagee stated what was the amount due and no attempt was made by the mortgagor to pay it, their Lordships said they were 'unable to construe the (mortgagee's) letter as equivalent to any such clear release to the mortgagor of his obligation to tender the money as is required in order to justify him in not having presented it for receipt'.[845] In another case, when the mortgagor went with the money to the mortgagee and did not pay it as the mortgagee demanded extra interest, that was good tender.[846] However, a mere expression of willingness to pay is insufficient,[847] for the money must be available for immediate delivery;[848] and even an offer by letter to pay is not sufficient.[849]

Tender of less than the proper amount is invalid according to the rule in *Dixon v Clarke*;[850] but in *Haji Abdul v Haji Noor Mahomed*[851] J Telang said this rule was limited to cases where the party making the tender admits that more is due than is tendered, but it is difficult to understand why the mortgagees should suffer for the mortgagor's mistake.[852] But the creditor may accept the amount tendered in part payment, if the debtor does not make it a condition that the tender is to be in discharge of the whole.[853] In the absence of a stipulation to that effect, the mortgagee is entitled to decline to receive payment by installments.[854] A valid tender, with continued readiness to pay, stops the running of interest.[855] However, not so an invalid tender.[856] A tender improperly rejected is not equivalent to payment.[857] Justice Phear said in an old case,[858] that tender by one of several mortgagors is not valid. But that is incorrect, for any of the several mortgagors can redeem and it is sufficient here, as in England, that tender should be made by a person having a prima facie right to redeem. The costs of a suit for redemption are payable by the mortgagor; but if a mortgagee improperly refuses to accept a tender, he may be refused his costs or ordered to pay costs.[859] In the absence of a stipulation to that effect, the mortgagee is entitled to decline to receive payment by installments.[860] Instead of making tender to the mortgagee

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845. *Chalikani Venkatarayanim v Zamindar of Tuni*, (1923) ILR 46 Mad 108, p 115 : 50 IA 41, p 46 : 71 I C 1035 : AIR 1923 PC 26.
846. *Pestonjee v Hormasji*, (1903) 5 Bom LR 387.
847. *Haji Abdul Rahman v Haji Noor Mahomed*, (1892) ILR 16 Bom 141, p 150.
848. *Pandurang v Dadabhoy*, (1902) ILR 26 Bom 643.
849. *Kamaya v Devapa*, (1898) ILR 22 Bom 440; *Chetan Das v Gobind*, (1914) ILR 36 All 139 : 22 IC 659; *Muhammad Mushtaq v Banke Lal*, (1920) ILR 42 All 420 : 55 IC 991.
850. *Dixon v Clarke*, (1848) 5 CB 365; *Chunder Count v Jodoonath*, (1878) ILR 3 Cal 468.
851. *Haji Abdul v Haji Noor Mahomed*, (1892) ILR 16 Bom 141; *cf Narasingh v Achaibar Singh*, (1914) ILR 36 All 36 : 22 IC 539; *Digambar Das v Harendra Narayan*, (1910) 14 Cal WN 617 : 5 IC 165.
852. See *Subbai Goundan v Palani*, (1916) 30 Mad LJ 607 : 34 IC 825.
853 *Digambar Das v Harendra Narayan*, 5 IC 165.
854 *Behari Lal v Ram Ghulam*, (1902) ILR 24 All 461.
855. *Satyabadi v Harabati*, (1907) ILR 34 Cal 223; *Jagat Tarani v Naba Gopal*, (1907) ILR 34 Cal 305; *Velayuda Naicker v Hyder Hussan*, (1910) ILR 33 Mad 100 : 3 IC 729; for the English authorities on this point, see *Barratt v Gaugh-Thomas*, [1951] 2 All ER 48 : (1951) 2 TLR 106 : (1951) WN 309.
856. *Narain Das v Abinash Chandar*, (1922) 27 Cal WN 299 : 69 IC 27 : AIR 1922 PC 347.
857. *Govind v Dillar Jang*, (1899) 1 Bom LR 38; *Satyabadi Behara v Hirabatti*, (1907) ILR 34 Cal 223; *Rukhmanibai v Venkatesh*, (1907) ILR 31 Bom 527.
858. *Ram Baksh v Mohant Ram Lall*, (1874) 21 WR 428.
859. *Pearce v Morris*, (1869) 5 Ch App 227.
860. *Behari Lal v Ram Ghulam*, (1902) ILR 24 All 461.

personally, the mortgagor may make a deposit in court under section 83, but such deposit does not of course, put an end to the relationship of the mortgagor and mortgagee.[861]

In the case of an usufructuary mortgage when the debt has been satisfied out of the usufruct, there is no question of tender.[862] In a suit for redemption, it is not necessary to prove a previous tender.[863] The Allahabad High Court once held that it was necessary;[864] but the Madras High Court disagreed.[865]The later Allahabad cases follow the judgement of Madras High Court.[866] According to the Bombay view, the mortgagor is not required to tender the amount due under the mortgage before suing for redemption. If he makes such a tender, he gets certain benefits under sections 83 and 84. However, he is not legally bound to do so.[867]

(22) Mortgage Money

A mortgagee is entitled to treat interest due under the mortgage as a charge on the estate.[868] Mortgage money, therefore, includes both principal and interest.[869] This accords with the definition in section 58(a). Mortgage-money also includes costs properly incurred by the mortgagee.[870]

(23) Mortgagor's Right on Redemption

The mortgagor's right on redemption are: (1) delivery of the mortgage-deed and documents of title relating to the mortgaged property; (2) possession; and (3) reconveyance or acknowledgment.

(24) Delivery of the Mortgage Deed

The mortgagor has a right on redemption to the return of the mortgage-deed, and documents of title relating to the mortgaged property. The provision as to documents relating to the property which are in possession or power of the mortgagee have been inserted in conformity with O 34, rules 3 to 8, of the Code of Civil Procedure 1908 to show that the mortgagor is also entitled to the return of all title deeds handed over to the mortgagee at the time of the mortgage. If the mortgage-deed comprises of other property, the mortgagor is not entitled to the return of the deed, but the mortgagee must covenant to produce it when required.[871] If the deeds are lost, the mortgagor is entitled to an indemnity,[872] and may also be entitled to compensation.[873] If the mortgagor pays the loan and the same is accepted by the

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861. *Balasidhantam v Perumal*, (1914) 27 Mad LJ 475 : 27 IC 162; *Ahmadullah v Abdul Rahim*, (1923) 45 All 592 : 74 IC 763 : AIR 1924 All 26.
862. *Het Singh v Bihari Lal*, (1921) ILR 43 All 95 : 59 IC 92 : AIR 1921 All 358.
863. *Dinanath Rai v Rama Rai*, (1927) ILR 6 Pat 102 : 97 IC 348 : AIR 1926 Pat 512.
864. *Muhammad Ali v Baldeo*, (1916) ILR 38 All 148 : 34 IC 183.
865. *Batchanna v Varahalu*, (1901) ILR 24 Mad 408.
866. *Het Singh v Bihari*, (1921) ILR 43 All 95 : 59 IC 92 : AIR 1921 All 358; *Raghunandan v Raghunandan*, (1921) ILR 43 All 638 : 61 IC 812 : AIR 1921 All 353; *Saiyid Ahmad v Dharmun*, (1921) ILR 43 All 424 : 60 IC 760 : AIR 1921 All 71 — followed in *Dinanath Rai v Rama Rai*, AIR 1926 Pat 512; *Asarfi v Ram Swaroop*, AIR 1972 Pat 183.
867. *Abdur Rahim v Vithaldas*, AIR 1981 Bom 58.
868. *Ganga Ram v Natha Singh*, 51 IA 377 : 80 IC 820 : AIR 1924 PC 183; *Manghi v Dial Chand*, (1926) ILR 7 Lah 559 : 96 IC 477 : AIR 1926 Lah 624; *Abbas Khan v Ram Das*, (1928) ILR 9 Lah 140 : 112 IC 153 : AIR 1928 Lah 342.
869. *Hewanchal v Jawahir*, (1889) ILR 16 Cal 307 (PC).
870. *Nadershaw v Shirinbai*, (1923) 25 Bom LR 839 : 87 IC 129 : AIR 1924 Bom 264; *Varadarajulu v Dhanalakshmi*, (1914) 16 Mad LT 365 : 26 IC 184; *Rewti Nandan v Ram Swarup*, AIR 1984 All 297 (NOC). See Transfer of Property Article 1882, section 72.
871. *Yates v Plumbee*, (1854) 2 S & G 174.
872. *Midleton (Lord) v Eliot*, (1847) 15 Sim 531.
873. *Homby v Matcham*, (1848) 16 Sim 325.

mortgagee bank, the bank has the statutory obligation to return the documents relating to mortgaged property and an action of withholding securities would not be justified.[874] Where the mortgagor filed a suit for redemption of the mortgaged property as also for claiming its re-possession, he would be so entitled as it was a redemption of mortgage by conditional sale.[875]

(25) Restoration of Possession

If the mortgagee is in possession, he must on redemption restore possession to the mortgagor—not only to the lands originally mortgaged, but all the lands that have come into his possession as mortgagee.[876] He must restore the lands in the same condition as when they were mortgaged. A lease granted by the mortgagee comes to an end when the land is redeemed.[877]

The mortgagee cannot be heard to say that he does not know what has happened to the mortgaged property.[878] If the lands have been lost through the negligence of the mortgagee, he is liable to account for them to the mortgagor.[879]

The Supreme Court has held that section 4-A of the Kerala Land Reforms Act, 1963, which provides that certain mortgagees and lessees of mortgagees shall be deemed to be tenant, would not denude the right to repossession of the mortgagor under section 60, without assent of the President of India.[880]

A conjoint reading of section 60, section 76(h) and section 83 of the TP Act would amplify that on deposit of the mortgage amount in court, the contractual relationship of mortgagor and mortgagee ceases. The Supreme Court has held that the right to possession under section 60 of the TP Act, on redemption is kept unaffected by the Kerala Compensation of Tenants' Improvements Act 1958, which only hedges the right to eviction and gives the tenant a right to remain subject to the terms of his lease or mortgage till the payment for improvements are made or deposited, so that the mortgagee/tenant is not driven to a separate suit.[881]

(26) Reconveyance

The right of the mortgagor to a reconveyance is not limited to the case of an English mortgage—but (except in the case of an English mortgage) it is seldom insisted on in India. If the mortgage-money is paid and the mortgage redeemed, it is not necessary that the redemption should be proved by a registered instrument.[882] The mortgagor must pay for the cost of the reconveyance which has been described as a useful protection, being evidence of the removal of the cloud on title created by the mortgage.[883] As an alternative, the mortgagor may require a registered acknowledgment that the mortgage is not outstanding. Special

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874. *Snow View Properties Ltd v Punjab & Sind Bank,* AIR 2010 Cal 94.
875. *Chhabu Punja Gaikwad v Vishnu Nana Chavan,* AIR 2017 Bom 232 : 2017 (5) ABR 575 : 2018 (1) ALL MR 813.
876. *Dildar v Shukrullah,* (1924) ILR 46 All 152 : 78 IC 1023 : AIR 1924 All 444; *Venkateshiah v Venkata Krishniah,* (1957) ILR Mys 100 : AIR 1958 Mys 20.
877. *Ramchand v Raj Hans,* (1906) 3 All LJ 517; *Subrao v Munjapa,* (1892) ILR 16 Bom 705; *Samudra Vijyam v Srinivasa Alwar,* (1956) 1 Mad LJ 276 : AIR 1956 Mad 301. See further, notes under section 76.
878. *Ramchandra v Mukund,* (1901) 3 Bom LR 152.
879. *Anandrao Purshottam v Bhikaji,* (1922) ILR 46 Bom 218 : 64 IC 485 : AIR 1922 Bom 156.
880. *Parmeswaran Govindan v Krishnan Bhaskaran,* (1993) 1 SCC 572 (Supp). See *Narayana Pillai Rathavan Pillai v Narayani Amma Ponnamma,* (1992) 3 SCC 29 (Supp).
881. *Parmeswaran Govindan v Krishnan Bhaskaran,* (1993) 1 SCC 572, p 579 (Supp).
882. *Kunj Behari v Bisheshwar,* 148 IC 68 : AIR 1934 Oudh 98.
883. *Dina Nath v Lachmi Narain,* (1902) ILR 25 All 446.

provision is made in this section for the registration of this acknowledgment in the case of registered mortgages, for section 17(l)(b) of the Registration Act, 1908 would not apply, if the mortgage was for less than ₹ 100.

(27) By Act of Parties

The right of redemption may be extinguished by act of parties or by operation of law.' "Act of parties" refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction; otherwise it would be invalid as a clog on redemption. Such a transaction may be oral.[884] Where the mortgaged property is sold at a court auction, and the sale certificate and the possession of the property is delivered to the auction purchaser, no mortgage property remains to be redeemed and the right of the purchaser of equity of redemption cannot be enforced having come to an end.[885] In a mortgage by conditional sale, the right of redemption is not extinguished at the expiry of the period. This has been discussed in the note "Mortgages by conditional sale" under section 58.

The insertion of a clause in the mortgage-deed that in default of payment the mortgage should operate as a sale is, therefore, not an act of parties' extinguishing the right of redemption.[886] If the mortgage stipulates that in default of payment, the mortgagee shall have a right to foreclose, the equity of redemption is not determined, unless the mortgagee obtains a decree for foreclosure. Otherwise, mere mutation to the name of the mortgagee in the revenue registers is not sufficient to extinguish that equity of redemption.[887] Subsequent to the mortgage, the mortgagee may purchase the equity or redemption from the mortgagor, and this is an extinction by act of parties. Instances of such purchasers have already been cited.[888]

The equity of redemption is not, however, extinguished by a mere contract for sale.[889] So also, where a mortgagee having a power to sell the mortgaged property as provided in the mortgage-deed enters into a contract to sell the property in the purported exercise of that power, the mortgagor has still the right to redeem the property.[890] Where, however, the mortgagor gave a power of sale to the mortgagee under section 69 and the mortgagee exercised the power and the purchaser paid the money which had been distributed, that would certainly discharge the mortgagee.[891] In one case where a charge holder agreed to postpone his right over the property in favour of an equitable mortgage, it was held that such agreement did not extinguish his right to redeem the equitable mortgage.[892] In *Pandurang Maruti Dombale v Bapurao Piraji Owal*,[893] A mortgaged his property to *B*. *B* later filed a suit for foreclosure, i.e. a declaration that in case *A* was unable to pay the mortgage money, his right of redemption may be treated as forfeited. *A*, whilst opposing the suit, filed a counter-claim for redemption of mortgage, and deposited the mortgage money in Court. The Court came to the conclusion that the decree of foreclosure could only be passed if the mortgagor could not ask for redemption but since, in the instant case, *B* had filed a counter-claim

884. *Phula v Hiralal*, (1955) 53 All LJ 752.
885. *Allokam Peddabbayya v Allahabad Bank*, AIR 2017 SC 3069 3069: 2017 (7) SCALE 83 : 2017 (6) SCJ 686.
886. *Perayya v Venkata*, (1888) ILR 11 Mad 409; *Mannathan v Chinnu*, AIR 2012 Mad 210.
887. *Harihar Baksh v Lachman Singh*, AIR 1934 Oudh 246.
888. See note 'Subsequent sale valid', above.
889. *Sitla v Dhum Singh*, (1925) 28 OC 100 : 82 IC 406 : AIR 1925 Oudh 114; *Ellapa v Sivasubramanian* AIR 1937 Mad 293; *Kukaji v Kisri Lal*, AIR 1952 MB 6.
890. *Abraham Ezra vAbdul Latif*, AIR 1944 Bom 156.
891. *K Narayana Rao v Meenakshivelu*, (1973) 2 Mad LJ 467.
892. *Re Vauraj Vallabhdas*, AIR 1945 Bom 161.
893. *Pandurang Maruti Dombale v Bapurao Piraji Owal*, Second Appeal No.306 of 1994, decided on: 25 January 2017.High Court of Bombay.

claiming redemption and had also deposited the mortgage amount in the Court, it was necessary for the Court to pass a decree of redemption rather than for foreclosure.

A usufructuary mortgagee cannot, by a mere assertion of his own or by a unilateral act on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner. He can do so only if he purchases the entire equity of redemption from the mortgagor.[894]

(28) Mortgagee purchasing at a court sale

The effect of the mortgagee purchasing the equity of redemption at a court sale is complicated by the peculiar position of the mortgagee. The Calcutta High Court in an old case[895] described the mortgagee as a trustee. This, it is submitted, is incorrect, and it is clear that a mortgagee is not a trustee, for he has rights of his own which he can exercise adversely to the mortgagor. Nevertheless, the mortgagee is under many obligations which are similar to those of a trustee, and which are entirely discussed in the notes under sections 64, 76(a), 76(g) and 69 of TP Act. Indeed, section 90 of the Indian Trusts Act, 1882, itself provides that where a mortgagee availing himself of his position gains an advantage, he holds such advantage for the benefit of the mortgagor. This has been recognised by the Supreme Court in *Sidhkamal Nayan v Bira Nayak,*[896] and *MritunjoyPani v Naramanda Bala Sasmal.*[897] It follows that the mortgagee can never benefit by his own default. So, if the mortgagee in possession makes default in payment of assessment, or rent, and then himself purchases the property at a sale, he is still liable to be redeemed.[898] In *Parichhan Mistry v Achhiabar Mistry*[899] where the mortgagor failed to pay rent to the landlord in respect of the holding as required under the mortgage deed and the mortgagee had paid the decretal amount in a suit for sale instituted by the landlord, the Supreme Court held that if for some default in payment of rent, a decree is obtained and the mortgagee pays off the same, even then the mortgage in question in liable to be redeemed at the option of the mortgagor. By virtue of the purchase of the property by the mortgagee in court sale, no merger takes place between the two rights, nor the mortgage stands extinguished.

The courts have never allowed the mortgagee to escape from his obligations by bringing the equity of redemption to sale in execution of a decree on the personal covenant.[900] By virtue of purchase of the property by the defendant/mortgagee in court sale, there is no merger in the defendant/mortgagee of two rights, extinguishing the mortgage. What proviso to section 60 contemplates is act of parties or a decree either for foreclosure, or putting the mortgaged property to sale.[901] The evil consequences of such sales were described in the judgment of J Macpherson in *Kamini Debi v Ramlochan Sircar.*[902] Where the mortgagee had improperly sold the equity of redemption in execution of a money decree for the mortgage debt, J Macpherson said:

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894. *CPK Mudaliar v Palaniammal,* (1973) 2 Mad LJ 457.
895. *Jogendronath v Raj Narain,* (1868) 9 WR 488.
896. *Sidhkamal Nayan v Bira Nayak,* AIR 1954 SC 336.
897. *MritunjoyPani v Naramanda Bala Sasmal,* [1962] 1 SCR 290 : AIR 1961 SC 1353.
898. *Kalappa v Shivaya,* (1896) ILR 20 Bom 492; *Babaji v Magniram,* (1897) ILR 21 Bom 396; *Jaikaran Singh v Sheo Kumar Singh,* (1928) ILR 50 All 36 : 25 All LJ 658 : 103 IC 37 : AIR 1927 All 747; *Ramkishore v Jagarnath,* 151 IC 255 : AIR 1934 Pat 307; *Raman Pillai v Abraham,* AIR 1952 Tr & Coch 53; *Nabia Yathu Ummal v Abdul Kasian Muhammed Mytheen,* AIR 1964 Ker 225; Cf *Kumaramkari Dewaswom v U Chacko,* AIR 1961 Ker 124.
899. *Parichhan Mistry v Achhiabar Mistry,* (1996) 5 SCC 526 : AIR 1997 SC 456.
900. *Khiarajmal v Daim,* (1905) ILR 32 Cal 296 : 32 IA 23; *Kamini Debi v Ramlochan Sircar,* (1870) 5 Beng LR 450, p 458; *Bhuggobutty Dossee v Samachurn Bose,* (1876) ILR 1 Cal 337.
901. *Kishinlal v Hargovind* AIR 1987 MP 134.
902. *Kamini Debi v Ramlochan Sircar,* (1870) 5 Beng LR 450.

> Without saying that an equity of redemption can never be seized and sold, I have no doubt that a mortgagee cannot properly in execution of a simple decree for a sum of money, the repayment of which is secured by a mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged, and that a mortgagee who attaches and sells his mortgagor's equity of redemption, and purchases it (directly or indirectly) himself, is a trustee, for the mortgagor, and cannot acquire an irredeemable title against him.

The Judicial Committee in *Mahabir Pershad v Macnaghten,*[903] approved this passage, but explained that it referred to a case of a mortgagee decree-holder who has purchased without the leave of the court, and then added that leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. *Mahabir Pershad's* case was that of a mortgagee purchasing with leave of the court at a sale in executing of his own mortgage decree, and the Judicial Committee held that he had acquired an irredeemable title. In *Kamini Debi's* case[904] J Macpherson, further said:

> One view of the matter is that, when the mortgagee purchases, the mortgage debt is satisfied. But I think that the more correct view is that the mortgagee purchasing, is a trustee for the mortgagor who still has the right to redeem.

The first view seems to have been adopted by the Allahabad High Court which at one time held that the mortgagee's purchase of even a portion of the property had the effect of extinguishing the whole mortgage[905]—and, that too, irrespective of the question whether leave to bid had been obtained. However, these decisions were soon overruled.[906] The second is the correct view, but it should be limited to cases where the mortgagee is the decree-holder, and buys without leave of the court.

The law, therefore, is:

(1) If the mortgagee, after obtaining leave to bid, purchases at a sale in execution of his decree, he gets an irredeemable title, and the equity of redemption is extinguished.[907]

(2) If the mortgagee purchases without leave to bid at a sale in execution of his decree on the mortgage, he holds as trustee for the mortgagor, and the equity of redemption is not extinguished.[908]

(3) If the mortgagee purchases at a sale in contravention of section 99 of the TP Act, or of O 34, rule 14 of the Code of Civil Procedure he holds as trustee, and the equity of redemption is not extinguished.[909]

(4) If the mortgagee purchases at a sale in execution of a decree, whether mortgage decree or money decree, obtained by a third person, he get an irredeemable title and the equity of redemption is extinguished.[910]

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903. *Mahabir Pershad v Macnaghten,* (1889) ILR 16 Cal 682, p 692 : 16 IA 107, p 114.
904. *Kamini Debi's* case, (1870) 5 Beng LR 450, pp 459-460.
905. *Ahmad Wali v Bakar Husain,* (1883) All WN 61; *Ballam Das v Amar Raj,* (1890) ILR 12 All 537.
906. *Nand Kishore v Raja Hariraj,* (1898) ILR 20 All 23.
907. *Mahabir Pershad v Macnaghten,* (1889) ILR 16 Cal 682 : 16 IA 107; *Sankaran Lekshmi v AKA Kunju,* AIR 1965 Ker 132.
908. *Kamini Debi v Ramlochan Sircar,* (1870) 5 Beng LR 450.
909. *Khiarajmal v Daim,* (1900) ILR 32 Cal 296 : 32 IA 23; *Ashutosh Sikdar v Behari Lal,* (1908) ILR 35 Cal 61, p 79; *Uttam Chandra v Rajkrishna,* (1920) ILR 47 Cal 377, p 407 : 55 IC 157. See also notes on order 34, rule 14, in *Mulla's Civil Procedure Code.*
910. *Bisheshur Dial v Ram Sarup,* (1900) ILR 22 All 284; *Sesha Ayyar v Krishna,* (1901) ILR 24 Mad 96; *Ikkotha v Chakiamma,* (1904) ILR 27 Mad 428; *Ponnambala Pillai v Annamalai,* (1921) ILR 43 Mad 372 : 38 Mad LJ 239 : 55 IC 666 : AIR 1921 Mad 475, overruling *Sami Rowappa v Kuppusami Iyengar,* (1911) 2 Mad WN 342 : 12 IC 130; *Siddeshwar v Ganpatrao,* (1926) ILR 50 Bom 331 : 96 IC 361 : AIR 1926 Bom 303; *Mohan Chandra v Dinai Keot,* AIR 1963 Assam 176.

In cases (2) & (3), the mortgagor must take objection in execution proceedings before the sale is confirmed, otherwise the equity of redemption is extinguished on confirmation of the sale.[911] So in a Madras case,[912] where the mortgagee had purchased the mortgaged property in execution of a money decree for an installment of the mortgage debt, a member of the undivided family of the mortgagor born after the decree, but before the attachment and sale and not added as a party, was entitled to redeem his own share as not being bound by the sale, but was not allowed to redeem the share of the members of the joint family who were parties to the decree, and order for sale.

In a suit for redemption, unless it is a conditional sale or anomalous mortgage, so long as the sale is not confirmed, the debtor has a right to deposit the entire sale money including the sale expenses and poundage fee, and the court is under the statutory duty to accept the payment and direct redemption of the mortgage. The limited right given to the corporation under section 29 of the State Financial Corporation Act, 1951, to act as an owner to bring the properties of the defaulter to sale does not have the effect of wiping out the statutory right of redemption under section 60 of the TP Act.[913] In a Kerala case, the auction sale of the property was found to be void and since there was no foreclosure of the mortgage, it was held that the mortgagee had the right of redemption on deposit of an amount to which the financial corporation was entitled upto date in terms of section 60.[914]

(29) By Operation of Law

The section does not refer to the extinction of the equity of redemption by operation of law. This may occur by merger when the mortgagee acquires the equity of redemption by inheritance.[915] One co-mortgagor may by adverse possession acquire the equity of redemption of another co-mortgagor;[916] but the possession of a mortgagee can never be adverse to the mortgagor during the continuance of the mortgage. This could only occur if the mortgagee's possession were indicative of such an acquiescence on the part of the mortgagor as to amount to a release of the equity of redemption.[917] A forfeiture and sale under the Bombay Land Revenue Code for non-payment of assessment has the effect of extinguishing the equity of redemption.[918] However, where a mortgagee himself is liable to pay the land revenue, but allows it to remain in default and then purchases the property in sale for satisfaction of the land revenue, the mortgagee cannot be allowed to take advantage of his own wrong; and so the mortgage would still subsist.[919] A suit for redemption is not maintainable by a mortgagor who was not personally cultivating the suit lands on 4 December 1952 when *jagirs* were abolished under the Madhya Bharat Abolition of Jagirs Act, whereby the said mortgagors lost all their rights and interests in the respective lands.[920]

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911. *Dharanikota v Budharazu*, (1907) ILR 30 Mad 362; *Lal Bahadur v Abharan Singh*, (1915) ILR 37 All 165 : 27 IC 795; dissenting from *Sardar Singh v Ratan Lal*, (1914) ILR 36 All 516 : 24 IC 612; *Pandit Sheo Narain v Ram Jatan*, (1917) 2 Pat LJ 587 : 41 IC 533, disapproving *Pancham Lal v Kishun Pershad*, (1910) 14 Cal WN 579 : 6 IC 47; *Raja Jagadish Chandra v Bhubaneswar*, (1923) 27 Cal WN 38 : 76 IC 241 : AIR 1923 Cal 121; Cf *Muhammad Abdul v Dilsukh Rai*, (1905) ILR 27 All 517.
912. *Muthuraman Chetty v Ettappasami*, (1899) ILR 22 Mad 372.
913. *New Kenilworth Hotels (P) Ltd v Ashoka Industries Ltd*, (1995) I SCC 161.
914. *Achamma Cyriac v Kerala Financial Corporation*, AIR 1997 Ker 75.
915. *Hamida Bibi v Ahmad Husain*, (1909) ILR 31 All 335 : 1 IC 779.
916. *Khiarajmal v Daim*, (1905) ILR 32 Cal 296 : 32 IA 23.
917. Ibid.
918. *Abdul Rehman v Vinayak*, (1927) 29 Bom LR 1056 : 104 IC 653 : AIR 1927 Bom 540.
919. *Munnabi v Mohanlal*, (1952) ILR Nag 366 : AIR 1953 Nag 259, foll *Dev Nandan Prasad v Janki Singh*, (1917) ILR 44 Cal 573 : 44 IA 30; *Abdul Ghafoor v Pahana*, AIR 1957 Pat 136.
920. *Balkrishan v Mohsin Bhai*, AIR 1999 MP 86.

The decree referred to in the proviso to section 60 is a final decree in a suit for foreclosure, as provided in sub-rule (2) of O 34, rule 3 and a final decree in a redemption suit as provided in O 34, rule 8(3)(a) of the Code of Civil Procedure. In a final decree in a suit for foreclosure, on failure of the defendant to pay all amounts due, the extinguishment of the right of redemption has to be specifically declared. Again, in a final decree in a suit for redemption of mortgage by conditional sale or for redemption of anomalous mortgage, the extinguishment of the right of redemption has to be specially declared, as provided in clause (a) of sub-rule (3) of O 34, rule 8 of the Code of Civil Procedure. In a suit for redemption of a mortgage other than a mortgage by a conditional sale or an anomalous mortgage, the mortgagor has a right of redemption even after the sale has taken place pursuant to the final decree, but before the confirmation of such sale. In view of these provisions, the question of merger of mortgage debt in the decretal debt does not at all arise.[921]

In foreclosure suits, the final decree extinguishes the equity of redemption. Until the final decree for foreclosure is made, the mortgagor can redeem even after the time fixed in the preliminary decree.[922] The court's jurisdiction to grant relief on equitable grounds does not by reason of the proviso to section 60 read with section 68 of the TP Act and O 34, rules 2 & 3 of the Code of Civil Procedure extend to the granting of a relief in proceedings taken in execution of a final decree for foreclosure. Accordingly, the court has no jurisdiction to re-open a final decree for foreclosure to extend the time for redemption,[923] but not where the right of redemption was not extinguished by passing a specific order.[924] However, in a case where the mortgagee under an arrangement with the mortgagor took possession before the order absolute for foreclosure, and the mortgagor raised no objection for many years, he was held to have lost his right of redemption by acquiescence.[925] The decisions of the Privy Council in *Het Ram v Shadi Lal*[926] and *Matru Mal v Durga Kunwar*[927] were based on the law as enacted in these sections. This seemed to imply that the right of redemption continued even after order absolute for sale, and the Calcutta High Court was constrained to construe section 89 as referring to the extinction of the right of redemption on the actual sale, and distribution of the sale proceeds.[928] This was doing violence to the section; but the section was bad law, for a decree for sale is but a judgment on the debt, and though the debt merges in the judgment, the collateral security of the mortgage does not merge.[929] The provision for the extinction of the right of redemption was, therefore, omitted in rules 5 and 8 of O 34. The Privy Council in *Sukhi v Ghulam Safdar*[930] said that the effect of this omission was that the law remained the same as it was before the passing of the TP Act. And before the TP Act a decree for sale did not have the effect of extinguishing the right of redemption.[931] The

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921. *Mhadagonda Ramgonda Patil v Shripal Balwant Rainda*, (1988) 3 SCC 298; *Maganlal v Jaiswal Industries*, (1989) 4 SCC 344, pp 353, 361.
922. *Poreshnath v Ramjodu*, (1889) ILR 16 Cal 246; *Somesh v Ram Krishna*, (1900) ILR 27 Cal 705; *Salig Ram v Muradan*, (1903) ILR 25 All 231; *Malikarjunadu v Lingamurti*, (1902) ILR 25 Mad 244, p 289; *Nandram v Babaji*, (1898) ILR 22 Bom 771; *Ishwar v Gopal*, (1904) ILR 28 Bom 102; *Murugesa v Ramasami*, (1916) ILR 39 Mad 882 : 31 IC 200; *Pardas Singh v Dwarka Singh*, (1910) 7 All LJ 953 : 7 IC 50; *Mohant Lal v Ram Charan*, (1931) 29 All LJ 265 : 130 IC 196 : AIR 1931 All 223; *Somnath v Sanno* AIR 1959 Ori 122.
923. *Sardar Autar Singh v Raja Sir Mohammad Ejaz*, 77 IA 53.
924. *Rehman v Bhoorji*, AIR 2010 P&H 151.
925. *Vasantrao v Nanabhai*, (1926) 28 Bom LR 347 : 94 IC 96 : AIR 1926 Bom 273; on app *Keshavrao v Nanabhai*, (1929) 31 Bom LR 696 : 114 IC 574 : AIR 1929 PC 61.
926. *Het Ram v Shadi Lal*, 45 IA 130 : 45 IC 798 : AIR 1918 PC 34.
927. *Matru Mal v Durga Kunwar*, 47 IA 71 : 55 IC 969 : 18 All LJ 396 : 22 Bom LR 553 : 38 Mad LJ 419.
928. *Bibi Jan v Sachi*, (1904) ILR 31 Cal 863.
929. *Drake v Mitchell*, (1803) 3 East 251.
930. *Sukhi v Ghulam Safdar*, 48 IA 465 : 65 IC 151 : AIR 1922 PC 11.
931. *Badruddin v Sitaram*, (1930) 32 Bom LR 933 : 126 IC 882 : AIR 1930 Bom 401.

Allahabad High Court held that the effect of the repeal of section 89 was that the right of redemption was not extinguished by the decree for sale, but by the sale.[932] The legislature has, however, made the law quite clear, for rules 5 and 8 as amended by Act 21 of 1929, expressly states that the mortgagor's right of redemption subsists till the confirmation of the sale held in execution of the decree for sale on a mortgage or, in a suit for redemption, until the final decree.[933] A Bench of the Calcutta High Court seemed to accept this;[934] but another Bench took the opposite view on the ground that the amending Act 21 of 1929 was not retrospective.[935] After the section of the TP Act was transferred to the Code of Civil Procedure 1908, the High Court of Calcutta has held that a mortgagor can have a sale set aside under O 21, rule 89.[936]

If the mortgagor obtains a decree for redemption and the decree does not provide that in default of payment of the mortgagor, he shall be debarred of all right to redeem, the right to redeem is not extinguished, and the mortgagor can file another suit for redemption. This has now been settled by the Privy Council in *Bhaiya Raghunath Singh v Hansraj Kunwar.*[937] In that case, the decree was that in default of payment, the suit for redemption should be dismissed. Their Lordships said:

> The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in the manner enacted for that purpose, and strictly complied with. In the present case, the only basis for the claim that the right to redeem has been extinguished is section 60; but in their Lordships' view the old decree cannot properly be construed as doing that which it does not purport to do, viz as extinguishing the right to redeem.

The Privy Council in the above case pointed out that in the first suit the issue was whether the plaintiff was then entitled to redeem, and in the second suit, the issue is whether he is now entitled to redeem. It is correctly pointed out by the Bombay High Court, following the above decision of the Privy Council, that in each case it would be a question of fact whether the earlier decree involves a decision that the mortgagor's right to redeem was extinguished. In that case, it was held that the decree provided that if there was any default in the payment of installments, the right to redeem would be extinguished.[938]It is perhaps unnecessary to add that if the first suit is pending, the second suit will not lie.[939] But so long as the equity of redemption is not extinguished, successive suits for redemption will lie.[940] If the mortgagor fails to pay the loan amount by the stipulated time and the property is sold at the court auction, the right of the mortgagor to redeem the property is extinguished even though the certificate issued by the court is not registered.[941]

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932. *Shah Mehdi Hasan v Syed Ismail*, (1920) ILR 42 All 517 : 56 IC 172. See *Faiyaz Hussain Khan v Prag Narain*, 34 IA 102.
933. *Joti Lal v Sheodhyan*, (1936) ILR 15 Pat 607 : 163 IC 908 : AIR 1936 Pat 420.
934. *Kalipada Mukerji v Basanta Kumar*, (1931) ILR 59 Cal 117 : 35 Cal WN 877 : 138 IC 177 : AIR 1932 Cal 126.
935. *Asia Khatun v Nur Jahan Khatun*, (1932) ILR 59 Cal 1464 : 36 Cal WN 955 : 142 IC 125 : AIR 1933 Cal 39.
936. *Virjiban Dass v Biseswar Lal*, (1921) ILR 48 Cal 69 : 60 IC 406 : AIR 1921 Cal 169.
937. *Bhaiya Raghunath Singh v Hansraj Kunwar*, 61 IA 362 : 1934 All LJ 900 : 39 Cal WN 9 : 60 Cal LJ 337 : 36 Bom LR 1189 : 151 IC 37 : AIR 1934 PC 205; *Kizhekke Kizhukkott Kunhothi v Payikkat Mammad Koya*, (1949) ILR Mad 276; *Govinda v Narain*, (1956) ILR Hyd 339 : AIR 1956 Hyd 107; *Hirabai v Ganesh Dattatraya*, (1958) ILR Bom 765 : 60 Bom LR 477 : AIR 1959 Bom 172.
938. *Maruti v Manohar*, AIR 1945 Bom 307 following *Kushaba v Budhaji*, (1922) ILR 46 Bom 348 : AIR 1922 Bom 127.
939. *Abdul Karim v Durga Prasad* 101 IC 324 : AIR 1927 All 305.
940. *Chunna Lal v GG in Council*, AIR 1950 All 89.
941. *R Chidambara Manickam v Shakeena*, AIR 2008 Mad 108 : 2008 Writ LR 108 : 2008 Writ LR 108.

The mortgagors filed a suit for redemption of mortgage. A preliminary decree for redemption was passed. The mortgagors failed to make payment within the specified period under the preliminary decree. On an application made by the mortgagee, a final decree for sale was passed in the suit, but the mortgagee did not get it executed and allowed the same to be time-barred. The mortgagee, and, after him, his heirs and legal representatives, however, continued to be in possession of the mortgaged property. Subsequently, the successors-in-interest of the original mortgagors filed a second suit for redemption of the mortgages. It was held that the plea that, as a final decree was passed in the earlier redemption suit, there was a merger of the mortgage-debt in the decretal-debt and, as such, the second suit for redemption was barred, would not be sustainable.[942]

The principle that in a suit for redemption of a mortgage other than a mortgage by conditional sale or an anomalous mortgage, the mortgagor has a right of redemption even after the sale has taken place pursuant to the final decree but before the confirmation of such a sale and that in such a case, the question of merger of mortgage debt in the decretal debt does not arise, is held by the Supreme Court to apply to a sale which has taken place pursuant to an order under section 32 of the State Financial Corporation Act, in so far as the provisions of the Code of Civil Procedure in O 34, rule 5, which in substance permit the judgment debtor to redeem the mortgage even during the proceedings in execution of a final decree for sale, unless the equity of redemption has got extinguished, are concerned.[943] When in execution of a mortgage decree, the mortgaged property is sold and the purchaser sues for possession of the property mortgaged, a minor son of the mortgagor who is discharged from the suit is not entitled to redeem the mortgage, unless the mortgage decree, and the sale are set aside.[944]

The withdrawal of the redemption suit does not extinguish the equity of redemption so as to bar a fresh suit.[945] In *Thota China Subba Rao v Mattapalli Raju,*[946] the Federal Court reversed a Madras judgment to the contrary,[947] and pointed out, approving a line of Bombay decisions,[948] that the right of redemption being a statutory right could only be extinguished as provided in section 60. If it is alleged to be extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose. If the right is not so extinguished, provisions such as O 9, rule 9 or O 23, rule 1 of the Code of Civil Procedure will not debar the mortgagor from bringing a second suit for redemption as the cause of action is a different one under a subsisting mortgage. Successive suits for redemption of mortgage can be filed till the right of redemption is not extinguished. This is because the right of redemption is an incident of subsisting mortgage and inseparable from it, so that the right is co-extinguished with the mortgage itself.[949] In a case where the first redemption suit was dismissed as the result of a compromise without regard to the fact that the plaintiff was a minor, a fresh suit was maintainable.[950] So also when the first redemption suit was dismissed for default;[951] when the mortgagee's decree for sale in the

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942. *Mhadagonda Ramgonda Patil v Shripal Balwant Rainade,* AIR 1988 SC 1200.
943. *Maganlal v Jaiswal Industries,* AIR 1989 SC 2113, pp 2122, 2123.
944. *Gangaram v Baburao,* (1949) ILR Nag 526.
945. *Ramchandra v Hanmanta,* (1920) ILR 44 Bom 939 : 58 IC 45.
946. *Thota China Subba Rao v Mattapalli Raju,* (1949) FCR 484 : AIR 1950 FC 1.
947. *Mattapalli Raju v Challa Venkaba,* AIR 1945 Mad 225.
948. *Ramchandra v Hanmanta,* 58 IC 45; *Shridhar v Ganu,* (1928) ILR 52 Bom 111 : 108 IC 22 : AIR 1928 Bom 67; *Rajaram Vithal v Ramchandra,* (1948) ILR Bom 189 : 50 Bom LR 45 : AIR 1948 Bom 226.
949. *Vora Aminbai Ibrahim v Vora Taherali Mohamed Ali,* AIR 1998 Guj 31.
950. *Basangouda v Rudrappa,* (1926) 28 Bom LR 1507 : 99 IC 814 : AIR 1927 Bom 87; *Thota China Subba Rao v Mattapalli Raju,* AIR 1950 FC 1.
951. *Shridhar v Ganu,* AIR 1928 Bom 67; *Kashiram v Maheshwar,* (1928) 30 Bom LR 1089 : 113 IC 384 : AIR 1979 Bom 116.

first suit was not executed;[952] or the mortgagor's decree for redemption could not be executed as it was time-barred;[953] and also when the first redemption suit abated by reason of the death of the mortgagor-plaintiff.[954] However, if the decree extinguishes the mortgage, a second suit is barred by *res judicata;* and it is immaterial that the decree was erroneous.[955] However, as the abatement of a suit does not amount to a decree extinguishing the right of redemption if a suit for redemption abates, the second suit for redemption is not barred. The provisions of O 22, rule 9 of the Code of Civil Procedure do not override the provisions of this section. So long as the relationship of mortgagor and mortgagee continues, and so long as the right to redeem has not been extinguished by the act of the parties, the mortgagor is entitled to go to a court of law to enforce his right of redemption.[956]

Redemption of mortgaged property after the auction sale was made absolute is not permissible. Once the title and ownership is found lost to mortgager on account of court sale of the subject property, right of redemption cannot be pressed into service.[957] Even if the mortgagor filed an application for redemption of the property, stating that he wanted to deposit the amount fetched in auction sale of property kept as collateral security with bank after the sale was confirmed and made absolute by issuance of the sale certificate and he received a better offer and not shockingly low price for his property, the right of the mortgagor to redeem the property is lost once the sale is absolute and sale certificate is issued.[958]

(30) Suit for Redemption

A suit for redemption is a suit to enforce the right to redeem. Such a suit may be filed not only by the mortgagor, but by any person mentioned in section 91. He must show that this was a subsisting mortgage.[959] The preliminary decree in the suit for redemption of mortgage should be drawn up in accordance with O 34, rule 7 of the Code of Civil Procedure. There should be a direction, first for an account being taken of the decree for principal and interest on the mortgage and, thereafter, a declaration ought to be made of the amount, if any, to be paid to the defendant. A decree shall thereafter be passed for payment by the party as liable to pay the same on account being taken in. If the defendant is held liable, then the decree may be passed against her for refund of the excess amount said to have been recovered illegally by her from the plaintiffs.[960] The forms of decree enforcing redemption are enacted in O 34, rules 7 and 8 of the Code of Civil Procedure 1908. All persons interested in the right of redemption or in the security must be joined as parties. The suit can only be instituted after the right has accrued, i.e., after the principal money has become due. It is not necessary to tender the mortgage money before filing the suit.

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952. *Badruddin v Sitaram,* (1930) 32 Bom LR 933 : 126 IC 882 : AIR 1930 Bom 401; *Rama v Bhagchand,* (1915) ILR 39 Bom 41 : 27 IC 249.
953. *Narayana Shenoi v Yasodabai,* (1954) Tr & Coch 675 : AIR 1955 Tr & Coch 9.
954. *Rajaram Vithal v Ramchandra,* AIR 1948 Bom 226.
955. *Edumban Chettiar v Ramalakshmi Pichamma,* AIR 1965 Ker 153.
956. *Rajaram Vithal v Ramchandra,* AIR 1948 Bom 226; *Kizhekke Kizhukott Kunhothi v Payikkat Mammad Koya,* (1949) ILR Mad 276 : (1948) 2 Mad LJ 293 : AIR 1949 Mad 443.
957. *Embassy Hotels Pvt Ltd v Gajaraj & Co* 2014 SCC OnLine SC 924.
958 *Bishnu Devi Shaw v The Federal Bank,* AIR 2014 Cal 90 : LNIND 2014 CAL 149 : (2014) 2 WBLR (Cal) 932 : 2014 (2) CHN (CAL) 269..
959 *Bhailal Ganpatram v Keshavji,* AIR 1952 Kutch 1; *Larho Deviv Chiranji Lal,*AIR 1984 Patna 45 (NOC)—heir of the mortgagor is necessary party in a suit for redemption filed by other heirs.
960. *Bharosilal v Shiladevi,* AIR 1989 MP 122.

The mortgagee is entitled to hold against everyone who has not a paramount title.[961] The plaintiff must, therefore, prove his title to redeem.[962] In *Sevvaji Raghunadha v Chinna Nayana*,[963] the Judicial Committee said:

A plaintiff who alleges that his ancestor, 44 years ago, made a mortgage to the ancestor possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title, and not by reason by the weakness of his opponent's.Prima facie evidence will, however, shift the burden of proofs. In *Raja Kishen Dutt v Narendar*,[964] where the mortgage deed was lost and the plaintiff claimed to redeem, the Privy Council said:

> It appears to their Lordships that in such a case as the present, it lies upon the plaintiff to substantiate his case by some evidence, by some *prima facie* evidence at least. But in this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence; and although the *prima facie burden of proof* in this case in their Lordships' view is upon the plaintiff, still they think the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be, *prima facie* at all events, more in his power to give accurate evidence of its contents than in that of the plaintiff.

In an old Bombay case,[965] it was said that it was not the practice in India for a counterpart of the deed to be taken by the mortgagor and, therefore, very slight proof that a mortgage had originally been made would serve to shift the entire burden of proof on the defendants. But the prima facie evidence must be forthcoming.[966] If the plaintiff fails to prove the specific mortgage on which he sues, he may succeed on defendant's admission in the suit that he is holding the land under a mortgage;[967] or if the defendant produces another deed of mortgage.[968] However, the defendant's admission made in another proceeding is not sufficient.[969] An agreement for sale in favour of a mortgagee is no defence to such a suit;[970] nor can the mortgagee resist redemption by denying the mortgagor's title to the property.[971] Where the mortgaged property came to the share of one co-sharer during partition, and he mortgaged the same and fixed the period of redemption but the mortgager died without redeeming his mortgage within the prescribed time it was held that the heirs of the mortgager are entitled to redeem the mortgaged property after expiry of the period fixed. It was immaterial if the mortgagee has accepted the debt from a stranger, and delivered possession thereafter.[972] Where the decree in a redemption suit became final and during the execution proceedings the erstwhile mortgagor deposited the mortgage amount, and consequently, the executing court ordered delivery of property on such payment to the decree holder, the erstwhile mortgagees in possession were not entitled to get the benefit of section 4-A of the Kerala Land Reform Act, 1964 and become "deemed tenant" of the mortgaged property

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961. *Pearce v Morris*, (1869) 5 Ch App 227.
962. *Gursaram v Shib Singh*, (1943) All LJ 548 : AIR 1943 All 393.
963. *Sevvaji Raghunadha v Chinna Nayana*, (1864) 10 Mad IA 151, p 160.
964. *Raja Kishen Dutt v Narendar*, 3 IA 85, p 88; *Chandanbai v Jagjiwanlal*, AIR 1958 Raj 110.
965. *Balaji Narji v Babu Devli*, (1868) 5 Bom HC 159.
966. Ibid; *Parmananad Misser v Sahib Ali*, (1889) ILR 11 All 438; *Ramchandra v Mukund*, (1901) 3 Bom LR 152; *Prem Singh v Mahamad Khurshid*, 103 IC 215 : AIR 1927 Lah 574.
967. *Lakshman v Hari Dinkar*, (1880) ILR 4 Bom 584: *Unnian v Rama*, (1885) ILR 8 Mad 415; *Chimmaji v Sakharam*, (1893) ILR 17 Bom 365; *Bala v Shiva*, (1903) ILR 27 Bom 271; *Kadakam Vallei v Mokkath*, (1907) ILR 30 Mad 388; *Kailash Rai v Jaga Kuer*, (1931) ILR 10 Pat 417 : 133 IC 678 : AIR 1931 Pat 295.
968. *Kunhi Kutti v Kutti Maraccar*, (1870) 4 Mad HC 359.
969. *Govindrav Deshmukh v Ragho*, (1884) ILR 8 Bom 543; *Krishna Pillai v Rangasami*, (1895) ILR 18 Mad 462.
970. *Hasan Ali v Ganga Nath*, (1955) ILR 7 Assam 489 : AIR 1956 Assam 17.
971. *CK Shetty v Abdul Khadar*, (1955) ILR Mys 562 : AIR 1956 Mys 14.
972. *Odappayee Ammal v Ramanathan*, AIR 1997 Mad 74.

because once the amount is deposited by the mortgagor decree-holder even during the execution proceedings, the relationship between the parties as mortgagor and the mortgagee ceases and thereafter, till the actual delivery of possession, the erstwhile mortgagee in possession remains merely as judgement-debtor in illegal possession.[973]

The proceedings in a preliminary decree does not get terminated by dismissal of the first application for passing of final decree or for non-prosecution. Till date of passing the final decree and its execution, or till remedy is barred by limitation under Article 137 of the schedule to the limitation Act, 1963, the court has power and jurisdiction to entertain the application to pass the final decree. At any time before the remedy is barred, it is open to the plaintiff to deposit the redemption money under the preliminary decree. The dismissal of the earlier application or non-prosecution, therefore, does not per se bar the right of the plaintiff. But if remedy to enforce preliminary decree for the redemption is barred by the limitation, thereafter the right remains unenforceable. The deposit therefore, is *non est* and the court cannot proceed to pass final decree as the remedy is lost.[974]

The provisions of sections 60 and 71 clearly provide that once a mortgage always a mortgage and once the mortgagee has been admitted, the responsibility of mortgagees is to convey the property mortgaged after accepting the mortgage money, and the equity of redemption cannot be lost. Section 60 of the TP Act confers a statutory right of redemption. It is an inviolable right of the mortgagor, on redemption to get back the subject of mortgage.[975]

(31) Right to Redeem Acquired by Adverse Possession

In *Purshottam v Sagaji,*[976] a right to redeem was acquired by adverse possession by a mortgagor who had no title when the deed was executed.

ILLUSTRATION

In 1873, the widow of the deceased owner granted a mortgage to *G,* the husband of her daughter *R.* On the widow's death the plaintiffs claimed the property as reversionary heirs and disputed the mortgage. The dispute was settled by *G* accepting a mortgage from the plaintiffs for a reduced amount, on 22 June 1882. The plaintiffs had then no title, for *R* was the true heir and had acquiesced in ignorance of her rights. *R* on discovering that she was the heir, sold the property and her vendee paid off the mortgage of 1873. The plaintiffs then sued to redeem the mortgage of 1882. It was held that the plaintiffs had a right to redeem. As between the plaintiffs and *G,* the mortgage of 1873 had been treated as having come to an end. *G* held the property as mortgagee of the plaintiffs, and though *G*'s possession was not in its inception by virtue of a right derived from the plaintiffs, yet, as from 22 June 1882, it was under colour of a right derived from the plaintiffs and so, adverse to *R,* and that to her knowledge.[977]

(32) Limitation

Limitation for a suit for redemption is, under Article 61(a) of the Act of 1963, 30 years from the time when the right to redeem accrues.[978] Within that period, the mortgagor is entitled to redeem if the mortgage has not been foreclosed.[979] The period of 30 years is to be computed from the date when the mortgagor is entitled to redeem.[980] It has been held that after the expiry of the said period, not only the remedy to file a suit for redemption of the

973. *MP Ahmed v Kuthiravattam Estate Receiver,* AIR 1997 SC 208.
974. *K Parameswaran Pillai v K Sumathi alias Jesis Jessie Jacquiline,* (1993) 4 SCC 431 : AIR 1994 SC 191; followed in *Ramvilas G Heda v Achaldas D Oswal,* AIR 2002 Bom 133.
975. *Haquik Mian v Rajendra Prasad,* AIR 1997 Pat 59.
976. *Purshottam v Sagaji,* (1904) ILR 28 Bom 87.
977. *Purshottam v Sagaji,* (1904) ILR 28 Bom 87.
978. Under the Act of 1908, the period was 60 years.
979. *Pal Singh v Bhola Singh,* 149 IC 969 : AIR 1934 Lah 242.
980. *Bageshari Tewari v Nandoo Singh,* AIR 1937 All 32.

mortgage is barred, but the right in the property in dispute is also extinguished in view of section 27 of the Limitation Act, 1963[981] Thus, where the mortgage was for a fixed period of two years, a suit filed after thirty two years and five months was held as barred by limitation,[982] but where the mortgage-deed was executed on 8 March 1947, and the suit was filed in the year 1976, only 29 years period had been completed and hence, the suit was held to be within limitation.[983] In a 99-years mortgage, the starting point for the period of limitation would commence from the expiry of period of 99 years, and not from the date of mortgage itself.[984] A suit for redemption filed 30 years from the date the cause of action arose would be barred by limitation.[985] Where the land was mortgaged with the mortgagee in 1952, the limitation for redemption for a period of thirty years would expire in 1982 and thereupon the right of mortgagee to file for foreclosure would start and the right of the mortgagee to file for possession of property would start after three years, i.e., in 1985, which would expire in accordance with the law of limitation in 1994, and thus a suit filed in 1995 for possession of the property would be barred by limitation.[986] Where ancestral property that was mortgaged was redeemed in its entirety by one of the co-owners, the other co-owner cannot be denied redemption of their respective share as against the first co-owner on the ground, that the suit was barred by law of limitation as against the original mortgagee, as once the mortgage is redeemed, it no longer bears the character of the mortgaged property and no law of limitation can be applied on that basis. As a co-owner he is entitled to get the property partitioned and the law of limitation would apply only from the date the cause of action arose in his favour by denial by one co-owner of his right in the property.[987]

Section 30 of the Limitation Act, 1963 provides that where the period of limitation is shorter than the one prescribed by the Limitation Act, 1908, the same may be instituted within a period of seven years next after the commencement of the Act, which came into force on 5 October 1963.[988] Thus, where, a suit was filed for redemption after four[989] or five[990] years, of the commencement of the 1963 Act, it would be within the period of limitation. Under the limitation Act, 1908, the period of limitation for redemption of mortgage was 60 years that was reduced to 30 years by the present Act of 1963. The 1963 Act, however provided that any suit for which limitation period is shorter than the one prescribed under the 1908 Act, may be instituted within 7 years of the commencement of the 1963 Act or within the period prescribed for such suits by the Act of 1908, whichever is earlier. Thus a mortgage executed in 1880; assigned in 1924, that was duly acknowledged by the mortgagee as well, could be redeemed till 1969.[991] Similarly, if the mortgagor could have redeemed the property by 1961, the limitation period would run from 1961 to another period of 12 years and a suit of redemption filed during this period would not be barred by limitation.[992] Similarly, in another Punjab & Haryana case,[993] it was

981. *Banarasi Dass v Jiwan Rani,* AIR 1991 P & H 85, p 86.
982. *Manjit Kaur v Kaushalya Devi,* AIR 2011 P&H 75.
983. *Vora Ibrahim Dosaji v Vora Ibrahim Noorbhai Makati,* AIR 1999 Guj 101 : (2001) GLR 359; *Lila Chand v Malappa Tukaram,* AIR 1960 SC 85 : [1960] 1 SCR 693.
984. *Sangar Gagu Dhula v Shah Laxmiben Tejshi,* AIR 2001 Guj 329 : (2001) 1 GLR 697.
985. *Mohan Lal v Mohan Lal,* AIR 2013 Raj 187 : LNIND 2013 RAJ 90 : 2013 (4) Raj LW 3309 : 2013 (4) RLW 3309.
986. *Palo Ram v Guari,* AIR 2013 HP 1 : LNIND 2012 HP 51 : JCNO HP 2012 0421.
987. *Becharji Bapuji Thakor v Arjanji Saluji Thakor,* AIR 2013 Guj 37 : LNIND 2012 GUJ 115 : 2013 (4) Civ LJ 390 : 2013 (3) Cur CC 474.
988. *Basanti Lal v Gokul Das,* AIR 2012 Raj 2.
989. *Basanti Lal v Gokul Das,* AIR 2012 Raj 2.
990. *Mehnga Singh v Gurdial Singh,* AIR 2004 P&H 93, pp 105,106.
991. *Shankarlal Nathumal Chandak v Balkrishna Jagannath Gujarathi,* AIR 2010 Bom 4 : (2010) 3 Bom CR 746.
992. *Laxman v Board of Revenue,* AIR 2008 Raj 109.
993. *Santa Singh v Parkash Singh,* AIR 2004 P&H 261, p 264.

held that such limitation period as provided in the Limitation Act, 1963 would extend by 7 years by virtue of section 39; meaning thereby, since a period of 30 years has been prescribed for limitation, a further 7 years would be added, thus, making limitation period for redemption of mortgage as 37 years.

A minor mortgagor's suit to redeem will not be barred under section 7 of the Limitation Act, because a co-mortgagor could have redeemed during his minority.[994] As the mortgage security is indivisible, limitation for a suit for redemption will not be saved by an acknowledgment made by one of the heirs of the mortgagee.[995] But in a case from Bombay,[996] the heirs of the mortgagee had effected a partition, and the suit for redemption was filed after the period of limitation had expired. One of the heirs had acknowledged the existence of the mortgage, and that acknowledgment was held to save limitation as to his share, though redemption of that share was allowed on payment of the whole amount due on the mortgage.

Once the mortgagor institutes a suit for redemption and exercises his right to redeem the mortgage, for which alone the period fixed under Article 61(a) of the Limitation Act fixing the outer limit to sue for redemption, it cannot be contended that his right of redemption has to be tested at different stages till the passing of the final decree in the suit. Where a preliminary decree is passed in favour of the mortgagor of a usufructuary mortgage, which is in effect a declaration or recognition of his right to redeem the property on deposit of the mortgage price already fixed, or to be fixed, time for such deposit has been fixed by the court would no way impair his right in making the deposit after the time limit fixed and move an application for passing a final decree.[997] The High Court of Kerala in *Kuttan Narayanan v Benny Sasi,*[998] also held that at any time before the remedy is barred, usufructuary mortgagor has the right to deposit the redemption money under the preliminary decree. Even if a previous application had been moved after deposit and it was dismissed for non prosecution that would not per se bar his right to move a fresh application for passing a final decree within three years from the date from which the deposit was made. In a usufructuary mortgage, the usufructuary mortgagor holds a right to liquidate money "any time" vis-a-vis the mortgagee and the limitation period commences as and when the liquidation occurs. Thus mere expiry of thirty years from the date of creation of the mortgage would not extinguish the limitation period. A mortgagee thus cannot seek ownership of the property by mere efflux of time.[999]

(33) Notice

The mortgagee may stipulate for notice before redemption after due date. This is in order to enable him to find another investment. In India, the mortgagee is entitled to three month's notice especially in presidency-towns. The omission to give notice would not be a bar to a suit for redemption, but probably, the mortgagee would be entitled to six months' interest in lieu of notice.[1000]

(34) Redemption Suit by *Benamidar*

The Judicial Committee have held that an action can be maintained by a *benamidar* in respect of property, although the beneficial owner is in no way a party to it.[1001] A *benamidar*

994. *Bai Keval v Madhu Kala,* (1922) ILR 46 Bom 535 : 64 IC 972 : AIR 1922 Bom 319.
995. *Bhogilal v Amritlal,* (1892) ILR 17 Bom 173.
996. *Motilal Jadav v Samal Bechar,* (1930) ILR 54 Bom 625 : 128 IC 417 : AIR 1930 Bom 466.
997. *Kuttan Narayanan v Benny Sasi* ILR, 2013 (2) Ker 642 : 2013 (2) KLJ 139 : 2013 (2) KLT 51.
998. *Kuttan Narayanan v Benny Sasi,* ILR 2013 (2) Ker 642 : 2013 (2) KLJ 139 :2013 (2) KLT 51.
999. *Ravinder Kumar v Ram Devi,* AIR 2017 (NOC) 1055 (HP).
1000. *Nadershaw v Shirinbai,* (1923) 25 Bom LR 839, p 848 : 87 IC 129 : AIR 1924 Bom 264.
1001. *Gur Narayan v Sheo Lal Singh,* 46 IA 1 : 49 IC 1.

may sue to redeem a mortgage granted by him as *benamidar* of the real owner, and so may the heirs of the *benamidar* mortgagor, or their assigns.[1002] However, the real owner is also, of course, entitled to sue.[1003] These judgements will not hold good, after promulgation of the Benami Transaction (Prohibition) Act, 1988.

(35) Redemption Suit by Purchaser of Property

A right of redemption does not remain independent of the property itself. A sale of property, that too to a stranger, who had nothing to do with the mortgage and who was not a party to the same would convey a complete title of the property to him, and once the title to that property goes, the equity of redemption shall also accompany the property. In short, the purchaser would then be in a position to substitute himself in place of the plaintiff, and to step in the latter's shoes.[1004] However, in *Panchanansharma v Basudeo Prasad Jaganani*[1005] the purchaser bought the property in a sale initiated due to default of a usufructuary mortgagee to pay land revenue as required under section 76(c). On the question whether the usufructuary mortgagor still had the right to redeem, the Supreme Court held that at best, the auction- purchaser, on redemption, would look to the mortgagee who had committed default in terms of the mortgage and the possession of the purchaser be on behalf of the mortgagee and becomes liable to accounting, rather than the mortgagor losing his title due to the misfeasance committed by the mortgagee, and the property being sold on account thereof to the third parties.

(36) Partial Redemption

The last proviso of this section recognises the principle of the indivisibility of the mortgage security. A part-owner or purchaser of part of the equity of redemption is entitled to redeem the whole mortgage,[1006] but is not entitled to redeem his share only.[1007] Thus a person interested in a share only of the mortgaged property is not entitled to redeem his own share only, on payment of a proportionate amount due on the mortgage but it is not so when a co-mortgagor sells his interest in the mortgaged property in favour of the mortgagee himself.[1008] The reason for this rule is that the disintegration of the mortgage security would result in great injustice to the mortgagee. The Judicial Committee in *Nilakant v Suresh Chunder*[1009] said:

> It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created.

A co-mortgagor cannot be permitted to redeem his own share of the mortgaged property only on payment of proportionate part of the amount remaining due on the mortgage, as this

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1002. *Mahomed Sheriff v Sayyad Kasim,* 145 IC 230 : AIR 1933 Mad 635.
1003. *Harish Chandra v Bansidhar,* [1966] 1 SCR 153 : AIR 1965 SC 1738 : [1966] 1 SCJ 145 : [1965] 2 SCA 766.
1004. *Gnanam v Palaniappa & Co,* AIR 2001 Mad 14, para 10.
1005. *Panchanansharma v Basudeo Prasad Jaganani,* (1995) 2 SCC 574 (Supp).
1006. *Shankar v Bhikaji,* (1929) ILR 53 Bom 353 : 116 IC 225 : AIR 1929 Bom 139; *Rugad Singh v Sat Narain,* (1905) ILR 27 All 178; *Fakir Chand v Babu Lal,* (1917) ILR 39 All 719 : 44 IC 77 : 42 IC 879; *Baikantha Nath v Mohesh Chandra,* (1917) 22 Cal WN 128 : 44 IC 77; *Protap Chandra v Peary Mohan,* (1918) 22 Cal WN 800 : 48 IC 669; *Sri Kanta Prasad v Jag Sah,* (1924) ILR 3 Pat 818 : 84 IC 293 : AIR 1925 Pat 57.
1007. *Mirza Yadalli Beg v Tukaram,* (1921) ILR 48 Cal 22 : 47 IA 207 : 57 IC 535 : AIR 1921 PC 125; *Kuppusami Chetti v Papathi Ammal,* (1897) ILR 21 Mad 369: *Aughore Kumar Gangooli v Mahomed Mussa,* 2 IC 662; *Bama v Rukiyal Bivi,* AIR 2004 Mad 243.
1008. *Baljit Singh v Ramphal,* (2011) 2 RCR (Civil) 86 : (2011) 100 AIC 812.
1009. *Nilakant v Suresh Chunder,* (1886) ILR 12 Cal 414 : 12 IA 171, p 181.

would break the integrity of the mortgage.[1010] Where, out of a number of mortgagees, only one of them acquires by purchase a part (one half) of the mortgaged property, the mortgage will remain undivided and, if redeemed at all, can be redeemed in its entirety. There is no merger.[1011] There may be a special condition in the mortgage-deed recognizing the mortgagors' shares as subject to a separate redemption,[1012] or there may be partial redemption as a matter of subsequent bargain, or arrangement between all the parties interested.[1013] When there are two mortgagors only one among them is not entitled to seek partial redemption to the extent of his mortgaged property. By act of co-mortgagor, integrity of the mortgage is broken and as such one of the mortgagors would be entitled to seek redemption to the extent of the share belonging to him. In these circumstances the co-mortgagor would be entitled to seek redemption of his half share in the suit property by paying the mortgage amount in proportion with his share. If the mortgagee acquires half share from the co-mortgagor by way of sale , the integrity of the mortgage being broken, the other co-mortgagor would be entitled to seek partial redemption of his respective share.[1014] Otherwise neither the mortgagor, nor the mortgagee can get relief except in consonance with the principle of indivisibility—for the character of indivisibility exists both with reference to the mortgagor, and to the mortgagee.[1015] Therefore, the mortgagor of a share is entitled to redeem the whole mortgage, although the mortgagee is prepared to allow redemption of the share only.[1016] A lessee of a share of the property mortgaged can redeem the whole property.[1017] However, when the indivisibility of a mortgage is broken by purchase, inheritance or otherwise, a partial redemption can be allowed.[1018]

An adjustment between a prior mortgagee and a subsequent mortgagee cannot be recognised as it would be a partial redemption.[1019] The section has application so long as the mortgage continues without being modified or split up by agreement between parties. By the amendment introduced in the proviso, it is no doubt true that the other modes of splitting up of the integrity of a mortgage were practically intended to be registered, and the only way by which the integrity would be broken is in the manner laid down in the last clause of section 60. But that is only when there is no modification of the mortgage by consent of the parties.[1020]

The vesting of portion of the mortgaged property with the government and the subsequent assignment of mortgaged right in favour of the government, are not sufficient to formulate the exception provided in the last paragraph of section 60 of the TP Act.[1021]

1010. *Chhanganlal Keshavlal Mehta v Patel Narandas Maribhai,* AIR 1982 SC 121.
1011. *Naurang Singh v Jangir Singh,* AIR 1985 P&H 268. The judgment agrees inter alia with *Jagnath Kumar v Jagdish,* AIR 1983 All 257.
1012. *Ram Kristo v Ameeroonissa,* (1867) 7 WR 314; see Law of Property Act 1925,section 119, replacingsection 28, Conveyancing the Law of Property Act 1881; *Parukutti Amma v C Balameenakshi Amma,* (1955) ILR Mad 274 : AIR 1954 Mad 818; *Tarapada Mondal v Hajia Khatum,* (1956) 60 Cal WN 903 : AIR 1956 Cal 625; *Thommi v Devasai,* AIR 1963 Ker 75.
1013. *Hathasanan v Parameswaran,* (1899) ILR 22 Mad 209.
1014. *Gangadhar Manji Choudhari v Tukaram Kisan Naikwadi,* AIR 2010 (NOC) 832 (Bom); 2010 (3) AIR Bom R 222.
1015. *Hathasanan v Parameswaran,* (1899) ILR 22 Mad 209.
1016. *Fakirchand v Babu,* (1917) ILR 39 All 719 : 42 IC 789.
1017. *Ananda Pandurang v Uttamrao,* 144 IC 521 : AIR 1933 Nag 44.
1018. *Maulabux v Sardarmal,* (1952) ILR Nag 211 : AIR 1952 Nag 341; *Ananthayya v Thimmaju Kengsu,* (1956) ILR Mad 914 : (1956) 1 Mad LJ 213 : AIR 1956 Mad 293; *Kunhi Kalanthan v P Madhvi Amma,* AIR 1955 Mad 260; *Ananthayya Holla v Thimmaju Kengsu,* (1956) ILR Mad 914 : (1956) 1 Mad LJ 213 : AIR 1956 Mad 293; *Bank of Poona v NC Housing Soc,* (1967) 69 Bom LR 504 : AIR 1968 Bom 106.
1019. *Suryanarayanrao v Daulatrao,* (1949) ILR Nag 60.
1020. *Purukutha Amma v Balameenakshi Amma,* AIR 1954 Mad 818.
1021. [1999] 4 LRI 1024; *State of Kerala v Koliyat Estates,* (1999) 8 SCC 419, para 27.

(37) After the Amendment

It is submitted that by the amendment of the section by the insertion of the word "only," the first two exceptions are abolished, and the third alone remains. The effect of the amendment is detailed as below:

(i) Where the mortgagee allows redemption of a share

Under the amended section, the fact that the mortgagee has allowed a share in the equity of redemption to redeem his share will not justify partial redemption as to the rest.[1022] So also, the integrity of a mortgage is not broken, if one of the mortgagees acquires the interest of the mortgagor.[1023] The mortgage of that share will be extinguished by the redemption, but as to the residue, there will be an indivisible mortgage. This was the view of the Allahabad High Court even before the amendment, and cases to that effect have already been cited.[1024]

(ii) Release of a share by the mortgagee

Under the amended section, the fact that the mortgagee releases part of the property mortgaged does not justify partial redemption as to the rest.[1025] Thus, when three properties *X*, *Y* and *Z* were mortgaged and the mortgagee released *X* from the mortgage, *Y* and *Z* were liable for the whole amount of the mortgage, and subsequent transferees of *Y* and *Z* could not claim that they were liable only for a share of the mortgage debt.[1026] In some cases before the amendment, the purchaser got relief by being allowed partial redemption, which was in effect making the mortgagee contribute. This was wrong, for the obligation of contribution under section 82 is not personal, but attaches to the property. The purchaser gets relief not against the mortgagee, but against the share of the property released by the mortgagee. This he must get after he has redeemed the whole mortgage. This view of the law was taken even before the amendment by the Allahabad High Court in *Jugal Kishore Sahu v Kedar Nath,*[1027] and by the Madras High Court in *Perumal v Raman Chettiar.*[1028]

(iii) Acquisition by the mortgagee of a share in the property

The law on this case has not been altered. If the mortgagee acquires a share in the property, the integrity of the mortgage is broken, and a sharer in the rest of the property is entitled to redeem his own share. The onus lies on the mortgagee to prove that no part of the mortgage debt was extinguished.[1029] However, it is open to a co-mortgagor to redeem the entire mortgage despite the mortgagee.[1030] If the integrity of the mortgage is broken by the mortgagee purchasing a share and there are several mortgagors, each mortgagor is entitled to

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1022. *Narain Singh v Teja Singh,* (1954) 56 Punj LR 498 : AIR 1955 Punj 96; *Banarasi Dass v Jiwan Ram,* AIR 1991 P & H 85, p 87; *Ambe Lal v Phina,* AIR 1974 HP 11.
1023. *Shiv Harakh Rai v Akbar Ali,* AIR 1948 All 55.
1024. *Lachmi Narain v Muhammad,* (1895) ILR 17 All, 63; *Ali Jan v Majid-ud-din,* (1923) ILR 45 All 524 : 81 IC 275 : AIR 1923 All 499; *Mussamat Beti v Tantya Singh,* 89 IC 574 : AIR 1926 All 136; *Baldeo Baksh v Jawahir Singh,* (1899) 2 OC 344.
1025. *Jugat Singh v Behari Lal,* AIR 1942 All 104.
1026. *Rama v Manak,* (1905) 7 Bom LR 191; *Balkishan v Bundia,* (1931) 29 All LJ 1093 : 136 IC 567 : AIR 1932 All 246; *Ram Chand v Parbu Dayal* 69 IA 98 : (1942) ILR All 608 : (1942) All LJ 463 : 45 Bom LR 1 : 47 Cal WN 1 : (1942) 2 Mad LJ 390 : 202 IC 265 : AIR 1942 PC 50.
1027. *Jugal Kishore Sahu v Kedar Nath,* (1912) ILR 34 All 606 : 16 IC 400; *Sheo Prasad v Behari Lal,* (1903) ILR 25 All 79; *Sheo Tahal v Sheodan Rai,* (1906) ILR 28 All 174; *Sanwal v Ganeshi Lal,* (1913) ILR 35 All 441 : 20 IC 41 (suit against one co-mortgagor time barred); *Ali Jan v Majid-ud-din,* (1923) ILR 45 All 524 : 81 IC 275 : AIR 1923 All 499; *Lachmi Narain v Muhammad,* (1895) ILR 17 All 63.
1028. *Perumal v Raman Chettiar,* (1917) ILR 40 Mad 968 : 42 IC 352; cf *Sant Lal v Nanku Lal,* 75 IC 96 : AIR 1924 Pat 174; *Delansingh v Dabarilal,* (1949) ILR Nag 396.
1029. *Himmat Sahai v Md Moin,* (1941) ILR All 220 : (1941) All LJ 234 : 195 IC 533 : AIR 1941 All 200.
1030. *Palla Singh v Attar Singh,* (1953) ILR Punj 271 : AIR 1954 Punj 81.

redeem his own share, and there is no equity in favour of redeeming more than his share.[1031] Cases on this point are still good law, and it does not matter whether the acquisition was by purchase, inheritance or otherwise. The share of the mortgagor means the interest of the mortgagor after the creation of the mortgage.[1032] The third para of section 60 does not apply to a maintenance decree which creates a charge.[1033] Where the mortgagee had already disintegrated the mortgage by agreeing to redemption of three-fourths of the land, the rule against partial redemption cannot apply. In fact, in the circumstances, the redemption cannot be called "partial".[1034]

ILLUSTRATIONS TO (iii) ABOVE

(1) *A* mortgages property to his wife *B* in satisfaction of a debt for dower. After the deaths of *A* and *B*, their daughter *C* sues to enforce the mortgage. *C* as one of the heirs of *A* is entitled to one-eleventh share of *A*'s estate. The integrity of the mortgage is broken, and the other heirs are entitled to redeem ten-elevenths of the property mortgaged for their share of the debt.[1035]

(2) *A* mortgages property to *B*. *A* then sells one-third of the property to *C*, one-third to *D*, and one-third to the mortgagee *B*. The integrity of the mortgage is broken, and *C* may redeem his one-third share for one-third of the debt.

(3) Where it was agreed between a usufructuary mortgagee and a co-mortgagor that a co-mortgagor should have liberty to redeem his two-fifths share of the property on payment of the amount for which he was proportionately liable, which amount was also determined by apportionment between the co-mortgagors and a preliminary decree was passed in terms of the arrangement in the presence of the other co-mortgagor, it was held that the mortgage security was split up, and the co-mortgagor in whose favour the preliminary decree was passed was not entitled to redeem the entire mortgage after the passing of the preliminary decree.[1036]

The above submission made in earlier editions of this work that by the amendment of the section by insertion of the word "only" after word "except", the first two exceptions are abolished and the third alone remains, is fully supported by a decision of the Privy Council,[1037] where it was held that the right of redemption of mortgaged property in India is, in the absence of a wider right being given by agreement express or implied, conferred and defined by the TP Act, and a mortgagor must redeem on the terms of the Act. The last clause of section 60 of the TP Act, apart from the exception which it recognises, was intended to preclude mortgagors or persons deriving title from them from claiming, independently of the agreement, to have an equity to redeem their own share on payment of a proportionate part of the mortgage money. Under section 60 of the TP Act the integrity of a mortgage is not broken except where the mortgagee has purchased or otherwise acquired as proprietor a certain portion of the property mortgaged. This categorical statement of the law sets at rest the divergent views previously expressed by courts in India. Where one co- mortgagor, by paying off the entire mortgage debt, gets a right to contribution against the other co-mortgagor, a co-related right also accrues to the non-redeeming co-mortgagor to redeem his share of the property, and to get possession on payment of his share of the liability to the

1031. *Durga Prasad v Chunni,* AIR 1940 All 528; *Purnachandra v Gobinda,* (1948) ILR 27 Pat 572.
1032. *Krishna Iyer v Susal Reddiar,* (1940) 2 Mad LJ 1003 : 51 Mad LW 239 : (1940) Mad WN 200 : 190 IC 858 : AIR 1940 Mad 498; and see *Ananthayya Holla v Thimmaju Hengsu,* (1956) ILR Mad 914 : (1956) 1 Mad LJ 213 : AIR 1956 Mad 293.
1033. *Debendra Nath v Trinayani,* AIR 1945 AP 273.
1034. *Jagir Singh v Atma Singh,* AIR 1979 P&H 70.
1035. *Zafar Ahsan v Zubaida Khatun,* (1929) 27 All LJ 1114 : 121 IC 398 : AIR 1929 All 604; *Maung Lal v Sagar Mal,* (1936) ILR 15 Pat 481 : 166 IC 29 : AIR 1936 Pat 629.
1036. *Parukutii Amma v C Balaminakshi Amma,* (1955) ILR Mad 274 : AIR 1954 Mad 818.
1037. *Shah Ram Chand v Prabhu Dayal,* AIR 1942 PC 50, p 54; 47 Cal WN 1; *Cf Nilakanta v Suresh Chandra,* (1885) ILR 12 Cal 414 (PC).

redeeming co-mortgagor.[1038] The undernoted Allahabad case is one where the mortgagee purchased a part.[1039]

(38) Redemption of Portion of Mortgaged Property

The last paragraph of section 60 prohibits partial redemption subject to one exception. The said paragraph can be divided into two segments. The first part contains a negation to the holder of part of equity of redemption to redeem that part alone on payment of the proportionate debt. The second limb of the paragraph provides the solitary exception to the aforesaid negativing edict. The words in that second limb "except only where" are a pointer that the said exception would strictly be confined to the one situation envisaged therein. In order to invoke the solitary exception to the disentitling fiat of the last paragraph of section 60, there must be a conjunction of two postulates. One is that the share of the mortgagor in the property would have been "acquired". The second is that the person who so acquired should have been the mortgagee. The principle behind the exception to the prohibition clause is, if the mortgagee is satisfied of a part of the mortgage debt by becoming the owner of a part of the mortgaged property, it is only equitable to allow the mortgagor to get pro tanto reduction of the mortgage debt, otherwise it would be in just to allow the entire mortgage debt again to be borne by the remaining mortgaged property. By becoming the owner of the a part of the mortgaged property, it is not necessary that the mortgage money would have been discharged even proportionately. It depends upon how the mortgagee got a share in the mortgaged property.[1040]

In an early decision of a Division Bench of the Calcutta High Court in *Jasodha Kumar Dey v Kali Kumar Dey,*[1041] a mortgagor sold one of the items of the mortgaged properties to the plaintiff mortgagee, and in consideration thereof purchased another property of the plaintiff for the same price. In the suit for recovery of mortgage debt from the remaining properties, the mortgagor contended that he is entitled to a proportionate reduction of the mortgage debt. The Division Bench repelled the contention in the following terms:

> The mortgagor by his conduct impliedly agreed by receiving the full value of the property that no portion of the mortgage debt would be extinguished by virtue of the purchase by the mortgagee. That being so the mortgagor is not entitled to claim in this suit that a portion of the mortgage debt should be held to be pro tanto extinguished by the purchase of one of the properties by the mortgagee.

Learned Judges of the Calcutta High Court in the above case relied on a Full Bench decision of the Bombay High Court in *Lakhmidas Ramdas v Jamnadas Shankarlal.*[1042] In that case, the mortgagee had purchased one of the properties in an auction-sale in execution of a decree. The Full Bench held that:

> If the mortgagee purchased the equity of redemption he must allow proportionate reduction of the value of the property purchased by him; but where the circumstances under which the purchase was made show that it was purchased free from all encumbrances, the plaintiff can enforce his entire security against the remaining property.

A Division Bench of the Madras High Court in *Eswara Krishna Iyer v Mariya Susai Reddiar*[1043] held:

1038. *Valliama Champaka Piliai v Sivathanu Pillai,* (1979) 4 SCC 429.
1039. *Himmat Sahai v Md Moin,* AIR 1941 All 200.
1040. *State of Kerala v Koliyat Estates,* (1999) 8 SCC 419, paras 15, 16, 22.
1041. *Jasodha Kumar Dey v Kali Kumar Dey,* AIR 1930 Cal 619.
1042. *Lakhmidas Ramdas v Jamnadas Shankarlal,* (1897–98) ILR 22 Bom 304.
1043. *Eswara Krishna Iyer v Mariya Susai Reddiar,* AIR 1940 Mad 498 : (1940) 2 Mad LJ 1003.

The principle underlying the last clause of section 60 applies only in cases where the mortgagee in the character of a mortgagee acquires the equity of redemption outstanding in the mortgagor.

The Supreme Court in the case of *State of Kerala v Koliyat Estates*[1044] has approved the above views taken by the High Courts of Calcutta, Bombay and Madras on the interpretation of the last paragraph of section 60.

The High Court of Kerala had considered the above decisions of the Supreme Court and other High Courts in *Leelamma v TG Raveendran Nair,*[1045] and held that *pro tanto* extinguishment of the mortgage right would arise only if it satisfies the last paragraph of section 60 which applies only in cases where the mortgagee in the character of a mortgagee acquires the equity of redemption outstanding with the mortgagor.

(39) Lis Pendens

If the mortgagee purchases a share of the equity of redemption after a redemption suit is filed, he is subject to the doctrine of *lis pendens*, and is liable to be redeemed as to the whole.[1046] Though, under the last para of section 60, the co-mortgagor cannot redeem the entire hypotheca, and has to redeem only the mortgagor's share, the principle does not apply, if the purchase of a share by the mortgagee is after the filing of the suit for redemption by the co- mortgagor. In that case, the co-mortgagor can sue for the redemption and possession of the entire hypotheca and the mortgagee cannot cling on to the possession of the property by purchasing, after the suit, a share of the hypotheca, howsoever small, from the non-redeeming co-mortgagors. In that event, he is subject to section 52, TP Act and has to first surrender possession of the entire *hypotheca-qua-mortgagee,* and then sue for partition and possession.[1047]

(40) Purchase by One of Several Mortgagees

A co-mortgagor cannot claim to redeem his share because of the purchase of another share by one of several mortgagees,[1048] for there is no merger unless the rights are co-extensive, and it would be a hardship, on the other mortgagees that one of them should have the power to alter the indivisible character of the security. In order that the integrity of the mortgage may be broken, it is necessary that the mortgagee should have purchased a share in the mortgaged property.[1049]

(41) Gift by Mortgagee to Two or More Persons

The mere fact that the mortgagee has divided his interest by gift or assignment to several persons will not justify partial redemption of each share.[1050] Where, however, such an assignee subsequently purchases the equity of redemption, the integrity of the mortgage is broken *qua* that portion, and partial redemption was allowed.[1051] In *Sunitabala Debi v Dhara Sundari,*[1052] where there was a mortgage to several mortgagees as tenants in common, their Lordships of

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1044. *State of Kerala v Koliyat Estates,* (1999) 8 SCC 419.
1045. *Leelamma v T G Raveendran Nair,* 2014 (1) KLJ 442 : 2013 (4) KHC 783.
1046. *Naro Hari v Vithalbhat,* (1886) 10 Bom 648, p 655.
1047. *Ammthappa v Abdul Rasool,* AIR 1988 AP 215.
1048. *Mahtab Rai v Sant Lal,* (1883) ILR 5 All 276; *Velayudan Chetty v Alangaram,* (1912) 23 Mad LJ 475 : 15 IC 605; *Subba Rao v Sarvarayudu,* (1924) ILR 47 Mad 7, p 19 : 72 IC 292 : AIR 1923 Mad 533; *Jagmohan v Harbans Singh* 85 IC 621 : AIR 1925 Oudh 609.
1049. *Bashir Uddin v Waheed Udin,* AIR 1939 All 600.
1050. *Purshottam v Isub Mohamad,* (1927) 29 Bom LR 1052 : 104 IC 648 : AIR 1927 Bom 513.
1051. *Varghese Cherian v Ousef Korathu,* AIR 1962 Ker 36.
1052. *Sunitabala Debi v Dhara Sundari,* (1920) ILR 47 Cal 175, p 179 : 46 IA 272 : 53 IC 131 : AIR 1919 PC 24.

the Privy Council said that no redemption could be effected of part of the property by paying to one of the mortgagees his separate debt.

(42) Adjustment of a Part of the Debt with some of the Mortgagors under Relief of Indebtedness Act

Where a mortgagee accepts a settlement with some of the persons interested in the mortgaged property and agrees to recover from them a proportionate part of the debt payable by them out of the property owned by them, and has submitted to the scheme of payment enforced on him by the operation of the provision of the Relief of Indebtedness Act, the court will not allow him to recover the entire debt again from the other mortgagors. Section 60 is inapplicable to such a case.[1053]

(43) Suit for Partial Redemption

A suit for partial redemption will now only lie when the mortgagee has acquired a share in the equity of redemption. When that occurs, the mortgage is *pro tanto* extinguished. The ordinary right of any sharer in the rest of the property is to redeem the whole of the rest of the balance of the debt. This is the general rule laid down by the Privy Council in *Narendra Narain v Dwarka Lal Mundur*,[1054] and enacted in section 91 of the TP Act. Thus, supposing four fields of equal value are mortgaged for ₹ 400 and the mortgagor then sells one to *A*, one to *B*, one to *C* and one to the mortgagee, the mortgage of the field sold to the mortgagee is extinguished, and there remains a mortgage of the three fields of *A*, *B* and *C* for ₹ 300. *A*, *B* or *C* is entitled to redeem the three fields for ₹ 300 and to allow the other two, who are necessary parties to the suit, to take their fields on their contributing ₹ 100 each. But the right of partial redemption would give either *A*, *B* or *C* a right to sue for the redemption of his own field for ₹ 100.[1055] But if *A* sues to redeem his field, he must make *B* and *C* parties, for they must be bound by the account which will have to be taken as to the respective values of the shares.

A suit for partial redemption is, therefore, a combination of a suit for redemption and a suit for contribution, the right of partial redemption being a privilege given to avoid multiplicity of suits.[1056] Thus, if *A* mortgages property to *B*, and then *A* sells one-sixteenth to *C*, one-half to *D*, three-sixteenth to *E* and one-fourth to the mortgagee *B*; the mortgage of one-fourth is extinguished, and there remains a mortgage of three-fourth consisting of one-sixteenth of *C* plus one-half of *D* plus three-sixteenth of *E*. Then if *C* sues to redeem three-fourth, this is generally called a suit for partial redemption because it seeks to redeem a part of the original mortgage. However, strictly speaking, this is not partial redemption, for the only mortgage subsisting after *B*'s purchase is a mortgage of three-fourth. *C* by seeking to redeem this mortgage is exercising his right as co- mortgagor to redeem the whole mortgage existing at the time of his redemption. But if *C* sues only to redeem his own share of one-sixteenth, he is exercising his right of partial redemption of "his own share only" to quote the words of the section. In this suit, *D* and *E* would be made parties and their rights safeguarded. On acquiring a share of the property by the mortgagee, the normal right of a sharer in the residue is to redeem it—and his right under the exception, in his section is to redeem his own share in that residue.

1053. *Bapurao v Bulakidas*, AIR 1944 Nag 225.
1054. *Narendra Narain v Dwarka Lal Mundur*, (1877) ILR 3 Cal 397 : 5 IA 18; *Madhavan Nairv Ramankutty Menon*, AIR 1994 Ker 75.
1055. *Phula Singh v Harnaman*, (1941) 43 Pat LR 705 : 197 IC 626 : AIR 1941 Lah 421.
1056. *Subba Rao v Sarvarayudu*, (1924) ILR 47 Mad 7, p 19 : 72 IC 292 : AIR 1923 Mad 533.

Unfortunately, this proposition has been obscured in what is generally considered to be the leading case on the subject of partial partition. This is the case of *Nawab Azimut Ali v Jowahir Singh.*[1057] In that case, an estate consisting of 16 villages had been mortgaged to the predecessors in title of the *Nawab*. The villages were then sold in execution of a money decree against the mortgagors. One village Husseinpur was purchased by the plaintiff, one village by *A*, one by *B*, a quarter of another village by *C*, and twelve ¾ villages by the mortgagee. The plaintiff sued to redeem his village of Husseinpur on payment of a ratable proportion of the debt, but did not make *A*, *B* and *C* parties to the suit. The mortgagee objected that they should have been made parties, and that plaintiff should have offered to redeem their villages also. The *sadar* court gave effect to the mortgagee's contention and dismissed the suit. The plaintiff then filed a fresh suit claiming to redeem all the three 1/4 villages excepting those purchased by the mortgagee. The mortgagee objected that the plaintiff was only entitled to redeem his own village. The *sadar* court made a decree for redemption in terms of the plaint. On appeal, however, the Judicial Committee varied the decree and allowed the plaintiff to redeem only his own village of Husseinpur on payment of a ratable proportion of the debt. The following passage gives the *ratio decidendi*:

> The courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the Sadar Court. It merely ruled that the plaintiffs were bound to offer to redeem the villages in question, it did not rule that they were entitled to do so, or to acquire the interest of the mortgagee in them against his will. It is unnecessary to determine in this suit, whether in the peculiar circumstances of this case the former proposition is correct. Their Lordships are of opinion, that the latter cannot be supported. They think that the appellant, if desirous of retaining possession of those villages as mortgagee, is entitled to do so against the plaintiffs, whose right in that case is limited to the redemption and recovery of their village of Husseinpur, upon payment of so much of the sum deposited in court as represents the portion of the mortgage debt chargeable on that village.

The right of partial redemption was, therefore, given effect to and in an earlier passage in the judgment, their Lordships said:

> The appellant does not, as their Lordships understand, contest the proposition that plaintiffs, as purchaser of the equity of redemption in a portion of the mortgaged premises, are entitled to redeem that portion on payment of some proportion of the mortgage debt.

It is clear that the Privy Council did not approve of the *sadar* court's finding that plaintiff should have offered to redeem the villages of *A*, *B* and *C* as well as his own. Ghose[1058] seems to think that the plaintiff was bound to offer to redeem these, as the mortgagee's purchase had not destroyed the indivisible character of the mortgage as to the residue. But this view seems inconsistent with the decree allowing redemption of one village only. All that was necessary was that *A*, *B* and *C* should have been parties to the suit in which the account of the respective values of the villages would have to be taken. But the Privy Council do apparently hold that a sharer in the residue left after a mortgagee's purchase of part of the property cannot redeem the whole of that residue without the consent of the mortgagee. It is impossible to justify this limitation of the ordinary right of the mortgagor of a share to redeem the whole. The mortgagee's only interest is to get his money and so long as he is paid, it cannot matter to him which mortgagor pays him. Chief Justice Sargent was evidently dissatisfied with the case, for he tried to explain it as limited to mortgagors who were owners of distinct villages, and not sharers in the same property.[1059] It is submitted that on this point *Nawab Azimut*

1057. *Nawab Azimut Ali v Jowahir Singh*, (1870) 13 MIA 404, pp 407, 415.
1058. *Law of Mortgages*, vol 1, p 270.
1059. *Sakharam Narayan v Gopal Lakshuman*, (1882) PJ 51.

Ali's case has been practically overruled by the later decision of the Privy Council in *Mirza Yadalli Beg v Tukaram.*[1060] That was not a case of a mortgagee purchasing a share in the equity of redemption, but it was very similar, for the mortgagee had foreclosed nine villages without making the purchaser in the equity of redemption of one village a party. This purchaser sued to redeem the whole mortgage. On behalf of the mortgagee, *Nawab Azimut Ali's* case was cited in support of the proposition that he was only entitled to redeem his own village. The Privy Council overruled this contention, and held that he was entitled to redeem the nine villages. Lord Haldane said:

> The Judge in the original court thought that the decisions of the courts in India had established that one of several mortgagors cannot redeem more than his share unless the owners of the other shares consent or do not object. Subject to proper safeguarding of the rights to redeem, which those owners may possess, their Lordships are of opinion that this is not so in India any more than in England. The decisions referred to when scrutinized, turn out to be based not on any general principle different from that adverted to, but on the special circumstances of the transactions to which they related.

In the case of an imperfect foreclosure, the mortgagee has not acquired complete title to any part of the equity of redemption, and so the whole mortgage is open to redemption. However, the judgment in *Mirza Yadalli Beg v Tukaram*[1061] shows clearly that the mortgagor of a share can redeem the shares of other co-mortgagors in the residue left after the mortgagee's purchase in spite of the opposition of the mortgagee. The real question is not whether the mortgagee objects; but whether the other co-sharers are willing to contribute their shares of the mortgage debt and redeem. If they are not, the plaintiff can redeem their share as well as his own. If they wish to redeem, they should be allowed to do so. This was the form of decree made in a case[1062] decided by the Patna High Court. The Patna High Court construed *Nawab Azimut Ali's* case as follows:

> This case does not lay down that, where a mortgage has been split up a mortgagor cannot redeem more than his share in equity of redemption. What it does lay down is that the mortgagee in such case cannot prevent a mortgagor from redeeming his share only, instead of the entire mortgage.

This is good law, but it is doubtful if that is a correct version of the decision in *Nawab Azimut Ali's* case. Justice Piggot, said quite correctly of the owner of a share in the residue that—

> he is entitled on the strength of his position as part owner of the mortgaged property to redeem just as much of it as does not belong to the mortgagees themselves, and he is entitled to do so on payment of a proportionate share of the mortgage debt.[1063]

Some other cases allow redemption of the whole of the residue;[1064] but as a rule *Nawab Azimut Ali's* case has been followed and the right of the owner of a share in the residue left after the mortgagee's acquisition has been limited to the redemption of his

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1060. *Mirza Yadalli Beg v Tukaram,* (1921) ILR 48 Cal 22 : 47 IA 207, p 212 : 57 IC 535 : AIR 1921 PC 125; *Pariakaruppa v Satyanarayan-moorthi,* AIR 1937 Mad 136.
1061. *Mirza Yadalli Beg v Tukaram,* (1921) ILR 48 Cal 22 : 47 IA 207 : 57 IC 535 : AIR 1921 PC 125.
1062. *Promotho Nath v Ram Kishan,* 97 IC 386 : AIR 1927 Pat 25, followed in *Azizurmissa v Komal Singh,* (1930) ILR 9 Pat 930 : 130 IC 33 : AIR 1930 Pat 579; see also *Girija Singh v Gaynwanti Devi,* AIR 2001 Pat 20.
1063. *Shiam Saran v Banarasi Das,* (1922) 20 All LJ 258, p 260 : 66 IC 866 : AIR 1922 All 192.
1064. *Siddeshwar v Ganpatrao,* (1926) ILR 50 Bom 331 : 96 IC 361 : AIR 1926 Bom 303; *Baikantha Nath v Mohesh Chandra,* (1918) 22 Cal WN 128 : 44 IC 77; *Protab Chandra v Peary Mohan,* (1918) 22 Cal WN 800 : 48 IC 669; dissenting from *Girish Chunder v Juramoni,* (1905) 5 Cal WN 83.

own share only,[1065] and the result has sometimes been almost absurd. Thus, in an Allahabad case,[1066] one *Dallibullah* owned at two ans eight pie share of the equity of redemption, the other thirteen ans four pie share having been purchased by the mortgagee. If *Dallibullah* had sued in his lifetime, he could have redeemed that two ans eight pie share, but he died and after his death one of his heirs sued to redeem it. He made the other heirs parties and none of them objected, yet on the mortgagee's opposition, the heir was allowed to redeem only his fraction of the two ans eight pie share. The Allahabad High Court in a later case[1067] has sought to justify this course of decisions on the ground that "the integrity of the mortgage is necessary for the benefit of a mortgagee alone, and where that has been broken and a redemption has to be allowed, there is no equity in favour of one of the mortgagors to possess the remaining property, although the same is more than his own legitimate share." This, it is submitted, is wrong, for the character of indivisibility exists both with reference to the mortgagor as well as to the mortgagee.[1068]

The right of the mortgagor of a share to redeem the whole is recognised in sections 91 and 95 of the TP Act, and it is difficult to see why the acquisition by the mortgagee of a part of the property should affect that right as to the rest. Where the mortgagee brings a suit omitting a necessary party and obtains a decree and purchases the mortgaged property in execution thereof, the mortgage decree and the execution sale are no effect as against the person who was not impleaded in the mortgage suit, and he is entitled to treat the mortgage as subsisting, and can ask for its redemption in its entirety. The position is quite different where the equity of redemption of some of the mortgagors has been effectively sold and purchased by the mortgagee himself at a private sale, or in execution of a money decree. In such a case, the effect of the mortgagee's purchase would be to wipe out the mortgage in respect of that share. The mortgage could not be said to be subsisting so far as that share was concerned.[1069]

The part purchased by the mortgagee cannot of course be redeemed. This is either because the mortgage as to that part has been extinguished by merger, or because the mortgagee if redeemed would immediately reclaim it. If the mortgagee has purchased a life-interest in a part, he cannot be redeemed while that interest lasts. Thus, in a Madras case[1070] two Hindu widows had mortgaged their late husband's property which was purchased by the mortgagee in execution of a money decree against one of them, the other widow was allowed

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1065. *Kuray Mal v Puran Mal*, (1880) ILR 2 All 565; *Girish Chunder v Juramoni*, (1900) 5 Cal WN 83; *Kallan Khan v Mardan Khan*, (1905) ILR 28 All 155; *Inukhan v Naimudin*, (1906) 3 Cal LJ 377; *Surjiram v Barharndeo*, (1905) 2 Cal LJ 202; *Munshi v Daulat*, (1907) ILR 29 All 262; *Rathna Mudali v Perumal*, (1915) ILR 38 Mad 310 : 17 IC 837; *Zaib-un-nissa Bibi v Maharaja Parbhu Narain Singh*, (1917) ILR 39 All 618 : 40 IC 345; *Mewa Ram v Ganga Ram*, (1919) 17 All LJ 910 : 52 IC 229; *Amba Prasad v Wahidullah*, (1922) ILR 44 All 708 : 68 IC 261 : AIR 1922 All 405; *Raghunath Prasad v Sadhu Saran*, 75 IC 821 : AIR 1925 Pat 31; *Ahmad Husain v Muhammad Qasim*, (1926) ILR 48 All 171, p 173 : 90 IC 80 : AIR 1926 All 46; *Kishan Lal v Chunna Lal*, (1887) All WN 250; *Sajjan Singh v Attar Singh*, 96 IC 362 : AIR 1926 Lah 601; *Mahammad Ismail v Sharfutullah*, (1930) ILR 57 Cal 872 : 129 IC 310 : AIR 1930 Cal 810; *HV Low & Co Ltd v Pulin Beharilal Sinha*, (1933) ILR 59 Cal 1372 : 143 IC 193 : AIR 1933 Cal 154; *Jagannath Kunwar v Jaipal*, (1933) ILR 55 All 359 : 142 IC 410 : AIR 1933 All 257; *Mustafa Khan v Shadi Lall*, (1907) 10 OC 81; *Jai Gobind v Abhai Roy*, (1923) 26 OC 308 : 77 IC 125 : AIR 1924 Oudh 40; *Mohamed Zaki v Ahmed Shah*, 58 IC 983; *Ramadhin v Jokhan*, 47 IC 115; *Abdul v Raghunandan*, AIR 1945 All 388.

1066. *Zaibunnissa Bibi v Maharaja Parbhu Narain Singh*, 40 IC 345.

1067. *Ahmad Husain v Muhammad Qasim*, (1926) ILR 48 All 171, p 173 : 90 IC 80 : AIR 1926 All 46.

1068. *Huthasanan v Parameswaran*, (1899) ILR 22 Mad 209.

1069. *Mir Wajid Ali v Alidad Khan*, (1940) ILR AP 45; *Kewal v Bikan*, AIR 1957 Pat 497.

1070. *Ariyaputri v Alamelu*, (1887) ILR 11 Mad 304.

to redeem her own half share at once, and the other half on the death of the co-widow. In the case of a mortgagee purchasing the share of an undivided Hindu coparcener, the Madras High Court requires the other coparcener to ascertain his share by partition and then sue to redeem it;[1071] but in Bombay he must redeem the whole property, and then ascertain his share by partition.[1072] The Andhra Pradesh High Court following the Bombay ruling has held that though under the last para of section 60 of TP Act, the co-mortgagor cannot redeem the entire hypotheca, and has to redeem only the mortgagor's share, the principle does not apply if the purchaser of a share by the mortgagee is after the filing of the suit for redemption by the co-mortgagor. In that case, the co-mortgagor can sue for redemption and possession of the entire hypotheca and the mortgagee cannot cling on to the possession of the property by purchasing after the suit a share of the hypotheca, however small, from the non-redeeming co-mortgagors as he is subject to section 52 of the TP Act, and has to first surrender possession of the entire hypotheca qua mortgage, and then sue for partition and possession.[1073] The Bombay ruling is based on CJ Sargent's construction of *Nawab Azimut Ali's* case as limited to the part redemption of separate parcels of property. There seems, however, no reason why a prayer for redemption and for partition should not be combined in one suit. Though on general principle, a mortgage security cannot be split up at the instance of the mortgagor by allowing him a piecemeal redemption, a statute such as section 26G of Bengal Tenancy Act, 1885 can intervene and provide for the same.[1074]

(44) *Vis-à-vis* SARFAESI Act

The Supreme Court of India has considered the impact of provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) *vis-à-vis* section 60. Until the sale is complete by registration of sale, mortgagor does not lose right of redemption. Under section 13(8) of SARFAESI Act borrower retains full right to redeem the property by tendering dues to the secured creditor at any time before the date fixed for sale. Section 60 of Transfer of Property Act is general in nature in respect of all mortgages and applicable to a transaction between debtor and secured creditor under provisions of SARFAESI Act[1075]

[1076][**60A. Obligation to transfer to third party instead of re-transference to mortgagor.**—(1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate

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1071. *Mamu v Kuttu*, (1882) ILR 60 Mad 61; *Thillai v Ramanatha*, (1896) ILR 20 Mad 295. But *Mamu v Kuttu* was dissented from in *Subba Rao v Sarvarayudu*, (1924) ILR 47 Mad 7 : 72 IC 292 : AIR 1923 Mad 533.
1072. *Mora Joshi v Ramchandra*, (1890) ILR 15 Bom 24; *Bhikaji Daji v Lakshman*, (1888) PJ 291; *Naro Hari v Vithalbhat*, (1886) ILR 10 Bom 648; *Alikhan Daudkhan v Mahamadkhan*, (1881) PJ 319—cf *Bahramkhan v Saidal Khan*, (1904) PR 2.
1073. *Amruthappa v Abdul Rasool*, AIR 1988 AP 215, p 225, following *Naro Hari v Vithalbhat*, (1886) ILR 10 Bom 648 and *distinguishing Ahmad Hussain v Md Quasim Khan*, AIR 1926 All 46.
1074. *Bhadu Dasi v Gokal Chandra*, (1948) ILR 2 Cal 273.
1075. *Mathew Varghese v Amritha Kumar*, 2014 (5) SCC 610 : JT 2014 (3) SC 151 : 2014 (2) SCALE 331.
1076. Ins. by Act 20 of 1929, sec. 23.

encumbrance; but the requisition of any encumbrance shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.]

This section has been inserted by the amending Act 20 of 1929. The right of the redeeming mortgagor under section 60 is to require the mortgagee to re-transfer either to the mortgagor himself, or to a third person. Under this section, he may require the mortgagee to assign the mortgage to a third person. A puisne mortgagee, as assignee of part of the equity of redemption, may redeem a prior mortgagee, and exercise this right.

(1) A Mortgagee who is or has been in Possession

The reason why a mortgagee being or having been in possession, is excepted is that a mortgagee who has taken possession remains accountable in respect of profits, and other matters even after the transfer.[1077]

[1078][**60B. Right to inspection and production of documents.**—A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.]

This section was inserted by the amending Act 20 of 1929. It recognises the right of the mortgagor to inspection and copies of deeds of title relating to the mortgaged property which are in the custody of the mortgagee. Cases which denied this right of inspection are no longer good law.[1079]

[1080][**61. Right to redeem separately or simultaneously.**—A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.]

Synopsis

(1) Amendment 601
(2) Contract to the Contrary 602
(3) Two or more Mortgages 602

(1) Amendment

This section was substituted by the amending Act 20 of 1929.

1077. *Coote's Law of Mortgages*, 9th edn, p 1425; *Hall v Seward*, (1886) 32 Ch D 430, p 435; Re *Prytherch, Prytherch v Williams*, (1889) 42 Ch D 590.

1078. Ins. by Act 20 of 1929, sec. 23.

1079. *Beattie v Jetha*, (1869) 5 Bom HC 152; *Mehta v Cassumbhai*, (1922) 24 Bom LR 847 : 75 IC 193 : AIR 1922 Bom 433.

1080. Subs. by Act 20 of 1929, sec. 24, for section 61.

(2) Contract to the Contrary

The parties themselves may exclude the operation of the section, and the contract of mortgage may allow the mortgagee to consolidate.[1081] However, a provision to that effect must be explicit.[1082] If there is a stipulation for simultaneous redemption in the subsequent mortgage of the same property, this is equivalent to a contract for consolidation and the mortgages cannot be redeemed separately. As explained in the notes on section 60, such a stipulation is not a clog on redemption. In this connection, the note "Subsequent Agreement Postponing Redemption" may be referred. In an Allahabad case,[1083] the first mortgage was by two mortgagors, and the second by one of them only, who covenanted to pay before redeeming the first mortgage. This was held not to be a contract of consolidation, but to be a provision fixing time for payment. The effect of a covenant for consolidation was much debated in a Full Bench decision of the Allahabad High Court.[1084] The mortgagor had made a usufructuary mortgage of his occupancy holding, and then took further advances and executed two bonds of further charge, and in those bonds covenanted not to redeem the usufructuary mortgage until these subsequent advances had been paid off. Now a transfer of an occupancy holding is forbidden by the Agra Tenancy Act, 1881, but the Allahabad High Court had held that an usufructuary mortgage in so far as it is a transfer of "a right to occupy" or of a right to possession is valid. Under this ruling, the bonds were invalid as mortgages or deeds of further charge and the usufructuary mortgage was valid only as the transfer of a right of possession.[1085] In view of this ruling, each of the judges took a different view of the effect of the covenant— one judge held that as a personal covenant it was valid— another judge held that it was invalid as it hindered redemption of the usufructuary mortgage; and the third judge that it was invalid as it has the effect of making the usufructuary mortgage operate as a mortgage of something more than a right of possession.

(3) Two or more Mortgages

These words mark the distinction between the old section and the new. The new section refers to two or more mortgages of the same or of different properties. For instance, it would include a case of four mortgages thus:

(1) *A* mortgages *X* to *B*;

(2) *A* mortgages *X* to *B* by a puisne mortgage;

(3) *A* mortgages *Y* to *B*;

(4) *A* mortgages *Z* to *B*.

The new section enacts that unless restrained by contract to the contrary, *A* may redeem each of these four mortgages separately. Under the section it is clear that even if the mortgages are of the same property, the mortgagor may redeem each separately, unless restrained by a contract to the contrary. The effect of the amendment is to abolish the consolidation of mortgages whether in respect of the same properties or different properties.[1086]

1081. *Parmeshwar v Raj Kishore*, (1924) ILR 3 Pat 829 : 80 IC 34 : AIR 1925 Pat 59.
1082. *Jiwan Das v Tharaj*, (1920) ILR 1 Lah 105 : 55 IC 509; *Nathwa v Kanhiya*, (1921) 3 Lah LJ 432 : 65 IC 642 : AIR 1921 Lah 170; *Punnu Ram v Ghulam Hussain*, (1926) ILR 7 Lah 297 : 96 IC 630 : AIR 1926 Lah 494; *Kanhaya Lal v Tulsi Pershad*, 129 IC 550 : AIR 1931 All 197; *Kurien v Ramakrishna*, AIR 1952 Tr & Coch 552.
1083. *Ganga Rai v Kitharath Rai*, (1911) ILR 33 All 393 : 9 IC 319; cf *Gava Din v Haz Karan*, (1913) 16 OC 207 : 22 IC 132; but see *Pyari Bibi v Andi Ranga Chariar*, AIR 1956 Mad 691.
1084. *Lallu Singh v Ram Nandan*, (1930) ILR 52 All 281 : 124 IC 733 : AIR 1930 All 136.
1085. *Khiali Ram v Nathu Lal*, (1893) ILR 15 All 219.
1086. *Jai Narain v Gokul Singh* 168 IC 40 : AIR 1937 Oudh 321.

It might be supposed that conversely a mortgagee who holds two or more mortgages of the same property from the same mortgagor might enforce each separately, and that the old rule requiring the mortgagee to consolidate was abolished. However, this is not so; and section 67A of the TP Act as amended puts the rights of the mortgagee on a totally different footing, and if he has successive mortgages of the same property or different mortgages of different properties from the same mortgagor, he must enforce all or none. This is because a sale of property subject to other mortgages is not likely to realise a fair price, and would be a hardship on the mortgagor.[1087] On the other hand, if the mortgagor redeems one of several mortgages, he benefits the mortgagee by enhancing the value of his security. This equitable consideration overrides not only the rule of procedure which allows a separate suit on each cause of action, but also the principle that rights of redemption and foreclosure are co- extensive.

62. Right of usufructuary mortgagor to recover possession.—In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property [1088][together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee]—

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;

(b) where the mortgagee is authorized to pay himself from such rents and profits [1089][or any part thereof a part only of the mortgage- money]—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee [1090][the mortgage-money or the balance thereof] or deposits it in court as hereinafter provided.

Synopsis

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(2) Right of Usufructuary Mortgagor to Recover Possession 603
(3) Clause (a) 604
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(7) Limitation 607

(1) Amendments

This section has been amended by the amending Act 20 of 1929.

(2) Right of Usufructuary Mortgagor to Recover Possession

The section does not use the word redemption and it applies only to usufructuary mortgages pure and simple;[1091] but the remedy of the mortgagor in clause (b) would be enforced by suit for redemption or by the summary process of deposit and notice under

1087. *Girvadis v Chacku*, AIR 1952 Tr & Coch 363.
1088. Ins. by Act 20 of 1929, sec. 25.
1089. Subs. by Act 20 of 1929, sec. 25, for "the interest of the principal money".
1090. Subs. by Act 20 of 1929, sec. 25, for "the principal money".
1091. *Panaganti Ramarayanimgar v Maharaja of Venkatagiri*, (1927) ILR 50 Mad 180 : 54 IA 68 : AIR 1979 PC 32.

section 83. On the other hand, under clause (a) there is no tender or payment and the suit would not be one for redemption. Such a suit would be described in England as a suit in ejectment;[1092] and in India it has been said that a suit for redemption of a usufructuary mortgage is in substance a suit for possession.[1093] When the debt is satisfied out of the rents and profits, the mortgagor recovers possession on his title.[1094] Thus, in *Nidha Sah v Murli Dhar*[1095] the mortgage was a usufructuary mortgage for a term of 14 years, and provided that at the expiry of that term the mortgagor was entitled to possession without an account. The mortgagee did not get possession of the whole property because of a misrepresentation by the mortgagor. Nevertheless, the Privy Council held that as the mortgagor's suit was not on contract but on title, he was entitled at the end of the term to recover the part of which the mortgagee had possession. However, the so-called mortgage in this case was not really a mortgage, for the transfer was not security for the payment of any money or for the performance of any engagement, but simply a grant for a fixed term free of rent in consideration of a sum made up of past and present advances. Where no period is fixed in a usufructuary mortgage for redemption of the mortgage when the mortgage was created the principle of "once a mortgage always a mortgage" applies and the mortgage can be redeemed at any time. The mortgagee cannot automatically become the owner of the land due to efflux of time.[1096] Upon redemption, the possession of property is to be delivered to borrowers with no further liability towards the bank.[1097] Where in a usufructuary mortgage, the mortgagee was declared as an evacuee and he migrated to Pakistan, and consequently his rights as a mortgagee would vest in the custodian and not the title to the property and therefore the custodian can accept redemption of the property from the mortgagor.[1098] In usufructuary mortgage, the right of the mortgagor to redeem the property does to come to an end by simple efflux of time of 30 years. Thus the mortgagee in possession of the property for a period of more than 30 years cannot claim ownership of the same by simple efflux of time.[1099]

(3) Clause (a)

This refers to cases where the principal and interest are paid out of the usufruct, and the suit is one for the recovery of possession rather than redemption. The words 'when such money is paid' refer to payment out of the rents and profits.[1100] In such cases, the mortgagee pays himself out of the rents and profits, and surrenders possession when the debt is paid off. If the mortgagor sues to recover possession before the debt is discharged out of the usufruct, the suit must be dismissed as premature.[1101] In some obsolete cases, the mortgagor was allowed to redeem by making a cash payment before the mortgage was discharged out of the usufruct.[1102] The chief court of Oudh made a similar order in a subsequent case;[1103] but the

1092. *Yates v Hambly*, (1742) 2 Atk 360.
1093. *Annada Hait v Kudiram Hait*, (1914) 19 Cal LJ 532 : 25 IC 558; *Appanna v Venkatasami*, (1924) ILR 47 Mad 203, p 208 : 79 IC 510 : AIR 1924 Mad 292.
1094. *Ram Prasad v Bishambhai*, AIR 1946 All 400.
1095. *J Rajiv Subramaniyan v Pandiyas*, (2014) 5 SCC 651 : LNIND 2014 SC 306 : AIR 2014 SC 1710 : JT 2014 (5) SC 144.
1096. *Gulzar Singh v Financial Commissioner & Secretary to Government , Punjab*, AIR 2010 P&H 114.
1097. *Dharam Singh v Faquir Chand*, AIR 2018 HP 5.
1098. (1903) ILR 25 All 115 : 30 IA 54.
1099. *Sukhbir Singh v Kali Ram*, AIR 2012 (NOC) 343 (P&H).
1100. *Tirugana v Nallatambi*, (1893) ILR 16 Mad 486, p 489; *Immani Seshayya v Dronamraju*, (1930) 57 Mad LJ 800 : 124 IC 282 : AIR 1930 Mad 160.
1101. *Tirugnana v Nallatambi*, (1893) ILR 16 Mad 486.
1102. *Sahib Zadah v Parmeshar*, (1877) ILR 1 All 524; *Raja Barda Kant v Bhagwan Das*, (1877) ILR 1 All 344.
1103. *Hardeo Bakhsh v Deputy Commissioner*, (1926) ILR 1 Luck 367 : 98 IC 542 : AIR 1926 Oudh 281.

decision proceeds on the erroneous notion that the mortgagor can redeem at his convenience, and it makes no reference to the Privy Council decision in *Bakhtawar Begam v Husami Khanam.*[1104] In a Madras case,[1105] the mortgage was usufructuary with a condition that the mortgagee should remain in possession until the mortgage debt and interest were discharged out of the usufruct. There was also an option given to the mortgagor to redeem by payment of the balance due at the end of 10 years. The mortgagor did not exercise this option at the end of the period of 10 years, but sued after the 10 years, but before the mortgage was satisfied out of the usufruct. The suit was dismissed as premature. This was on the principle that the law will not allow the mortgagor to discharge the debt before the prescribed period in a manner not contemplated by the contract.[1106] If the interest or the interest and defined portions of the principal are to be satisfied out of the usufruct, the mortgagee would not be liable to account on redemption. If, however, the mortgagee has remained in possession after the date of tender or deposit and has realised a surplus in excess of the mortgage money, he is liable to account for such surplus but the mortgagor must include a claim for it in his suit, the surplus being really mesne profits, for otherwise he will be barred from filing another suit.[1107]

Usufructuary mortgages under clause (a) sometimes fix a term when right to recover possession arises. This is when the parties make an estimate of the rents and profits, and agree that the mortgage will be discharged by possession for the term fixed. In such cases, the mortgagor will not be entitled to recover possession before the expiry of the term, for "when the parties to a mortgage agree to certain terms, it is the duty of both parties to adhere to the terms of the mortgage".[1108] The mortgagor may on equitable grounds be allowed to redeem before the expiry of the term by reason of the conduct of the mortgagee. Thus, in *Immani Seshayya v Dronamraju,*[1109] a usufructuary mortgage provided that the mortgage should be discharged by the rents and profits for 55 years, less an annual sum of ₹ 60 to be paid out of the rents and profits to the mortgagor. The mortgagee did not make these payments to the mortgagor, and it was held that he was bound to apply the sums to the reduction of the debt, so that the mortgagor could redeem within the fixed period as soon as the debt was discharged.[1110]

(4) Clause (b)

This clause in the old section referred to the case in which the mortgagee took the profits in lieu of interest. It has now been expanded in order to cover all the classes of usufructuary mortgage as defined in section 58(d) which are not included in clause (a). There are three classes in section 58(d). These are when the whole or part of the rents and profits are taken:

(1) in lieu of interest;

(2) in payment of the mortgage-money;

(3) part in lieu of interest and part in payment of mortgage-money.

Class (2) is covered by clause (a); and clause (b) covers classes (1) and (3).

1104. *Bakhtawar Begam v Husami Khanam,* (1914) ILR 36 All 195 : 41 IA 84 : 23 IC 355.
1105. *Aga Muhammadally v Venkatappayya,* (1918) 35 Mad LJ 287 : 48 IC 379; *Setrucherla Ramabhadra v V Surianarayanaraju,* (1878) ILR 2 Mad 314.
1106. *Immani Seshayya v Dronamraju,*AIR 1930 Mad 160.
1107. *Rukhminibai v Venkatesh,* (1907) ILR 31 Bom 527.
1108. *Narasimha Rao v Seshayya,* (1925) 48 Mad LJ 363, p 366 : 90 IC 138 : AIR 1925 Mad 825; *Rangayya Naidu v Basana,* 94 IC 639 : AIR 1926 Mad 594: *Subratan v Dhanpat Godariya,* (1932) ILR 54 All 1041 : 143 IC 409 : AIR 1933 All 70.
1109. *Immani Seshayya v Dronamraju,* (1930) 57 Mad LJ 800 : 124 IC 282 : AIR 1930 Mad 160; *Jaijit Rai v Gobind Tiwari,* (1884) ILR 6 All 303; *Narasimha Rao v Seshayya,* AIR 1925 Mad 825.
1110. See *Chhotku Rai v Bladeo,* (1912) ILR 34 All 659 : 17 IC 340. Also see the note 'When the right of redemption arises' under section 60.

In class (1), the interest is part of the mortgage-money and the mortgagor redeems when he tenders the balance of the mortgage money, i.e., the principal. If the usufructuary mortgagee leases the property to the mortgagor for a rent equivalent to the interest so that the lease and mortgage are one transaction, the mortgagor cannot redeem without payment of arrears of rent.[1111] However, this has been doubted in some judgments of the Kerala and Madras High Courts.[1112] But if the lease and the mortgage are independent transactions, the mortgagor can redeem on payment of the principal money, irrespective of the amount due under the lease.[1113]

In class (3), part of the rents and profits are set apart as equivalent to interest, and the rest or part of the rest go in reduction of the principal.

If no term is fixed and if the contract is for payment of the debt out of the rents and profits also, the mortgagor would be entitled to redeem when the principal was discharged out of the residue or part of residue of the rents and profits. Otherwise, the mortgagor could redeem at any time on payment of the balance of the mortgage-money. If a term is fixed, the right of redemption would arise at the expiry of the term, and there would be an account to ascertain the balance due, unless such account were dispensed with by the terms of the mortgage.

In *Subban Chettiar v Rangan Chetti*,[1114] there was a usufructuary mortgage to *A* for a term for 12 years, then a second usufructuary mortgage to *B* who was to redeem *A* and take possession for a further term of 10 years, and a third mortgage to *C*. *B* failed to redeem *A* at the end of the first term and so, *C* redeemed *A* and took possession. Then *B* sued to redeem *C* as first mortgagee and *C* delayed giving possession for 15 months. *C* then sued to redeem *B* at the expiry of the second term of 10 years. *B* was not entitled to add the period of 15 months to his term. Whatever remedy *B* might have in damages or otherwise for *C*'s wrongful conduct, he could not extend the period of the mortgage.

If by the terms of the mortgage, part of the rents and profits are to be taken in lieu of interest and the balance paid to the mortgagor, arrears of such balance should be deducted in the redemption suit.[1115]

(5) Anomalous Mortgages

Section 62 applies to usufructuary mortgages pure and simple, and has no application to anomalous mortgages which contain a covenant to pay.[1116] To an anomalous mortgage, the provisions of section 60 apply.

(6) Usufructuary Mortgage and Deed of Further Charge

If the usufructuary mortgage is followed by a deed of further charge or a puisne simple mortgage, then in the absence of a covenant for consolidation, the mortgagor is entitled to redeem each mortgage separately.[1117] He may recover possession from the usufructuary mortgagee by suit under section 62, and then redeem the simple mortgage by suit under

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1111. *Imdad Hasan v Badri Prasad*, (1898) ILR 20 All 401, p 407.
1112. *Beevathuma v Lakshmi Ammal*, AIR 1952 Tr & Co 92; *Venkitasubramania Ayyar v Vadasseri Karnavan*, (1956) ILR Mad 983 : (1956) 1 Mad LJ 355 : AIR 1956 Mad 434 (and see the earlier decisions mentioned there); *Venkappa v Gangadhara*, AIR 1959 Ker 112.
1113. *Khuda Bakhsh v Alim-un-nissa*, (1903) ILR 27 All 313.
1114. *Subban Chettiar v Rangan Chetti*, (1927) 51 Mad LJ 706 : AIR 1927 Mad 173.
1115. *Bihari Lal v Shib Lal*, (1924) ILR 46 All 633 : 82 IC 25 : AIR 1924 All 591; *Mahabal Singh v Rajeshwari*, 101 IC 200 : AIR 1927 Oudh 208.
1116. *Panaganti Ramarayanimgar v Maharaja of Venkatagiri*, (1927) ILR 50 Mad 180 : 54 IA 68 : 100 IC 86 : AIR 1927 PC 32.
1117. *Khuda Bakhsh v Alim-un-nissa*, (1905) ILR 27 All 313; *Tajjo Bibi v Bhagwan*, (1894) ILR 16 All 295.

section 60. In an Oudh case,[1118] it was said that section 62 has no application where after the execution of a usufructuary mortgage, other mortgages by way of further charge have been executed by the same mortgagor. This is incorrect, and the Privy Council have observed that section 62 is not in any way inconsistent with the provisions of section 61.[1119] On the other hand, if there is a contract for consolidation, the mortgagee is entitled to remain in possession until the further charge or mortgage is paid off.[1120]

ILLUSTRATION

A borrowed ₹ 5,500 from *B*, and in July 1881, executed a usufructuary mortgage of his village to *B* for a period of 15 years. In November 1881, *A* borrowed a further sum of ₹ 2,500 from *B* and executed another document promising to repay the sum with interest within the period of 15 years. The deed then provided: "I shall first pay up this debt, including principal and interest, and thereafter I can redeem the mortgaged village, having paid up the mortgage money. Without the payment of this debt, I cannot redeem the mortgaged village." Held that this subsequent deed created a further charge on the village and that he was entitled to remain in possession until both debts were discharged.[1121]

(7) Limitation

Article 61 of the Limitation Act, 1963 provides the limitation of thirty years for a suit to redeem or recover the possession of immovable property mortgaged by the mortgagor from the date of accrual of right of the right to redeem or recover possession. Article 137, which is a residuary provision provides for limitation of three years in a case where no period of limitation is provided.[1122] In *Achaldas Durgaji Oswal v Ramvilas Gangabisan Heda,*[1123] the Supreme Court has upheld the view taken by the Bombay High Court[1124] that there is no limitation for filling an application for preparation of a final decree in respect of usufructuary mortgage. It has further been held that sub-rule (2) of rule 7 of O 34 of Code of Civil Procedure is not applicable to usufructuary mortgages. A usufructuary mortgagor is not entitled to seek extension of time and, therefore, the rejection of application of time becomes irrelevant.[1125] In para 36 of the judgement, it has been held that:

> We are therefore, of the opinion that although by reason of preliminary decree in the suit for redemption of usufructuary mortgage, the court may fix the time for payment of the amount declared due, but default in depositing such payment would not debar him from a right to redeem the mortgaged property.

In usufructuary mortgages there is no time fixed for repayment of money. As far as limitation for redemption of mortgage would be 30 years as prescribed under the limitation Act.[1126] As the right to seek redemption accrues not from date of creation of mortgage but

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1118. *Zahid Ali v Kedar Nath*, (1914) 17 OC 388 : 27 IC 427; followed by one of the judges in *Lallu Singh v Ram Nandan*, (1930) ILR 52 All 281 : 124 IC 733 : AIR 1930 All 136.
1119. *Panaganti Ramarayanimgar v Maharaja of Venkatagiri*, AIR 1927 PC 32.
1120. *Aditya Prasad v Ram Ratan Lal*, (1930) ILR 5 Luck 365 : 57 IA 173 : 123 IC 191 : AIR 1930 PC 176 approving *Janardan v Anant*, (1908) ILR 32 Bom 386; and affirming *Ram Ratan v Babu Aditya*, (1928) ILR 3 Luck 459 : 112 IC 481 : AIR 1928 Oudh 273; *Har Prasad v Ram Chandar*, (1922) ILR 44 All 37 : 63 IC 750 : AIR 1922 All 174; *Ram Das Choube v Simirkha Kuar* 2 IC 144; *Paras Ram Chaubey v Sheo Dhan Panday*, 138 IC 492 : 1932 All LJ 592 : AIR 1932 All 558; *Jagannath Kunwar v Jaipal*, (1933) ILR 55 All 359 : 142 IC 410 : AIR 1933 All 257; *Dhulabai v Mabhai*, (1961) 2 Guj LJ 433 : AIR 1961 Guj 129.
1121. *Aditya Prasad v Ram Ratan Lal*, (1930) ILR 5 Luck 365 : 57 IA 173, p 175 :123 IC 191 : AIR 1930 PC 176.
1122. *Achaldas Durgaji Oswal v Ramvilas Gangabisan Heda*, (2003) 3 SCC 614, para 16.
1123. Ibid.
1124. AIR 2002 Bom 133.
1125. *Achaldas Durgaji Oswal v Ramvilas Gangabisan Heda*, (2003) 3 SCC 614, para section 19, 20, 25.
1126. *Bhandaru Ram v Sukh Lal*, AIR 2012 HP 1.

from the date of payment of mortgage money out of usufructs or partly out of usufructs and partly on payment or deposit by mortgager, mere expiry of the period of 30 years from the date of mortgage does not extinguish the right of the mortgagor under section 62.[1127] Where no time is specified for redemption of a usufructuary mortgage, the right of red emption is a continuing one and is not subject to any constraints of limitation.[1128] The right of redemption in usufructuary mortgage arises only after the payment of loan and no limitation period applies unless the parties agree that mortgage is for a specific period.[1129] Thus, if under a usufructuary mortgage, if the mortgagee was in possession of property for 60 years without the mortgagor going in for redemption, the right of redemption would subsist and therefore the mortgagee's suit for declaration of title on the ground of mortgagor's right of redemption being barred by limitation would be dismissed.[1130]

Usufructuary mortgagor's right under section 62 continues till mortgage money is paid. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of mortgage. Thus in case of usufructuary mortgage, mere expiry of period of 30 years from the date of mortgage does not extinguish the right of mortgagor under section 62.[1131]

63. Accession to mortgaged property.—Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession acquired in virtue of transferred ownership.—Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, [1132][with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

1127. *Joginder Singh v Ajmer Singh*, RSA No. 2401 of 1985; decided on 20 February 2017; High Court of Punjab and Haryana; *Singh Ram v Sheo Ram*, (2014) 9 SCC 185; AIR 2014 SC 3447.
1128. *Jaimal v State of HP*, AIR 2010 HP 7; *Urmila v Sohanlal*, AIR 2010 (NOC) 654 (P &H); *Sukhbir Singh v Kali Ram*, AIR 2012 (NOC) 343 (P&H).
1129. *Prakash Chand v Amar Singh*, AIR 2011 HP 21 : (2011) 1 Shim LC 24; *Jaimal v State of HP*, AIR 2010 HP 7.
1130. *Ram Kishan v Sheo Ram*, AIR 2008 P&H 78; *Jaswant Kaur v Des Raj*, AIR 2010 HP 61 : (2010) 1 Shim LC 299.
1131. *Singh Ram (D) thrs LRs v Sheo Ram*, AIR 2014 SC 3447.
1132. Subs. by Act 20 of 1929, sec. 26, for "at the same rate of interest".

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Synopsis

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(1) Amendment

The words "with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum" were substituted for the words "at the same rate of interest" by the amending Act 20 of 1929. This amendment was necessary in order to provide for cases where the mortgage deed is silent as to the rate of interest.

(2) Accessions

The section deals with—

(1) Natural accessions.

(2) Acquired accessions which are separable.

(3) Acquired accessions which are inseparable.

This section refers to the mortgagor's rights to accessions made by the mortgagee, while section 70 refers to the mortgagee's right to accessions made by the mortgagor. Natural accessions, unless they have been the subject of a special contract, follow the general rule, *accessio credit principal,* of which sections 70 and 108 (d) are examples.

Accession means an addition or improvement leading to expansion of or benefit of mortgaged property.[1133] It is not an absolute rule that a benefit or an interest acquired by a mortgagee over the mortgaged property in all cases, whatever may be the circumstances, must be held in trust for the benefit of the mortgagor. If the mortgagee by fraud or behind the back of the mortgagor obtained such benefit, it must be held for the benefit of the mortgagor. However, it is open to the mortgagee to show that he acquired it under an agreement.[1134] Accessions are treated as accessions to the mortgaged property; but although the section does not make it a condition that the mortgagee should have made the acquisition by availing himself of his position as such mortgage, yet the judgment of the Privy Council in *Sorabjee v Dwarkadas*[1135] shows that the section is only an application of the equitable principle enacted in section 90 of the Indian Trusts Act, 1882 thus:

> Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, *by availing himself of his position as such,* gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

1133. *M K Rakesh Kumar v Asset Reconstruction Co,* AIR 2008 AP 45 : (2008) III BC 258.
1134. *Parvathi v Cherian,* AIR 1951 Tr & Coch 94.
1135. *Sorabjee v Dwarkadas,* 59 IA 366, p 371 : 36 Cal WN 947 : 56 Cal LJ 65 : 63 Mad LJ 116 : 34 Bom LR 1310 : 1932 All LJ 889 : 138 IC 557 : AIR 1932 PC 199.

As to this section, their Lordships in the case cited above said:

> In their Lordships' opinion there is nothing inconsistent with that section (section 90, Trusts Act) in the provisions of section 63 of the Transfer of Property Act as to accessions to mortgaged property and the terms on which the mortgagor may upon redemption obtain the benefit of them. The word "accession" is not defined in the Act, but the section dealt expressly with accessions which are acquired at the expense of the mortgagee and would appear to be clearly applicable to cases in which a subordinate tenure has admittedly been acquired by the mortgagee as an accession to the mortgaged property. Whether the term "accession" as used in this section should also be held to cover acquisition which the mortgagee has made for his own benefit but is bound, under section 90 of the Trusts Act to hold for the benefit of the mortgagor need not be discussed. Section 90 itself provides for the mortgagor bearing the cost of the acquisition in such a case, but section 63 goes somewhat further and contains as well an express provision as to profits arising from the accession where the mortgage is usufructuary. In the present case, it is sufficient to say that their Lordships are clearly of opinion that section 63 of the Transfer of Property Act cannot be read as entitling the mortgagor to recover acquisitions made by the mortgagee for his own benefit *in circumstances which do not bring him within* section 90 *of the Indian Trusts Act.*[1136]

Section 90 of the Indian Trusts Act, 1882 enacts a wider rule than that in section 63 and deals with a tenant for life, a co-owner, a mortgagee or other qualified owner who by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested. An acquisition by the mortgagee is an advantage gained, and illustration (c) to section 90 shows that such an acquisition may not be an accession, though the Privy Council has refrained from saying that this is necessarily the case. However, it was held that when the acquisition is an accession made by the mortgagee for his own benefit, the mortgagor is not entitled to it, except under the equitable rule enacted in section 90 of the Indian Trusts Act, 1882. In other words, the mortgagor must show that the mortgagee by availing himself of his position as such, acquired the accession in derogation of the rights of the mortgagor. The case before the Privy Council was that of a mortgagee of a share of a village who also became a co-owner by the purchase of a half share in the equity of redemption, and by the purchase of two fields. He required these fields for a ginning factory and, therefore, purchased the tenancy rights in them during the continuance of the mortgage. On redemption, the tenancy right was claimed as an accession, but the Privy Council held that in order to justify the mortgagor's claim it was incumbent on him to show that the tenancy right was acquired under such circumstances as to bring the acquisition within section 90 of the Indian Trusts Act, 1882. Their Lordships dissented from a decision of the Calcutta High Court[1137] that the mortgagor was entitled to a subordinate tenure acquired by the mortgagee without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them. When a mortgagee of *mulki lekraj* property purchased *raiyati* land appertaining to the mortgage, such purchase was not an accretion within the meaning of the section.[1138] The same test has been reaffirmed by a Full Bench of the Patna High Court[1139] in which the court approved the last-mentioned case, and disapproved of another Patna decision to the contrary.[1140]

Rajah Kishendatt v Rajah Mumtaz Ali[1141] was a case decided by the Privy Council before the TP Act, but the same principle was applied. In that case, the mortgagee of a *taluka*, during the continuance of the mortgage, acquired subordinate tenures known as *birts*. Their

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1136. *Sorabjee v Dwarkadas*, 59 IA 366 : AIR 1932 PC 199.
1137. *Ram Birch Narain v Ambika Prasad*, (1912) 17 Cal WN 586 : 19 IC 90.
1138. *Sheo Pujan v Bhagwati*, (1948) ILR 27 Pat 705 : AIR 1949 Pat 99.
1139. *Umraon Singh v Chakauri Singh*, (1958) ILR 37 Pat 236 : AIR 1958 Pat 302.
1140. *Kameshwar Singh v Jhalak Singh*, AIR 1949 Pat 16.
1141. *Rajah Kishendatt v Rajah Mumtaz Ali*, (1880) ILR 5 Cal 198 : 6 IA 145, 159.

Lordships referred to the general principle of English law 'that most acquisitions by a mortgagor ensure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. But this rule was only referred to as an equity applicable to the case, and it was held to be applicable because on the facts their Lordships had found that the mortgagee taking advantage of his position as de facto *talukdar* had acquired the *birts* on very favourable terms and allowed them to merge in the *taluka,* and that it would be inequitable to allow him on redemption to revive them for his benefit. But a mortgagor is entitled to such accession only after the redemption of the mortgage.[1142] Where a usufructuary mortgagee used his position as mortgagee for getting *kumki lands* on *darkhast* and the lands were assigned to the mortgagee under the Revenue Board standing orders on the basis of the preferential claim of the mortgagee as *warqadar* of the property; lands so assigned could be considered as accession, and liable to be redeemed. Absence of any mention of the right to *kumki land* in the deed in question, cannot deprive the mortgagor of the right of redemption.[1143]

(3) During the Continuance of the Mortgage

An acquisition made after a decree extinguishing the mortgage is not within the section.[1144] But when the usufructuary mortgagee of a share of a village took a mortgage by conditional sale of a tenant's holding and foreclosed the tenant after the expiry of the usufructuary mortgage, the mortgagor was entitled to the tenancy as an accretion.[1145]

(4) Natural Accession

Natural accessions are, under section 70, additions to the security and becoming incorporated in it, are subject to redemption. When the area of a village mortgaged without specification of boundaries was increased at a survey settlement the mortgagor was, on redemption, entitled to the increase.[1146] When the mortgagee was, by mistake, put in possession of a greater area of land the mortgagor was entitled to redeem the excess as well.[1147]

(5) Acquired Accessions—Separable

Such accessions, being separable, the mortgagor is not bound to take them, but if he does take them, he must pay the mortgagee the expense of acquiring them. In the case cited above,[1148] the mortgagor had to pay the mortgagee the expense incurred in acquiring the sub-tenures. The mortgagor can take the accretion even if the mortgagee has acquired it *benami* in the name of a relation.[1149] In a Bombay case, before the TP Act, government trees standing on the land mortgaged and purchased at a favourable rate by the mortgagee, were held to be accretions to which the mortgagor was entitled on redemption on payment of the purchase price, and other reasonable expenses.[1150] The mortgagor's right only accrues upon redemption, and so he may be held to have abandoned his right if he does not at the time of

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1142. *Maya Devi v Rajlakshmi Debi,* AIR 1950 Cal 1.
1143. *Mammunhi Beavy v Neelamma,* AIR 1976 Kant 21 : (1975) 2 Kant LJ 300.
1144. *Sivananjiah v Sithay Goudar,* (1921) 41 Mad LJ 490 : 70 IC 367 AIR 1921 Mad 627.
1145. *Ketki v Dinabandhu,* (1909) 10 Cal LJ 83 : 3 IC 395; *Mohanlal v Chaodhry,* (1901) 14 CPLR 169.
1146. *Sadashiv Anant v Vithal,* (1874) 11 Bom HCR 32.
1147. *Nanchi v Shititi,* 72 IC 1003 : AIR 1923 Bom 42.
1148 *Rajah Kishendatt v Rajah Mumtaz Ali,* (1880) ILR 5 Cal 198 : 6 IA 145; *Ketki v Dinabandhu,* (1909) 10 Cal LJ 83 : 3 IC 395; *Mohanlall v Chaodhry,* (1901) 14 CPLR 169.
1149. *Venkatachariar v Srinivasa,* 4 IC 357.
1150. *Bakshiram v Darku,* (1873) 10 Bom HCR 369.

redemption tender to the mortgagee the cost incurred by the mortgagee in making the acquisition.[1151] Adjoining government waste land brought into cultivation by the mortgagee, is not an accession.[1152]

(6) Acquired Accessions—Inseparable

When the accessions are inseparable, the mortgagor has no option but to take them on redemption. He is, therefore, liable to pay the cost only:

(1) if the acquisition was necessary to preserve the property from destruction, forfeiture or sale; or

(2) if the acquisition was made with his consent.

Thus, if a mortgagee makes the necessary repairs to a well with the consent of the mortgagor, the mortgagor must pay the cost.[1153] But when the mortgagee without the consent of the mortgagor added an upper story to a building,[1154] or constructed a well,[1155] or planted a grove,[1156] he was not entitled to recover compensation from the mortgagor. The last case may seem inconsistent with the case of Bombay High Court already cited,[1157] but in that case, the trees were government property, and so possibly capable of separate enjoyment. In *Raghunandan Rai v Raghunandan,*[1158] a Full Bench of the Allahabad High Court said that a mortgagee who had planted a grove without the consent of the mortgagor could fell the trees and, remove the timber; but in *Nagesgar Rai v Nand Lal,*[1159] the same court said that the matter is to be considered from the mortgagor's point of view and that the grove cannot be treated as separable for although the mortgagee might remove the timber, that would be destructive of the land. In the latter case, the court allowed the mortgagor a grove of 110 mango trees as an inseparable accession, as they had been planted without his consent. The distinction between these two cases is that in the former, the trees were regarded as separable, and in the latter as inseparable. This, it is submitted, is a question of fact. If the trees are young saplings, the mortgagee may remove them or receive compensation, but if the trees are old trees deeply rooted, the mortgagor is entitled to keep them if they have been planted without his consent. In another case, the grove was planted with the mortgagor's consent, and the mortgagee was allowed compensation.[1160] The Bombay High Court has held that, irrespective of whether the mortgagor can claim a tree planted by the mortgagee as an accession, the mortgagee does not commit waste if he cuts down a tree planted by himself, in the absence of evidence that it is within the meaning of section 76(e), destructive or permanently injurious to the property.[1161]

1151. *Ram Lagan v Mary Coffin,* 97 IC 159 : AIR 1926 Pat 572.
1152. *Maung Shwe v Ponniah,* (1923) 1 Bur LJ 262 : 82 IC 787 : AIR 1923 Rang 127; *Tha Dun v Tha Zan,* 11IC 808.
1153. *Durga Singh v Naurang,* (1895) ILR 17 All 282.
1154. *Arunachella v Sithayi,* (1896) ILR 19 Mad 327; *Rupan v Champa,* (1915) ILR 37 All 81 : 26 IC 521; *Sammo v Abdul Wahid,* (1883) All WN 208.
1155. *Rajaram v Vithal,* (1914) 10 Nag LR 166.
1156. *Zubeda v Sheo Charan,* (1900) ILR 22 All 83; *Madho Ram v Shamsuddin,* (1883) All WN 203; *Jahangir v Ram Harakh,* 92 IC 262.
1157. *Bakshiram v Darku,* (1873) 10 Bom HCR 369.
1158. *Raghunandan Rai v Raghunandan,* (1921) ILR 43 All 638 : 61 IC 812 : AIR 1921 All 353; *Lallu Singh v Raghunandan,* 85 IC 690 : AIR 1925 All 794; *Ram Brichh Singh v Chhakauri Singh,* 86 IC 929 : AIR 1925 All 748.
1159. *Nagesgar Rai v Nand Lal,* (1926) ILR 48 All 70 : 88 IC 908 AIR 1926 All 67; followed in *Ma E v Maung Po Ko,* (1930) ILR 8 Rang 233 : 126 IC 538 : AIR 1930 Rang 63 and *Ajodhya v Indra,* 113 IC 405 : AIR 1979 All 330.
1160. *Parmanand Pandit v Mata Din,* (1925) ILR 47 All 582 : 87 IC 477 : AIR 1925 All 427.
1161. *Ramchandra v Shripati,* (1926) ILR 50 Bom 692 : 99 IC 400 : AIR 1926 Bom 595.

A house has been held to be an accession that is separable,[1162] but that view had been dissented from.[1163] In an Allahabad case,[1164] the mortgagee rebuilt a house that was in a dilapidated condition when mortgaged, and the court held that as the house had already fallen down, there was no question of preserving it from destruction, and that the mortgagor was not liable for the cost of rebuilding. Such a case would now probably fall under section 63A.

When the mortgagee had evicted a tenant of tenancy lands, the lands are an accession to the mortgaged property to which the mortgagor is entitled.[1165] The same rule applies when the mortgagor is a *khot,* and the mortgagee purchases *khot nisbat* land without the *khot's* permission.[1166]

[1167][**63A. Improvements to mortgaged property.**—(1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.]

Synopsis

(1) Amendment 613
(2) Applicability 613
(3) Contract to the Contrary 614

(1) Amendment

This section was inserted by the amending Act 20 of 1929. The object underlying section 63A is to prevent the mortgagee from improving the property in such a way as to make it impossible for the mortgagor with his means to redeem the property.[1168]

(2) Applicability

The present section lays down a uniform rule, and provides that the mortgagor is liable to pay the cost of the improvements only if they are:

(1) necessary to preserve the property from destruction or deterioration; or

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1162. *Gopi Lal v Abdul Hamid,* (1928) 26 All LJ 887 : 116 IC 91 : AIR 1928 All 381.
1163. *Nannu Mal v Ram Chandra,* (1931) ILR 53 All 334 : 132 IC 401 : AIR 1931 All 277.
1164. *Katlu v Ganesh,* 116 IC 747 : AIR 1929 All 348.
1165. *Ram Rai v Maheshwar Prasad,* 78 IC 466 : AIR 1925 Pat 336; *C Venkatachariar v Srinivasa,* 4 IC 357; *Mohanlal v Chaodhry,* (1901) 14 CPLR 169.
1166. *Kondu v Mahadev,* (1932) 34 Bom LR 855 : 139 IC 812 : AIR 1932 Bom 526.
1167. Ins. by Act 20 of 1929, sec. 27.
1168. *Md Mohideen Rowther v NNH Mohd Mohideen Rowther,* AIR 1960 Mad 24.

(2) necessary to prevent the security from becoming inadequate; or

(3) done under the orders of a public authority such as a municipality.

If the improvement fulfils any one of these tests, the cost is allowed to the mortgagee as an addition to the principal money secured by the mortgage, interest at the rate specified in the section is allowed on the cost. Profits due to the improvements are credited to the mortgagor.[1169] Where a *kutcha* building was demolished and a *pucca* building erected in its place, it was held that it was not an improvement for the preservation of the property and the mortgagor was not liable for its act, nor could he claim the profits arising therefrom.[1170] In the case of accidental destruction by fire, the mortgagee would not, it is submitted, be allowed to re-build a whole house as in the case already cited,[1171] but he would have to pursue his remedy under section 68. Improvement to agricultural land so as to improve its yield is not within the section,[1172] nor is the construction of a well on such land.[1173] If the improvement is not permanent, the mortgagee is entitled in Punjab to remove the material,[1174] but even this has been denied to the mortgagee by the Patna High Court when he made new constructions.[1175]

Where the mortgagee, in making improvements, is not acting bona fide, he is not entitled to claim their cost under section 63A or section 72.[1176]

Even though the mortgagee might have spent on improvements of the mortgaged property, he would not be entitled to the same in final decree proceedings if he permits the preliminary decree to attain finality without contesting the same in view of section 97 of Code of Civil Procedure.[1177] Once the mortgage money is deposited with notice, the contractual relationship of mortgagor and mortgagee ceases and, therefore, the mortgage can no longer continue. The right of the mortgagee to remain in possession is also co-terminus and the mortgagee's possession thereafter is unlawful. In such circumstances, the mortgagee is not entitled to get any improvement which has been effected after the deposit of the mortgage money, and value of improvements.[1178]

(3) Contract to the Contrary

The section safeguards the right of private contract. The terms of the mortgage deed may allow the mortgagee to make improvements and to charge the cost to the mortgagor and in that case, the mortgagee is entitled to a charge under the contract. Instances of such contracts are cited below.[1179] A condition allowing the mortgagee to make reasonable improvements will not justify the demolition and rebuilding of the house at a cost equivalent to nine times the mortgage debt.[1180] In one reported case,[1181] the mortgagee was by the terms of the deed

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1169. *Cf Bompas v King*, (1886) 33 Ch D 279, p 288; *Wasu Ram v Mahomed Ramzan*, AIR 1940 Lah 199 : 188 IC 570.
1170. *Ram Asraj v Hiralal*, AIR 1949 All 681.
1171. *Manchersha v Kamrunisa*, (1869) 5 Bom HCR 109.
1172. *Rup Ram v Munshi Chillu*, (1960) 62 Punj LR 480 : AIR 1960 Punj 480 (assumed that section applied).
1173. *Fayaz Hussain v Chapi Hussain*, AIR 1951 Ajm 10.
1174. *Pal Singh v Bhola Singh*, 149 IC 964 : AIR 1934 Lah 242.
1175. *Gyan Chand v Ram Prasad*, AIR 1960 Pat 503.
1176. *Varadappa Naicker v Appavi Gounder*, AIR 1973 Mad 454 : (1973) 1 Mad LJ 346.
1177. *MG Eswara Rao v Rabiyabi*, AIR 2000 Kant 232.
1178. *Chinnathampi Nadar Chinnyyan Nadar v Ponnamma Pillai Prasannakumari Amma*, AIR 2004 Ker 123, p 124.
1179. *Mahl Singh v Amar Nath*, (1926) ILR 7 Lah 212 : 94 IC 152 : AIR 1926 Lah 430; *Qasim Bux v Bhagwandeen* 126 IC 397 : AIR 1930 Oudh 337; *Abdul Aziz v Rahmat Ullah*, 148 IC 234 : AIR 1933 Lah 155; *Muhmmad Rowther v Mohammad M Rowther*, AIR 1960 Mad 24.
1180. *Surapur v Diwan Chand*, 59 IC 764; *Kukaji v Mishrilal*, AIR 1952 MB 6.
1181. *Sakharamshet v Amtha*, (1890) ILR 14 Bom 28; *Cheddi Lal v Balu Nandan*, AIR 1944 All 204.

allowed to rebuild in the event of destruction of a house by fire. On the other hand, if the mortgagee is prohibited from making improvements, the application of this section would be excluded. There may be cases in which the contract may provide that the improvements belong to the mortgagor. In such cases, the mortgagor is not liable to pay costs of the improvements except in cases provided for in sub-section (2). In such cases, if the improvements are such that they cannot be severed from the land and taken away by the mortgagee, the mortgagor must be made liable to pay the costs of such improvements as he will have the benefit of them. In Malabar, a usufructuary mortgage carries with it a customary incident that the mortgagee may affect improvements and claim costs.[1182] A mortgagee ought not to be allowed to improve the property as he likes; and a condition to pay for all such improvements, though valid for the purposes of section 63A(2), may amount to a clog on the equity of redemption.[1183]

64. Renewal of Mortgaged lease.—Where the mortgaged property is a lease [1184][***] and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Synopsis

(1) Amendments ..... 615 (2) Renewal of Mortgaged Lease 615

(1) Amendments

The old section referred to a lease for a term of years. The words "for a term of years" have been omitted by the amending Act 20 of 1929 as unnecessary.

(2) Renewal of Mortgaged Lease

The mortgagee obtaining a renewal of a lease is one particular mode of accession. Under illustration (d) to section 3 of the Specific Relief Act, 1877,[1185] a mortgagee obtaining a renewal of a lease in his own name is a trustee for those interested in the original lease. In a case before the Privy Council,[1186] their Lordships said that this section may be said to give statutory effect to the rule in *Rakestraw v Brewer*[1187] referred to in *Rajah Kishendatt v Rajah Mumfaz Ali*,[1188] as it was apparently thought better to provide for this particular acquisition by the mortgagee instead of leaving it to the general provisions of section 90 of the Indian Trusts Act, 1882. In *Rakestraw v Brewer*,[1189] there was a mortgage of a lease of chambers in the Temple renewed for an additional term as a favour to the mortgagee who was a brother of a Bencher of the Inn, but the mortgagor was allowed to redeem and this was for the reason that "this additional term comes from the old root, and is of the same nature, subject to the same equity of redemption." The same principle was applied to a mortgage of a *jote*,[1190] and

1182. *Sundaram Aiyer v Valia*, AIR 1947 Mad 197.
1183. *Mammunhi Beary v Neelamma*, AIR 1976 Kant 21.
1184. The words "for a term of years" omitted by Act 20 of 1929, sec. 28.
1185. Section 2 of the Act of 1963, which repeals and re-enacts the Act of 1877, and which corresponds to section 3 of the old Act, contains no illustrations.
1186. *Sorabjee v Dwarkadas*, 59 IA 366 : (1932) 36 Cal WN 947 : 56 Cal LJ 65 : 63 Mad LJ 116 : 34 Bom LR 1310 : (1932) All LJ 889 : 138 IC 557 : AIR 1932 PC 199.
1187. *Rakestraw v Brewer*, (1729) P Wms 511.
1188. *Rajah Kishendatt v Rajah Mumfaz Ali*, (1880) ILR 5 Cal 198 : 6 IA 145.
1189. *Rakestraw v Brewer*, (1729) 2 P Wms 511, p 513.
1190. *Baijnath Singh v Harikishen*, (1901) 6 Cal WN 372.

also to a case where the mortgagee of a leasehold with option to purchase the freehold reversion had purchased the freehold reversion.[1191]

Under section 72(e), the mortgagee is entitled to recover the cost of renewal, and may add it to the mortgage money. This is also the English law.[1192]

65. Implied contracts by mortgagor.—In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee,—

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

(b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(d) and, where the mortgaged property is a lease [1193][***] that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all the claims sustained by reason of the non-payment of the said rent or the non-performance or non- observance of the said conditions and contracts;

(e) and, where the mortgage is a second or subsequent encumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior encumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior encumbrance.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

1191. *Nelson v Hannam,* (1943) Ch 59 : [1942] 2 All ER 680.
1192. *Manlove v Bale and Bruton,* (1688) 2 Vern 84; see Fisher & Lightwood, *Law of Mortgage,* 8th edn, p 562.
1193. The words "for a term of years" omitted by Act 20 of 1929, sec. 29.

Synopsis

(1) Amendment 617
(2) Contract to the Contrary 617
(3) Estoppel 617
(4) Clause (a): Covenant for Title..... 617
(5) Clause (b): Defence of Title..... 618
(6) Clause (c): Public Charges..... 618
(7) Clause (d): Leaseholds..... 619
(8) Clause (e): Prior Mortgages 619
(9) Benefit of the Contracts 619

(1) Amendment

The amendment was brought in this section by the amending Act 20 of 1929.

(2) Contract to the Contrary

The mortgagor's covenants implied by this section are subject to any express contract the parties may have entered into. Such a contract may be presumed when the mortgagee was fully aware of the nature and extent of the mortgagor's title.[1194]

(3) Estoppel

Apart from the implied covenants for title referred to in this section, there is a title by estoppel, for a mortgagor cannot derogate from his grant so as to defeat the mortgagee's title;[1195] nor can the mortgagor set up a title of a third person;[1196] or allege that the property does not belong to him.[1197] Even when the mortgagor is a trustee he has not been allowed to set up the trust as a defence for himself.[1198] Justice Banerjee in *Srimati Mallika v Ratanmani*,[1199] held that there was no estoppel when the mortgagor was a trustee for a public purpose. The correctness of this decision has been doubted;[1200] but in such a case there is no estoppel against a succeeding trustee.[1201] The principle of estoppel is, however, not applicable when the mortgage is illegal.[1202]

A mortgagee is precluded from denying the title of the mortgagor, but this principle would not apply where the mortgagee in possession is evicted by a person having paramount title.[1203]

(4) Clause (a): Covenant for Title

The mortgagor's covenant for title is similar to that of a vendor under section 55(2). It is twofold:

(1) as to the quantum of interest; and

(2) as to the interest being transferable.

1194. *Parasurama v Kanhunni*, (1908) 4 Mad LT 437.
1195. *Hillaya Subbaya v Narayanappa*, (1912) ILR 36 Bom 185 : 12 IC 913; *Chotte Lal v Sheopal*, (1911) ILR 33 All 335 : 9 IC 217; *Abdul Ahad v Brij Narain Rai*, (1935) All LJ 214 : 153 IC 984 : AIR 1935 All 269.
1196. *King v Smith*, (1900) 2 Ch 425; *Debendra Nath v Mirza Abdul*, (1909) 10 Cal LJ 150 : 1 IC 264 : citing *Doe v Stone*, (1846) 3 CB 176; *Joti Prasad v Aziz Khan*, (1908) 6 All LJ 5; *Ramjiban v Dhiku*, (1912) 16 Cal LJ 264 : 16 IC 246; *Damodar v Rama Row*, (1915) ILR 39 Mad 101 : 29 IC 192.
1197. *Bholanath Sen v Balaram Das*, (1922) 27 Cal WN 607 : 70 IC 932 : AIR 1922 PC 382.
1198. *Gulzar Ali v Fida Ali*, (1884) ILR 6 All 24; *Balu Brij Ratan Das v Raghunandan*, 71 IC 944 : AIR 1923 AP 203.
1199. (1897) 1 Cal WN 493.
1200. *Mahamaya Debi v Haridas Haldar*, (1915) ILR 42 Cal 455 : 27 IC 400, p 469.
1201. *Narayan v Chintaman*, (1881) ILR 5 Bom 393; *Shri Ganesh v Keshavrav*, (1891) ILR 15 Bom 625; *Nandan v Jumman*, (1912) 34 All 640 : 17 IC 632.
1202. *Madras Hindu Mutual Benefit Permanent Fund v Ragava Chetti*, (1896) ILR 19 Mad 200.
1203. *N Nanjappa v Siddiah*, AIR 1973 Mys 28.

The mortgagor covenants his title and his power to deal with it. However, in a mortgage suit, the question of the mortgagor's title is, in the absence of fraud, irrelevant as between the parties. The mortgagee takes whatever title the mortgagor has, and is entitled to enforce the mortgage against the mortgagor even when both sides knew that the mortgagor's title was imperfect.[1204]

ILLUSTRATION

A mortgaged property to *B*. *A* sold the equity of redemption to *C*. On *C*'s death *B* sued *C*'s sons for sale of the property mortgaged. *C*'s sons pleaded that the property was wakf and that *A* was not entitled to mortgage it. Held that this defence was barred by section 65(a).[1205]

As there is no estoppel against a statute, it would be open to the mortgagor to show that the mortgage was forbidden by law, e.g. an occupancy holding in the United Provinces.[1206]

The combined effect of sections 8 and section 65(a) is that the mortgagor transfers all the interest he has,[1207] subject of course, to the right of redemption that is reserved. A breach of the covenant for title gives the mortgagee the right to sue for the mortgage-money under section 68. In a Rangoon case,[1208] a mortgagee was allowed compensation for breach of the covenant for title after he had purchased the property mortgaged in execution of his decree for sale on the mortgage,[1209] but not where the mortgage debt is satisfied.[1210] It has been said that this clause imposes no duty on the mortgagor to disclose an encumbrance.[1211] However, it is submitted that if the mortgagor mortgages, an unencumbered property which is subject to an encumbrance, he commits a breach of the covenant that the interest he professes to transfer subsists.

(5) Clause (b): Defence of Title

The mortgagee being entitled to the full benefit of the security has a right to protect the title of the mortgagor. The mortgagor is, therefore, under an implied covenant to defend the title if he is himself in possession or to assist the mortgagee in defending the title if the mortgagee is in possession.

(6) Clause (c): Public Charges

The mortgagor when in possession, and after his death his heir, is under a liability to pay public charges, such as government revenue and municipal taxes.[1212] The same liability attaches under section 76(c) to the mortgagee when in possession. The Madras High Court has held that when the mortgagor sells the equity of redemption, the purchaser is under no obligation to the mortgagee to pay public charges, though it may be to his interest to do so.[1213] The extinction of the right of redemption by a court sale on the mortgagee's decree puts an end to the implied covenant of the mortgagor.[1214] If a stranger acquires the equity of redemption by adverse possession, he is under no duty to the mortgagee to pay the revenue and if after such acquisition, the land is sold for arrears of revenue and purchased by him, he holds it free of the mortgage.[1215]

1204. *Dhondappa v Kasabai*, (1948) ILR Nag 936.
1205. *Achhaibar Singh v Rajmati*, (1929) ILR 51 All 802 : 121 IC 111 : AIR 1929 All 483; *Hindustan Ideal Insurance Co v P Satteyya*, AIR 1961 Andh Pra 183.
1206. See *Lallu Singh v Rama Nandan*, (1930) ILR 52 All 281 : 124 IC 733 : AIR 1930 All 136.
1207. *Chiranji Lal v Bhagwan*, 8 IC 826.
1208. *Ma Gun v Maung Lu Gale*, 85 IC 223 : AIR 1925 All 130.
1209. *Perumal Konar v Maruthanayagam*, (1933) 43 Mad LW 627 . 165 IC 559 : AIR 1933 Mad 433.
1210. *Arulayi v Jagadeesiah*, (1963) 2 Mad LJ 365 : AIR 1964 Mad 122.
1211. *Ramkrishna v Ganesh Narain*, 150 IC 20 : AIR 1934 Nag 149.
1212. *Balwantrao v Tulsa*, 171 IC 740 : AIR 1937 Mad 225.
1213. *Srinivasa Chari v Gnanaprakasa*, (1907) ILR 30 Mad 67, p 70.
1214. *Balkrishna Muhadshet v Vishvanath*, (1895) ILR 19 Bom 528.
1215. *Subbiah v Ram Reddi*, (1916) ILR 39 Mad 959 : 33 IC 326.

If the mortgagor fails to pay and the property is sold for arrears of revenue, the mortgagor if he purchases the property, is still subject to the mortgage, for he cannot take advantage of his own wrong in order to better his position.[1216] The mortgagor has no claim against the mortgagee for moneys spent in payment of public charges whether accruing during, or before, the period of the mortgage, for he pays them for his own benefit, and if the mortgagee pays these on behalf of the mortgagor, he cannot recover them from a subsequent mortgagee.[1217] A mortgagee, on the other hand, is entitled to be reimbursed for expenses incurred in the payment of public charges; and if the land is sold through no fault of his, he is entitled to a charge on the surplus sale proceeds.

(7) Clause (d): Leaseholds

If the mortgaged property is leasehold, the mortgagor covenants that he has paid the rent, and observed the conditions of the lease for the period anterior to the mortgage. For the future, he covenants that as long as the mortgagee is not in possession, he will pay the rent and perform the conditions of the lease. This clause has been held to imply that the mortgagee is liable to pay the rent when he takes possession.[1218] This is a liability to the mortgagor, for the mortgagee does not become liable to the lessor on the covenants in the lease that run with the land, unless the mortgage is in English form, and involves a complete transfer. There is no covenant by the mortgagor to renew the lease.

(8) Clause (e): Prior Mortgages

There is an implied covenant that the mortgagor will discharge prior mortgages, for otherwise, the mortgagee may be deprived of his security. A mortgagor left a sum of money with a mortgagee and empowered him to redeem a prior mortgage. The sum proved to be insufficient, and the mortgagor was held liable under the principle of this clause to pay the excess amount incurred in discharging the prior mortgage.[1219]

This covenant does not affect the mortgagee's right to redeem prior encumbrances himself under section 92. A breach of this covenant entitles the mortgagee to sue for the mortgage money under section 68, although there may be no personal covenant in the mortgage.[1220] If the mortgagee was not informed of the previous mortgage, he has a cause of action to sue for the mortgage money as soon as he discovers it.[1221]

(9) Benefit of the Contracts

The benefit of the covenants implied by this section runs with the land, so that not only the mortgagee, but anyone claiming under him is entitled to enforce them. The burden of the covenants cannot be enforced against a purchaser of the equity of redemption.[1222]

[1223][**65A. Mortgagor's power to lease.**—(1) Subject to the provisions of sub- section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

1216. *Sanagapally Lakshmayya v Intoori*, (1903) ILR 26 Mad 385; *Po Due v KMTTS Chetty*, 51 IC 574.
1217. *Syed Ibrahim v Armugathayee*, (1915) ILR 38 Mad 18 : 16 IC 877.
1218. *Vithal Narayan v Shriram Savant*, (1905) ILR 29 Bom 391 : 7 Bom LR 313; citing *Kannye Loll v Nistoriny*, (1884) ILR 10 Cal 443; *Macnaghten v Bhikaree*, (1878) 2 Cal LR 323.
1219. *Gauri Shankar v Bhairon*, 92 IC 17 : AIR 1926 Oudh 207.
1220. *Singjee v Tiruvengadam*, (1890) ILR 13 Mad 192.
1221. *Radha Churn v Parbuttee Churn*, (1876) 25 WR 51.
1222. *Srinivasa Chari v Gnanaprakasa*, (1907) ILR 30 Mad 67, p 71.
1223. Ins. by Act 20 of 1929, sec. 30.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage,

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance,

(c) No such lease shall contain a covenant for renewal,

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made,

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

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(1) Amendment

This section was inserted by Act 20 of 1929.

(2) Whether Section Retrospective

Section 63 of the amending Act 20 of 1929 expressly enacts that this section shall not have retrospective effect.[1224] The validity of leases granted by a mortgagor whose rights were governed under a mortgage deed executed prior to 1 April 1930 must be determined with reference to the law as it stood prior to the enactment of section 65A.[1225]

(3) Mortgagor's Power to Lease

As no provision was made in the TP Act, before the insertion of this section, for the mortgagor's power to lease, the cases were not consistent. Section 65A was introduced by the amending Act of 1929 in recognition of the mortgagor's powers exercised bona fide to grant lease of the mortgaged property in the usual course of management, makes provision with

1224. *Dasain Sahu v Ramdulari*, (1931) ILR 10 Pat 332 : 133 IC 169 : AIR 1931 Pat 210; *Mallappa v Shivappa*, (1949) 51 Bom LR 820 : AIR 1950 Bom 71.
1225. *Mongru Mahto v Thakur Taraknath ji Tarakeshwar Math*, [1967] 3 SCR 125, p 131 : AIR 1967 SC 1390.

regard to exercise of such power by the mortgagor, while the mortgage subsists and mortgagor is in lawful possession of mortgaged property.[1226]

The present section confers upon the mortgagor in possession, a statutory power of leasing, subject to any express provision in the deed of mortgage. The section has been said in the Rangoon case[1227] to embody the same law as in the Calcutta case.[1228] Under this section, the validity of a lease granted by a mortgagor in possession is determined with reference to the section, and the terms of the deed of mortgage without regard to its effect on the mortgagee's security. Such a lease will not bind either the mortgagee, or a person claiming through him,[1229] unless the mortgagee has given his consent to the lease. Such consent may be given in the mortgage-deed itself,[1230] and may be inferred from conduct which may also create an estoppel,[1231] but such acquiescence does not arise merely because the mortgagee allows the tenant to remain in possession,[1232] or waits for eight months before taking steps to evict him.[1233] It is submitted, on a parity of reasoning that this new section, which expressly gives power to the mortgagor in possession to grant a lease binding on the mortgagee, does not take away the old right of the mortgagor to grant a lease which, without the consent of the mortgagee, will not be binding on the mortgagee, but will be binding on the mortgagor. Therefore, if the mortgagor grants a lease which is not in conformity with this section, the lease, while it will not be binding on the mortgagee, will still be binding on the mortgagor, and such a lessee will be entitled to redeem the mortgage. A lease for seven years, which is bad under this section, would be valid as a lease from year to year.[1234] When the mortgage deed does not prohibit a mortgagor from making a lease of the mortgaged property and so long as the lease satisfies the requirements of section 65 A(2), a lease made by a borrower as a mortgagor will be valid and binding on the secured creditor as a mortgagee.[1235] A person cannot claim the protection as a protected tenant under an unregistered lease deed executed before the property was mortgaged with the Bank and the fact of the occupation of such tenant was not disclosed to the Bank. Thus where the Bank gave an advertisement in the newspaper for auction of flats and T filed a writ for protection of tenancy, it was held that in absence of proof of delivery of possession to him and payment of rent there would be doubts created with respect to the genuineness of the claim and he cannot be treated as a protected tenant.[1236] In *Kelukutty P M v Young Men's Christian Association*,[1237] A had taken a loan from the bank , *B* while keeping its property as security. through an unregistered mortgage deed. The bank served a notice and by way of this notice, any further lease of the mortgaged property now required the written consent of the secured creditor, i.e. the bank. The question before the Court was whether the leases granted after the notice were valid under law. Noting that the deed was unregistered, the Court held that the document could not be treated as a document transferring any right in the land and thus did not constitute a mortgage deed. Section 65A is the overarching provision regulating the right of the borrower

1226. *Dev Raj Dogra v Gyan Chand Kain*, (1981) 2 SCC 675 : AIR 1981 SC 981.
1227. *MPMS Firm v Ko Pyu*, (1932) ILR 10 Rang 210 : 138 IC 213 : AIR 1932 Rang 113.
1228. *Madan Mohan Singh v Raj Kishore*, (1916) 21 Cal WN 88 : 39 IC 182.
1229. *Rust v Goodale*, (1957) Ch 33.
1230. *Lever Finance Ltd v Trustee of Needleman*, (1956) Ch 375 : [1956] 2 All ER 378.
1231. Ibid.
1232. *Taylor v Ellis*, (1960) Ch 368 : [1960] 1 All ER 549.
1233. *Parker v Braithwaite*, [1952] 2 All ER 837 : (1952) 2 TLR 371.
1234. *Abdul Rahim Rowther v Swaminatha Odayar*, (1955) ILR Mad 744 : (1955) 1 Mad LJ 322 : AIR 1956 Mad 19.
1235. *Harshad Govardhan Sondagar v International Assets Reconstruction Company Ltd.*. 2014 (6) SCC 1 : JT 2014 (5) SC 75 : (2014) 5 MLJ 613(SC) : 2014 (4) SCALE 484.
1236. *State Bank of India, Mumbai v Rajesh Khetan*, AIR 2017 Pat 141 : LNIND 2017 PAT 345 : 2017 (4) PLJR 251.
1237. *Kelukutty P M v Young Men's Christian Association*, ILR 2016 (2) Kerala 5.

to lease a mortgaged property. The Court held that the definition of mortgage under the TP Act including section 65A had to be complied with while execution of the lease deed after a mortgage. Therefore, tenants had no protection from dispossession under the 2002 Act as the lease deed was in violation of section 65A(2).

(4) Interest of Lessee

A lease granted by the mortgagor, out of ordinary course of management, though not binding on mortgagee, is binding as between mortgagor and lessee. Such a lessor acquires an interest in the right of redemption, and is entitled to redeem. If such a lease is created before the institution of a suit relating to mortgage, the lessee must be joined as party to the suit under O 34, rule 1 of Code of Civil Procedure, otherwise he will not be bound by decree passed in the suit, and will continue to retain his right of redemption. However, in view of section 52, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation. If the property is sold in the execution of the decree passed in the suit, the lessee cannot resist a claim for possession by auction-purchaser. The lessee could apply for being joined as a party to the suit and ask for an opportunity to redeem the property. However, if he allows the property to be sold in execution of the decree, he loses his right of redemption.[1238]

(5) Contract to the Contrary

The right of contract is saved by sub-section (3), for under the sub-section, the terms of the mortgage deed may altogether exclude the power to lease. If the power is varied or extended, such varied or extended power must be exercised according to the terms of the deed, and according to such of the provisions of the section as are not varied.[1239] If the deed altogether and absolutely excludes the power to lease, a lease in contravention of such covenant will amount to a breach of that covenant. However, where the covenant in the deed only provides that the mortgagor shall not without the consent of the mortgagee exercise the powers conferred by this section and the mortgagor without such consent grants a lease, the question arises whether it would amount to a breach of that covenant. This interesting question arose in *Iron Trade Employers' Insurance Association's* case,[1240] and was answered in the negative. The covenant adds an additional condition to the statutory conditions and prohibits the granting of a lease which will be binding on the mortgagee and, therefore, the granting of the lease without consent cannot be said to be exercising the powers conferred by the statute, but is rather the exercise of the common law right which does make the lease binding on the mortgagee. The lease not being binding on the mortgagee cannot be said to be under the statute and, therefore, the granting of such a lease is not a breach of the covenant. The English statute contains provisions for the surrender of a lease which are not reproduced in the section.

(6) *Kanom*

The case of a *kanom* granted, before the enactment of the section was decided on the principle of the effect of the lease on the mortgagor's security. A *kanom* is a combined lease and mortgage. It is granted by the owner or *jenmi*, and is not redeemable for 12 years. At the end of 12 years, the *jenmi* may redeem or grant a renewed *kanom* on receipt of a renewal fee. The *jenmi* in this case gave a simple mortgage of property which was subject to two *kanoms*. During the pendency of the simple mortgage, the period of 12 years expired; and the *jenmi* instead of redeeming the *kanoms* granted renewed *kanoms*, and received renewal fees. The

1238. *Mongru Mahto v Thakur Taraknath Ji Tarakeshwar Math,* [1967] 3 SCR 125 : AIR 1967 SC 1390.
1239. *Public Trustee v Lawrence,* (1912) 1 Ch 789 : [1911-13] All ER Rep 670.
1240. (1937) 1 Ch 313 : [1937] 1 All ER 481.

simple mortgagee brought the property to sale subject to the old *kanoms* which were before his mortgage. He purchased the property himself and sought to evict the renewed *kanomdars*, whose *kanoms* were subsequent to his mortgage. The *kanomdars* did not seek as mortgagees to redeem the simple mortgagee auction purchaser, but claimed to remain in possession as lessees for the remainder of their terms of 12 years each. The court held (1) that as leases the renewed *kanoms* were invalid, as they had so impaired the security that the sale had not realised the mortgage money; and (2) the *kanom* transaction being indivisible, the *kanoms* were also invalid as puisne mortgages.[1241]

(7) Covenant Against Alienation

Apart from this section it has been held that when a mortgage contained the usual covenant against alienation during the term of the mortgage, the covenant only created a personal liability as between the mortgagor and the mortgagee, and that a lease granted despite such a covenant was only voidable by the mortgagee so far as it encroached upon the right to the maintenance of his security.[1242] But under the present section, a lease in violation of such a covenant though valid by estoppel between the mortgagor and the lessee, would be void as between the mortgagee and the lessee.[1243] The lessee might however, avoid eviction by redeeming the mortgage;[1244] and it has been held that the mortgagee should give the lessee an opportunity of redeeming.[1245]

66. Waste by mortgagor in possession.—A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

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(1) Waste

The mortgagor when in possession is never liable to account for rent and profits received by him;[1246] and may do all such acts as are preferable to his qualified ownership, and which are consistent with the maintenance of sufficient security for the mortgagee. Thus, in *Humphreys v Harrison,*[1247] Lord Eldon refused an injunction to prevent a mortgagor cutting

1241. *Moidunni Haji v Madhavan Nair,* (1933) 65 Mad LJ 826 : 148 IC 1115 : AIR 1933 Mad 876.
1242. *Chunni v Thakur Das,* (1876) ILR 1 All 126; *Ali Hasain v Dhirja,* (1881) ILR 4 All 518; *Radha Pershad v Monohur,* (1881) ILR 6 Cal 317; *Niader Singh v Ramchandra,* (1935) All LJ 360 : 154 IC 1009 : AIR 1935 All 511.
1243. *Trent v Hunt,* (1853) 9 Ex 14.
1244. *Tarn v Turner,* (1888) 39 Ch D 456 (CA); *Paya Matathil v Kovamel,* (1896) ILR 19 Mad 151; *Raghunandan Prasad v Ambika,* (1907) ILR 29 All 679.
1245. *Radha Pershad v Monohur,* (1881) ILR 6 Cal 317.
1246. *Higgins v York Building Co,* (1740) 2 Atk 106; *Yorkshire Banking Company v Mullan,* (1887) 35 Ch D 125; *Trent v Hunt,* (1853) 9 Ex 14.
1247. *Humphreys v Harrison,* (1853) 9 Ex 14 : (1820)1 Jac AW 581.

underwood as it was an ordinary act of husbandry. He is not responsible for permissive waste, i.e., for omission to repair or to prevent natural deterioration. The section, therefore, has no application to the grant of a lease by the mortgagor;[1248] but he must not commit destructive waste, i.e., acts of waste so substantial as to reduce the value of the mortgagee's security below the standard fixed in the explanation. Even felling timber may not be waste if the sum advanced on the mortgage is small in comparison with the value of the land, and in *King v Smith,*[1249] VC Wigram said:

> I think the question which must be tried is whether the property the mortgagee takes as a security is sufficient in this sense — that the security is worth so much more than the money advanced — that the act of cutting timber is not to be considered as substantially impairing the value which was the basis of the contract between the parties at the time it was entered into.

In a Madras case,[1250] a co-tenant of the mortgagor felled trees during the pendency of the mortgagee's suit for sale so that there was a deficit in the price realized at the sale. The mortgagee was held entitled to sue for damages for waste on the ground that he had the right to have the mortgaged property secured from deterioration in the hands of the mortgagor, or any other person to whose rights those of the mortgagor were superior. In another Madras case, the first defendant mortgagor sold the mortgaged house to the second defendant who pulled it down, and sold the materials. The mortgagee was given a decree for the sale proceeds in the hands of the first defendant, and for the balance of the mortgage money against the second defendant.[1251] Mortgagors who had expressed their intention to remove the machinery and sell it must be restrained from doing that. However, if they want to make a second mortgage or to sell the equity of redemption, they cannot be restrained from doing that.[1252]

The principle of this section was applied in Punjab where it was held that the validity of a grant by the mortgagor of a right to take water from a well on the premises mortgaged depended, upon whether it would reduce the value of the security below the prescribed standard.[1253]

English cases supply further instances of waste by a mortgagor in possession, e.g. felling timber,[1254] undermining, binding,[1255] and removing fixtures.[1256]

(2) Leases

Prior to the insertion of section 65A in the TP Act, the validity of the mortgagor's leases was determined with reference to its effect upon the security.[1257] In an Allahabad case, a lease detrimental to the interests of the mortgagee was held to fall within the mischief of this rule.[1258] Section 66 confers a wider power on the mortgagor and to determine whether the mortgagor has exceeded his power in granting a permanent lease during the continuance of a simple mortgage, the only test which must be applied is to see whether the act of the mortgagor impairs the security so as to render it insufficient. If the security is not being

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1248. *Raja Kamakshya Narayan Singh v Chohan Singh,* [1953] SCR 108, p 117 : [1952] SCJ 553 : [1952] SCA 807. And see Transfer of Property Act 1882, section 65 A.
1249. *King v Smith,* (1843) 2 Hare 239, p 244.
1250. *Aiyappa v Kuppusami,* (1905) ILR 28 Mad 208. On appointment of a receiver where security will be rendered insufficient, see *K Kunhambu v Syndicate Bank, Manipal,* AIR 1987 Kant 40, p 47.
1251. *Punnayya v Venkatappa* 91 IC 754 : AIR 1926 Mad 343.
1252. *Sugan Chand v Dina Nath,* AIR 1980 Raj 121.
1253. *Bhagwan Dei v Secretary of State,* (1902) Punj LR 124.
1254. *Usborne v Usborne,* (1740) 1 Dick 75.
1255. *Dugdale v Robertson,* (1857) 3 Jur NS 687.
1256 . *Ellis v Glover & Hobson,* (1908) 1 KB 388.
1257. *Tulsi Ram v Muna Koer,* (1936) ILR 12 Luck 161 : 162 IC 225 : AIR 1937 Oudh 146; *Ramasray Prasad Chaudhari v CG Akins,* 175 IC 279 : AIR 1938 Pat 189. See also notes under section 65A.
1258. *Mallappa v Shivappa,* (1949) 51 Bom LR 820 : AIR 1950 Bom 71.

rendered insufficient, the act is within the competence of the mortgagor. However, it may be condemned as amounting to a destruction or a permanently injurious act.[1259] A permanent lease granted after the property was advertised for sale in the execution of a mortgage decree is granted in bad faith, and is not in the ordinary course of prudent management; such a lease is not binding on the mortgagee.[1260]

(3) Easements

Section 10 of the Indian Easements Act, 1882 prohibits a mortgagor from burdening the mortgaged property, during the continuance of the mortgage, with an easement that is injurious to the security.

(4) Explanation

The standard of value for the security taken under the explanation is the same as that under section 20 (o) of the Indian Trusts Act, 1882, and section 10 of the Indian Easements Act, 1882.

Rights and Liabilities of Mortgagee

67. Right to foreclosure or sale.—In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become [1261][due] to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the court [1262][a decree] that the mortgagor shall be absolutely debarred of his right to redeem the property, or [1263][a decree] that the property be sold.

A suit to obtain [1264][a decree] that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

[1265][(a) to authorise any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or]

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

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1259. *Faqira v Jiwan Singh*, AIR 1947 All 240.
1260. *Mongru Mahto v Thakur Taraknathji Tarakeshwar Math*, [1967] 3 SCR 125 : AIR 1967 SC 1390.
1261. Subs. by Act 20 of 1929, sec. 31, for "payable".
1262. Subs. by Act 20 of 1929, sec. 31, for "an order".
1263. Subs. by Act 20 of 1929, sec. 31, for "an order".
1264. Subs. by Act 20 of 1929, sec. 31, for "an order".
1265. Subs. by Act 20 of 1929, sec. 31, for clause (a).

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interest under the mortgage.

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(1) Amendments

This section was amended by the amending Act 20 of 1929.

(2) Scope

Sections 67 to 77 deal with the rights and liabilities of the mortgagee, just as sections 60 to 66 have dealt with the rights and liabilities of the mortgagor. Sections 67, and 68 to 73 refer to the mortgagee's rights and sections 67A, 76 and 77 refer to the mortgagee's liabilities. Section 67 is the counterpart of section 60, and gives the mortgagee a right of foreclosure or sale in default of redemption by the mortgagor. If the mortgagor has paid or deposited the mortgage-money, there is no occasion for the exercise of the right of foreclosure or sale. Again, if a decree for redemption is made, a suit for foreclosure or sale would be barred, especially as a redemption decree itself provides for sale or foreclosure in default of payment.

(3) Mortgagee Cannot Dispute Mortgagor's Title

Mortgagee always derives his title from his mortgagor. Having come into possession of the property as mortgagee, treating the mortgagor as the full owner, it is not open to the mortgagee to question the title of the mortgagor.[1266] In *Tasker v Small*[1267] Lord Cottenham said:

> To him (mortgagee) it is immaterial, upon repayment of the money, whether the mortgagor's title was good or bad. He is *not* at liberty to dispute it any more than a tenant is at liberty to dispute the landlord's title.

A usufructuary mortgagee cannot deny the title of his mortgagor. Nor can he set up adverse possession, unless he actually leaves the holding and re-enters under a different status.[1268]

1266. *Ishwar Das Jain v Sohan Lal*, (2000) 1 SCC 434, para 32.
1267. *Tasker v Small*, (1837) 3 My & Cr 63.
1268. *Jai Nandan Tewari v Umrao Koeri*, AIR 1929 All 305 : 119 IC 568; *Shri Ram v Thakur Dhan Bahadur Singh*, AIR 1965 All 223.

(4) Mortgagee's Remedies

The mortgagee's remedies by suit are:

(1) on the covenant;

(2) for sale; and

(3) for foreclosure.

There is a remedy on the covenant, only if the mortgage imports a personal liability, express or implied. This is under section 68(a). The suit for sale of the security is a statutory remedy, and avoids the hardship of the forfeiture of a security which may exceed in value the mortgage debt. Foreclosure is a legal term which implies that the relief given by equity against the forfeiture of the security is withdrawn.[1269] The effect of foreclosure, therefore, is that the conditional conveyance becomes absolute, and the property vests absolutely in the mortgagee.[1270] In the case of successive mortgages, the procedure for foreclosure is complicated and dilatory. The rights of the parties are more easily adjusted by an order for sale. The TP Act goes a step further and the amended clause of this section has the effect of abolishing the remedy of foreclosure, except in mortgages by conditional sale and in anomalous mortgages where the parties have by the terms of the deed stipulated for foreclosure.[1271] A mortgagee claiming under a mortgage executed before the TP Act can enforce remedies under this section.[1272]

In a suit for foreclosure, if the plaintiff succeeds, the court shall pass a preliminary decree directing that if the defendant pays into court the amount found or declared due on or before such date as the court may fix, the plaintiff shall deliver to the defendant or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall re-transfer the property to the defendant at his cost, free from the mortgage and from all encumbrances created by the plaintiff. The defendant can make payment into court of all the amounts due before any final decree is passed in a foreclosure suit.[1273]

(5) Contract to the Contrary

The right of redemption is not subject to a contract to the contrary, for the mortgagor requires protection against oppression, but the mortgagee not being in need of the same protection may curtail his right of foreclosure or sale by contract.[1274] Thus, a mortgagee may bind himself not to enforce his security without giving notice on the day after the cultivating season, but that will not affect the mortgagor's right to redeem.[1275] A contract to the contrary may also accelerate the mortgagee's right of foreclosure or sale. A proviso for reconveyance may amount to a contract to the contrary, so that the mortgagee may not take action even though interest is unpaid,[1276] but that depends on the construction of the proviso. Where the proviso is conditional upon interest being paid "as hereinbefore provided", it does not amount to such a contract.[1277]

1269. *Carter v Wake,* (1877) 4 Ch D 605.
1270. *Williams v Morgan,* (1906) 1 Ch 804; *Ladu Chimaji v Babaji,* (1883) ILR 7 Bom 532.
1271. *Ujagar Lal v Lokendra Singh,* (1941) ILR All 240 : (1940) All LJ 111 : 194 IC 520 : AIR 1941 All 169.
1272. *Shero v Chamaru,* AIR 1955 HP 46.
1273. See Code of Civil Procedure 1908, O XXXIV, rules 2, 3; *Bhalubhai Jethabhai Shah v Chhaganbhai Bamanbhai,* AIR 1991 Guj 85, p 90.
1274. *Velu Rengasami v Bal Krishna,* (1902) 12 Mad LJ 366; *Ram Sarup v Gaya Prasad,* 139 IC 61 : AIR 1932 Oudh 178.
1275. *Rarichan v Manakkal,* (1923) 44 Mad LJ 515 : 74 IC 309 : AIR 1923 Mad 553.
1276. *Williams v Morgan,* (1906) 1 Ch 804.
1277. *Karachiwalla v Nanji,* (1959) AC 518 : [1959] 1 All ER 137 (an appeal from Kenya, where the same section is in force).See note 'Default of payment of interest' below.

(6) After the Mortgage Money has become Due

In section 60, the phrase used with reference to the mortgagor's right of redemption is "after the principal money has become due," but there is no significance in this difference, for the mortgagee's right of foreclosure or sale is correlative to the mortgagor's right of redemption. Just as the mortgagor cannot redeem before due date, so also the mortgagee cannot enforce his security before the due date.[1278] It had been held that if no time is fixed for payment, the mortgage money is due on the date of execution,[1279] and the mortgagee, may foreclose at any time[1280] On the other hand, in *Nilkanth Balwant v Vidya Narasingh Bharati,*[1281] the Judicial Committee said that, as there was no specific time for the payment of the mortgage debt, the money did not become due and the cause of action of the mortgagee did not arise until demand for the payment of the mortgage debt was made by the mortgagee, and refused by the mortgagor. In a Madras case,[1282] where in default of payment of interest, the condition was that principal and interest were payable on demand, no demand by the mortgagee before suit was necessary, the words being regarded as technical expression equivalent to "immediately" or "forthwith". However, when the mortgage money was payable "if so required",[1283] or "when you require",[1284] the mortgagee cannot sue for foreclosure until he has made a demand.

(7) Default of Payment of Interest

Default in payment of interest by the mortgagor does not accelerate the mortgagee's right to foreclose, unless it is so expressly provided in the mortgage. An instance of such a provision is the case of *Yeo Htean Sew v Abu Zaffar,*[1285] where the mortgagor covenanted to pay the principal in a year and the interest every month and that in default of paying interest for one month after becoming due, the total sum of principal and interest should thereupon become due and payable.

The Bombay High Court, in the case of a mortgage before the TP Act, followed the rule in *Seaton v Twyford,*[1286] and held that the mortgagor's failure to pay interest and to make good title to part of the property, entitled the mortgagee to sue for sale before the due date.[1287] The court professed to follow the principles of the TP Act, but under this section the mortgagee is unable to realize his security before due date, unless there is a contract to the contrary, and the mortgagor's breach of covenant does not relieve the mortgagee of this disability. In a Madras case,[1288] a covenant to pay interest on specified dates and, in default, at a higher rate, was said to be a contract to the contrary accelerating foreclosure. This again is erroneous, for the higher rate was compensation for breach of the agreement to pay on specified dates, and bore no relation to the mortgagee's right of foreclosure.

1278. *Williams v Morgan,* (1906) 1 Ch 804; *Kannu v Natesa,* (1891) ILR 14 Mad 477; *Kamod v Raja Raghoji* (1902) 15 CPLR 78. See note 'Right of redemption and right of foreclosure co-extensive' under section 60.
1279. *Nilcomal Pramanick v Kamini,* (1893) ILR 20 Cal 269; *Durga Prosad v Mario Galstaun,* AIR 1955 Cal 194.
1280. *Chengiah v Pichayya,* (1907) 17 Mad LJ 177.
1281. *Nilkanth Balwant v Vidya Narasingh Bharati,* (1930) ILR 54 Bom 495 : 57 IA 194 : 126 IC 417 : AIR 1930 PC 188.
1282. *Perumal v Alagirisami,* (1897) ILR 20 Mad 245, p 248. See also *Barkat-un-nissa v Mahbub Ali,* (1920) ILR 42 All 70, p 73 : 52 IA 684.
1283. *Hanmantram Sadhuram v Bowles,* (1884) ILR 8 Bom 561.
1284. *Nettakaruppa v Kumarasami,* (1899) ILR 22 Mad 20.
1285. *Yeo Htean Sew v Abu Zaffar,* (1900) ILR 27 Cal 938 : 27 IA 98; *Perumal Ayyan v Alagirisami,* (1897) ILR 20 Mad 245.
1286. *Seaton v Twyford,* (1870) 11 Eq 591.
1287. *Venkatarao v Mahableshwar,* (1902) ILR 26 Bom 241.
1288. *Subbiah Chetty v Kuppammal,* (1916) 31 Mad LJ 437 : 35 IC 104.

A usual contract to the contrary accelerating the mortgagee's right of foreclosure or sale, is that in case of default in payment of interest on the specified dates, or of any act of the mortgagor which causes loss to the mortgagee, the mortgagee shall have the power to realize the mortgage without waiting for the due date. The Privy Council have held in two decisions that such a condition is exclusively for the benefit of the mortgagee, and that it gives him the option either to enforce his security at once, or if the security is ample, to stand by the investment for the full term of the mortgage.[1289] In the earlier case, their Lordships said that it gives the mortgagee "a right by appropriate action to make the mortgage money immediately due".[1290] Such appropriate action may be a notice of demand,[1291] or the mere filing of a suit.[1292] Interest is as much a charge on the property as the principal.[1293] It is as a rule, accessory to the principal, and not separately recoverable.[1294] There may, however, be cases in which there is a separate and independent covenant to pay interest.[1295] In such cases, the mortgagee may sue for the interest as soon as it falls due. Each default constitutes a separate cause of action, and so a subsequent suit for the principal is not barred.[1296] However, apart from a special stipulation to that effect, there is no right to demand a sale of the mortgaged land for interest in arrears.[1297] The usual proviso for reconveyance may be construed, if so drafted, as a contract to the contrary so as to deprive the mortgagee of his right to take action till the date mentioned therein, even if there is a default in the payment of interest,[1298] but that is a matter of construction in each case.[1299]

(8) Installments

In the absence of a stipulation to that effect, the mortgagee is not bound to accept payment by installments.[1300] But if the mortgage deed makes the amount payable by installments, the mortgagee is entitled to sue for the recovery of each installment from the mortgagor as it falls due.[1301]

(9) Mortgage Money Paid or Deposited

If a usufructuary mortgagee leases the property to the mortgagor for a rent equivalent to the interest so that the lease and the mortgage are one transaction, the rent is part of the mortgage money.[1302] Payment of mortgage money would render the mortgagee's suit

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1289. *Lasa Din v Dulab Kuar,* 59 IA 376 : 138 IC 779 : AIR 1932 PC 207; *Panchan v Ansar Husain,* 53 IA 187 : 99 IC 650 : AIR 1926 PC 85; *Bappu v Venkatachalapathy Ayyar & Co,* (1934) 64 Mad LJ 606 : 148 IC 311 : AIR 1934 Mad 227; *Subbana v Krishna Iyengar,* AIR 1962 Mys 5.
1290. *Panchan v Ansar Husain,* 53 IA 187, p 194 : 99 IC 650 : AIR 1926 PC 85.
1291. *Raghubir Singh v Kumar Rajendra Bahadur Singh,* (1933) ILR Luck 488 : 144 IC 279 : AIR 1933 Oudh 237.
1292. *Abdul Rahman v Sheo Dayal,* (1934) ILR 56 All 496 : (1934) All LJ 188 : 151 IC 900 : AIR 1931 All 152.
1293. *Ganga Ram v Natha Singh,* (1924) ILR 5 Lah 425 : 51 IA 377 : p 379 : 80 IC 820 : AIR 1924 PC 183; *Manghi v Dial Chand,* (1926) ILR 7 Lah 559 : 96 IC 447 : AIR 1926 Lah 624; *Abbas Khan v Ram Das,* (1928) ILR 9 Lah 140 : 112 IC 153 : AIR 1928 Lah 342.
1294. *Dhondiram v Taba,* (1903) ILR 27 Bom 330, p 333; *Hollis v Palmer,* (1836) 2 Bing NC 713.
1295. *Madappa Hegde v Ramkrishna,* (1911) ILR 35 Bom 327 : 12 IC 42 (PC); *Kashi Pershad v Jamuna,* (1904) ILR 31 Cal 922; *Arunachala v Raja of Kalasti,* (1921) Mad WN 172 : 62 IC 505 : AIR 1921 Mad 229; *Ma Schwe Tu v Maung Ba San,* 176 IC 818 : AIR 1938 Rang 113.
1296. *Yashvant v Vithal,* (1897) ILR 21 Bom 267.
1297. *Satrucherla v Maharaja of Jeypore,* (1919) ILR 42 Mad 813 : 46 IA 151 : 51 IC 185.
1298. *Williams v Morgan,* (1906) 1 Ch 804.
1299. *Karachiwalla v Nanji,* (1959) AC 518 : [1959] 1 All ER 137 (appeal from Kenya, where the same section is in force).
1300. *Behari Lal v Ram Ghulam,* (1902) ILR 24 All 461.
1301. *Ramayya v Venkata,* (1903) 13 Mad LJ 2; *Kamidan v Megraj,* (1915) 11 Nag LR 153 : 30 IC 98.
1302. *Altaf Ali v Lalta Prasad,* (1898) ILR 19 All 496.

unnecessary. The deposit referred to is the deposit under section 83 which provides the summary procedure for redemption. The security is extinguished and the mortgagee is debarred from suing, not by mere deposit, but when the deposit is accepted and acted upon by the mortgagee in terms of section 83.[1303] If notice of the deposit has not been served on the mortgagee, he is not debarred from suing.[1304] The section would seem to suggest that the mortgagee's suit is not maintainable after the deposit has been made and the Allahabad High Court have said[1305] that if there is a valid deposit, there is no subsisting mortgage which can be enforced or redeemed. However, this, it is submitted, is not correct, for the deposit does not discharge the mortgage,[1306] and the mortgagee continues in possession as mortgagee, and is accountable for rents and profits.[1307]

(10) Simple Mortgagee

A simple mortgagee cannot foreclose, as the real right transferred is a right of sale. This has been discussed in the notes "Mortgage" and "Right to cause the property to be sold" under section 58. The case of *Papamma Rao v Pratap Korkonda*[1308] illustrates the impossibility of a simple mortgage leading to a foreclosure, for when the court erroneously gave a simple mortgagee a decree for possession against which the mortgagor did not appeal, the Privy Council held 15 years later that the mortgagee was in possession as mortgagee, and liable to be redeemed. The remedy of sale is also available in some anomalous mortgages which involve the transfer of a right of sale.

Limitation for a suit for sale is under Article 62 of the Limitation Act 1963, 12 years from the time when the mortgage money becomes due,[1309] and a suit filed after 12 years would be barred by law of limitation.[1310] If the net proceeds of the sale are insufficient, there will be a personal decree for the balance, if the mortgagor is personally liable, and if the personal claim is not barred by limitation. This is provided for in O 34, rule 6 of the Code of Civil Procedure, but such an order may be made on a motion upon a consent decree even though the terms of the decree are silent as to the personal remedy.[1311]

Under the amended rules 4 and 5 of O 34 of the Code of Civil Procedure, there are two decrees, a preliminary mortgage decree, followed in case of default by a final decree for sale.[1312]

(11) Usufructuary Mortgagee

A usufructuary mortgagee is a transferee of a right of possession only, and he retains possession until the debt is discharged. As usufructuary mortgagee he cannot sue either for sale, or for foreclosure;[1313] though if the mortgagor is in possession as lessee of the mortgagee

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1303. *Horay Krishna v Sashi Bhushan*, (1941) 45 Cal WN 74 : 192 IC 781 : AIR 1941 Cal 18.
1304. *Sitamayya v Venkataramanna*, (1808) ILR 11 Mad 371.
1305. *Rugad Singh v Sat Narain*, (1904) ILR 27 All 178.
1306. *Ahmad Ullah v Abdul Rahim*, (1923) ILR 45 All 592 : 74 IC 763 : AIR 1924 All 26; *Balasidhantam v Perumal*, (1914) 27 Mad LJ 475 : 27 IC 162.
1307. *Rukhminibai v Venkatesh*, (1907) ILR 31 Bom 527; *Harbans v Ramdhan*, AIR 1960 Pat 51.
1308. *Papamma Rao v Pratap Korkonda*, (1896) ILR 19 Mad 249 : 23 IA 32.
1309. *Vasudeva v Srinivasa*, 34 IA 186 : (1907) ILR 30 Mad 426.
1310. *Jaswant Kaur v Des Raj*, AIR 2010 HP 61 : (2010) 1 Shim LC 299.
1311. *Sundermal v JC Galstaun*, (1932) 36 Cal WN 109 : 62 Mad LJ 170 : 54 Cal LJ 400 : 137 IC 672 : affirming (1929) 33 Cal WN 300 : 120 IC 110 : AIR 1929 Cal 387.
1312. *MALM Chettiar Firm v Maung Po Hoy in*, (1935) ILR 13 Rang 325 : 157 IC 784 : AIR 1935 Rang 239.
1313. *Umda v Umrao Begam*, (1889) ILR 11 All 367; *Chathu v Kunjan*, (1889) ILR 12 Mad 109, dissenting from *Venkatasami v Subramanya*, (1888) ILR 11 Mad 88; *Luchmeshar v Dookh*, (1897) ILR 24 Cal 677.

and the lease makes the rents a charge on the property, the mortgagee may sell the property in enforcement of the charge.[1314] In a Patna case, a mortgagor in a usufructuary mortgage, after undertaking to give possession, did not give possession. Two questions arose—(a) whether the mortgagee can file a suit for sale under section 67; and (b) whether the mortgagee was entitled to a decree for the mortgage money with interest under section 68(1)(d). On the first question, one of the judges gave an affirmative answer, while the other judge took a different view. As to the second question, one of the judges considered it unnecessary to decide it, but the second judge answered it in the affirmative. A decree for the mortgage money and interest was ultimately passed.[1315] The Madras High Court has held that before possession is given to a usufructuary mortgagee, he is not a usufructuary mortgagee and may, therefore, sue for sale of the property mortgaged;[1316] but this case has now been rendered obsolete by the amended definition of usufructuary mortgage as explained in the commentary on section 58(d) above. Of course, the usufructuary mortgagee can do so if there is a covenant empowering him to sell in default of delivery of possession. It is then that an anomalous mortgage, and the rights and liabilities of the parties are determined by the terms of the deed. Instances are cited under note "Usufructuary mortgage" under section 58.

(12) Mortgagee by Conditional Sale

In a mortgage by conditional sale, the mortgage works itself out into a sale, or the conditional sale becomes absolute. The mortgagee is, therefore, not entitled under this section to an order for sale, but this remedy is foreclosure.[1317] In a suit, the possession of the property was claimed on the strength of title to the suit property arising out of a mortgage which was in the nature of a conditional sale. It was held that the only remedy to which the plaintiff was entitled to was section 67, under which he could obtain from the court a decree that the mortgagor shall be absolutely barred to redeem the property. In a mortgage by conditional sale, the mortgage works itself out into a sale, or the conditional sale becomes absolute. The mortgagee is not entitled to an order for sale. His remedy is foreclosure and as the mortgagee did not claim a relief of foreclosure, the suit was dismissed.[1318] Article 63(a) of the Limitation Act, 1963, now provides a period of 30 years from the due date for suits by a mortgagee "for foreclosure". It would appear that the deletion of the words "or sale" is deliberate, and excludes the intention to limit the article to English mortgages (which, after 1929, resulted in the article being superfluous).

A mortgage by conditional sale is not necessarily accompanied by the delivery of possession;[1319] but the mortgagee is entitled to possession when he obtains a decree for foreclosure.[1320] If the mortgagee by conditional sale is entitled to possession under the mortgage, and the mortgagor fails to deliver possession, the mortgagee's suit for possession is now governed by Article 63(b) of the Limitation Act, 1963, which provides for a period of 12 years from the time when the mortgagee becomes entitled to possession.[1321] In decisions

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1314. *Damodara Shanbhvgue v Chandappu Pujary*, (1933) ILR 56 Mad 892 : 65 Mad LJ 194 : 148 IC 1029 : AIR 1933 Mad 613.
1315. *Sanug Devi v Bhamar Lal*, AIR 1982 Pat 180.
1316. *Subbamma v Narayya*, (1918) ILR 41 Mad 259 : 43 IC 4.
1317. *Venkatasami v Subramanya*, (1888) ILR 11 Mad 88, p 89; *Valu Punja v Puna Marji*, (1962) 3 Guj LR 1021 : AIR 1963 Guj 112.
1318. *Mahendra Mohanlal Mistry v Mehta Mohanlal Maihuradas*, AIR 1988 Guj 110.
1319. *Ammanna v Gurumurthi*, (1893) ILR 16 Mad 64.
1320. Code of Civil Procedure 1908 : O 34, rule 3(2).
1321. The corresponding article in the Act of 1908, Article 135, provided for the same period, commencing however, from when the mortgagor's right to possession determines. See *Balubhai Jethabhai Shah v Chhaganbhai Bamanbhai*, AIR 1991 Guj 85, p 91.

under the old Act, it had been held that a suit for possession would lie even if a suit for foreclosure is time-barred.[1322]

(13) Anomalous Mortgagee

The rights of an anomalous mortgagee depend upon the terms of the deed;[1323] he can institute a suit for foreclosure only if the deed specifically so empowers him. He can, however, maintain a suit for sale even if there is no clause in the deed specifically empowering sale, provided, of course, that the deed does not contain a provision to the contrary.[1324] Such mortgages are generally composite mortgages. If it is a simple mortgage usufructuary, the mortgagee is entitled to an order for sale. In some anomalous mortgages, the mortgagee has the alternative of taking possession or of bringing the property to sale.[1325] In a case where a mortgage contained certain provisions which indicated a usufructuary mortgage and certain provisions which indicated a simple mortgage, it was held that there was no right of sale on the mere failure to pay the mortgage money.[1326] The various types of anomalous mortgage are set forth in the note under the same heading under section 58. If it is a mortgage usufructuary by conditional sale, the mortgagee is entitled to foreclose. The court has, however, jurisdiction to order a sale instead of foreclosure under the Code of Civil Procedure 1908, O 34, rule 4(3). A court, however, has no power to direct a sale or foreclosure of a mortgage, unless the mortgage is an anomalous mortgage.[1327]

Section 67 does not conflict with section 98, particularly when there is nothing in section 98 to indicate that it is subject to the other provisions of the TP Act.[1328]

(14) English Mortgagee

The section before the amending Act of 1929, did not put any limitation on the right of an English mortgagee, and he could sue either for foreclosure, or sale.[1329] In cases governed by the present section, he can only sue for sale.

(15) Mortgagee by Deposit of Title Deeds

The new section 96 inserted by the amending Act 20 of 1929 puts equitable mortgages on the same footing as simple mortgages, and makes it clear that the remedy of the mortgagee by deposit of title deeds is by suit for sale. In case of mortgage by deposit of title deeds, the period of limitation would also be 12 years from the date when the money becomes due and a suit for the payment of money secured by mortgage would lie.[1330]

1322. *Ganpat Bhujanga v Hanmangauda Shidagauda*, (1933) ILR 57 Bom 593 : 35 Bom LR 956 : 147 IC 919 : AIR 1933 Bom 439; *Aman Ali v Asgar*, (1900) ILR 27 Cal 185.
1323. See *Madho Rao v Gulam Mohiuddin*, (1919) 15 Nag LR 134 : 56 IC 717 : AIR 1919 PC 121; *Gajadhar v Sibananda*, (1924) 28 Cal WN 532 : 81 IC 768 : AIR 1924 Cal 592; *Mohan Das Talib v Mehdi Khan*, AIR 1938 Lah 145.
1324. *Ramakkammal v GGS Iyer*, (1952) ILR Mad 993 : AIR 1953 Mad 13; *Savitri Devi v Beni Devi*, (1967) ILR 46 Pat 1202 : AIR 1968 Pat 222; *Satya Narain v Adya Prasad*, AIR 1972 Pat 432; *Contra Gajadhar v Sibananda*, AIR 1924 Cal 592.
1325. *Lingam Krishna v Maharaja of Vizianagram*, (1911) 13 Bom LR 447 : 10 IC 272; *Lalta Prasad v Hari Lal*, (1913) 16 OC 90 : 19 IC 748; *Hundaldas v Balukhan*, AIR 1943 Sau 59; (1942) ILR Kar 452 : 204 IC 574.
1326. *Kanhaiya Prasad v Hamidan*, (1938) ILR All 714 : (1938) All LJ 746 : 176 IC 492; AIR 1938 All 418; *Hutchappa v Mallappa*, AIR 1954 Mys 177.
1327. *Kuwarilal v Rekhlal*, (1950) ILR Nag 321 : AIR 1950 Nag 83.
1328. *Ram Dayal v Bhanwar Lal*, AIR 1973 Raj 173.
1329. *Allahabad Bank v Shivganga Tube Well*, AIR 2014 Bom 100 : LNIND 2014 AUG 132 : 2014 (3) AIR Bom R 689 : 2014 (3) ABR 689.
1330. *Vasudeva Mudaliar v Srinivasa*, (1907) ILR 30 Mad 426 : 34 IA 186; *Askaran v Gobardhan*, (1921) 26 Cal WN 318 : 70 IC 158 : AIR 1922 Cal 52.

(16) Mortgagor Trustee for Mortgagee

A mortgagor who is a trustee of the mortgagee may not in his representative character foreclose, and so become trustee of what was his own property. In such a case, sale is the appropriate remedy.[1331] So also when the mortgagee is a trustee for the mortgagor, for he would be acquiring property which it is his duty to preserve for his *cestui que trust.*[1332]

(17) Mortgagee of Public Works

A mortgagee of a railway, canal or other work which serves the public convenience may not foreclose or sell. This is in the interest of the general public. The proper remedy is the appointment of a receiver with a view to realizing the earnings of the undertaking as a going concern.[1333]

(18) Bundelkhand Land Alienation Act

If the mortgagee's suit has been referred to the collector under section 9 of the Bundelkhand Land Alienation Act, 1902, the reference is a final disposal of the suit, and the court cannot pass a decree for sale.[1334]

(19) Partial Foreclosure or Sale

Section 67(d) is the corollary to the last clause of section 60, and rests on the same principle of the indivisibility of the mortgage security. The reason has been explained in the case of *Nilakant v Suresh Chunder.*[1335] Hence, one of several mortgagees, or his assignee or a purchaser of part of the mortgagee's right, cannot foreclose or sell in respect of his fractional share;[1336] and, on the other hand, foreclosure proceedings must be taken against all persons interested in the equity of redemption.[1337] The proper remedy of the part-mortgagee, if he cannot obtain the other mortgagee's consent to the suit, is to join them as co-defendants, and sue to realize the whole mortgage debt. The leading case on this point is *Sunitabala Debi v Dhara Sundari,*[1338] where the rule was enforced though the mortgage was to two mortgagees to secure two separate sums, because the whole property was conveyed to the mortgagees as tenants-in-common, and there was no covenant to repay each separately. However, the decree would provide for all proper accounts, except that there would be no judgment as between the mortgagor and the defendant mortgagees.[1339] This view was followed in *Gopalswami v Nataraj,*[1340] in which it was held that the right of a co-mortgagee defendant is

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1331. Cf *Lucas v Scale,* (1740) 2 Atk 56.
1332. *Tenant v Trenchard,* (1869) 4 Ch App 537.
1333. *Gardner v London Chatham & Dover Railway Co,* (1867) 2 Ch App 201.
1334. *Ram Sahai v Debi Din,* (1932) ILR 54 All 482 : (1932) All LJ 584 : 139 IC 170 : AIR 1932 All 614.
1335. *Nilakant v Suresh Chunder,* (1886) ILR 12 Cal 414 : 12 IA 171. See note 'Partial redemption' under section 60.
1336. *Bishan Dial v Manni Ram,* (1878) ILR 1 All 297; *Parsotam Saran v Mulu,* (1887) ILR 9 All 68; *Lalju v Janki Lal,* (1887) All WN 233.
1337. *Norender Narain v Dwarka Lal Mundur,* (1887) ILR 3 Cal 397 : 5 IA 18; *Chandika Singh v Pohkar* (1880) ILR 2 All 906.
1338. *Sunitabala Debi v Dhara Sundari,* (1920) ILR 47 Cal 175 : 46 IA 272 : 53 IC 131 : AIR 1919 PC 24; *Gobind Ram v Sunder Singh,* (1892) All WN 246; *Kanhai Lal v Jwala Dei,* (1896) All WN 153; *Ray Satmdra v Ray Jatindra,* (1927) 31 Cal WN 374 : 101 IC 530 : AIR 1927 Cal 425; *Seth Bansiram v Gunnia Naga Ayyar,* (1930) 59 Mad LJ 928 : 129 IC 45 : AIR 1930 Mad 985; *Haidar Ali v Mahammad Safiuddin,* (1931) 54 Cal LJ 113 : 134 IC 1068 : AIR 1932 Cal 34; *Kailas Ayyar v Sundaram Pattar,* AIR 1942 Mad 205 (court fees to be paid on whole amount); *Moti Lal v Bijay Lal,* (1943) ILR 1 Cal 59 : 76 Cal LJ 267 : (1942) 46 Cal WN 1015 : 208 IC 483 : AIR 1943 Cal 455 (court fees may be paid on the plaintiff share of the mortgage money).
1339. *Sunitabala Debi v Dhara Sundari,* AIR 1919 PC 24.
1340. *Gopalswami v Nataraj,*AIR 1948 Mad 17.

not extinguished automatically on the passing of a decree in favour of the plaintiff co-mortgagee, irrespective of the judgment given and the language of the decree passed in it, and irrespective of whether the right of the co- mortgagee was the subject of adjudication. In *Lachmi Narain v Babu Ram,*[1341] the deed of mortgage specified the separate sums which each mortgagee had advanced to make up the total consideration of the mortgage. One mortgagee was allowed to sue for sale of the entire property including the other mortgagees as co-defendants, the plaintiff mortgagee thus realized his share by sale, while the defendant mortgagees had a charge on the surplus sale proceeds.

As already explained in the notes under section 60, a purchase of a share in the equity of redemption by one of the several part mortgagees does not justify partial redemption, for it is not equitable that one of the several mortgagees should have the right to split the security.[1342] Where a mortgagee purchases the equity of redemption without the consent of his co-mortgagee, the latter can bring the whole of the property to sale to recover his share of the mortgage debt.[1343] However, in a case where after such a purchase the other part mortgagee sued to recover his share of the debt, he was allowed to proceed against the rest of the property on the ground that his conduct in suing for a share of the debt was an admission that the security had been severed.[1344] This is erroneous, and is contrary to the principle that a mortgage interest cannot be severed without the consent of all mortgagees and mortgagors.[1345] The question will, however, be otherwise where one of the co-mortgagees has by suing for his own share of the mortgage debt, broken up the integrity of the mortgage.[1346] In cases in which a part mortgagee has been discharged, the other mortgagees are allowed to sue to recover their share of the debt on the ground that the mortgage security has been severed with the consent of the mortgagors. Thus, when a part mortgagee obtains a decree for his share of the debt and the mortgagors who are parties to the suit have not objected, the other mortgagee may sue to recover his share.[1347] Again, in an Allahabad case,[1348] there was a simple mortgage by *K* to two mortgagees *B* and *J*, and another simple mortgage by *K*'s brother *G* also to *B* and *J;* and then a usufructuary mortgage was given by *K* and *G* to *B* in discharge of the two previous mortgages. This discharge was not binding on *J*, and as the action taken by *B* had operated as a severance with the consent of the mortgagors, J was entitled to realize his share in the two previous mortgage debts. But a payment to one part mortgagee will not operate as a severance of the security, and the other part mortgagee will be entitled to recover his share of the debt against the whole of the security.[1349]

Illustration

A mortgaged his property to *B* and *C*. *A* then sold part of the property and out of the Sale proceeds paid *B* ₹ 9,460 half for himself and half for *C* in full discharge of the mortgage. *C* has no knowledge of this transaction and contended that ₹ 1,000 more was due on the mortgage. The transaction was not binding on *C*; there was no severance of the security; and *C* was entitled to recover his share of the debt from the whole of the property.[1350]

1341. *Lachmi Narain v Babu Ram,* (1935) All LJ 749 : 154 IC 437 : AIR 1935 All 391.
1342. *Mahtab Rai v Sant Lal,* (1883) ILR 5 All 276; *Velayudan Chetty v Afangaram,* (1912) 23 Mad LJ 475 : 15 IC 605; *Subba Rao v Sarvarayudu,* (1924) ILR 47 Mad 7, p 19 : AIR 1923 Mad 533; *Jagmohan v Harbans Singh,* 85 IC 621 : AIR 1925 Oudh 609.
1343. *Sadasheo Rao v Rupchand,* 184 IC 719 : AIR 1939 Nag 136; *Sadashiv v Govind,* AIR 1945 Bom 350.
1344. *Mohan Lal v Prasadi Lal,* (1923) ILR 45 All 46 : 74 IC 999 : AIR 1924 All 11.
1345. *Arunachalam Chetty v Ramasamy,* (1928) Mad WN 518 : 112 IC 501 : AIR 1928 Mad 933.
1346. *Narayan Rao v Chattebai,* (1937) ILR Nag 503 : 171 IC 978 : AIR 1937 Nag 262.
1347. *Vijayabhanammal v Evalappa,* (1916) ILR 39 Mad 17 : 35 IC 91.
1348. *Jauhari [illegible] v Ganga Sahai* (1919) ILR 41 All 631 : 51 IC 107.
1349. *Arunachalam Chetty v Ramaswamy,* (1928) Mad WN 518 : 112 IC 501 : AIR 1928 Mad 933.
1350. Ibid.

Where the mortgagee or, if there are several mortgagees, all the mortgagees, acquire by purchase or inheritance or otherwise, a share of the equity of redemption, the mortgage is extinguished *pro tanto*, and they may recover the balance of the debt against the residue of the property.[1351] This is the counterpart of the case referred to in the last clause of section 60, and the severance is effected by the merger which occurs when the mortgagee acquires a share in the equity of redemption. The sale by the mortgagor of his share to the mortgagee implies consent, and brings the case within the terms of the section. So, when the mortgagor of two villages sells one to the mortgagee, the latter can foreclose the other village for a proportionate share of the debt.[1352] When the mortgagee purchases a third share in the equity of redemption from one of three sons of the mortgagor, he can foreclose the remaining two-thirds for two-thirds of the debt.[1353] So also, when the mortgagee's purchasers inherited a share of the mortgaged property from their father who was one of the heirs of the mortgagor, they were held to be entitled to foreclose on the other heirs for their share of the debt.[1354]

ILLUSTRATION

A mortgaged his property to B. *A* died leaving three sons *C*, *D* and *E*, *B* purchased from *E* his share in the equity of redemption. *B* was then entitled to recover two-thirds of the debt from the shares of *C* and *D* as the integrity of the mortgage had been broken.[1355]

If a subsequent mortgagee who is impleaded in a suit on the basis of a prior mortgage, fails to redeem that mortgage and allows the property included in that mortgage to be sold, his security in that property ceases and he can no longer claim to redeem that mortgage.[1356] The merger may occur even after the final decree for sale. Thus, in an Allahabad case,[1357] the mortgagee *K* obtained a final decree for sale against his mortgagor *T* in January; *M* purchased part of the mortgaged property in execution of a money decree against *T* in March; then in April, *M* purchased from the mortgagee *K*, the mortgage decree, and proceeded to execute it against the residue of the property in the hands of *T;* but it was held that the decree was extinguished *pro tanto*, and that it could only be executed for the balance of the amount. Again, when a mortgagee purchases part of the property mortgaged at the execution sale on his mortgage decree, he splits his security and can realise a proportionate part of the debt from a purchaser of another part who has not been made a party.[1358]

The mere fact that there has been a division of the equity of redemption does not justify a suit for partial foreclosure or sale.[1359] However, when the mortgagee has recognised the partition, it was held that such recognition effects a severance of security with the consent of the mortgagors. This occurred in *Venkatchella Chetty v Srinivasa*[1360] where the property was

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1351. *Bisheshar Dial v Ram Sarup*, (1900) ILR 22 All 284; *Dina Nath v Lachmi Narain*, (1903) ILR 25 All 446; *Shib Lal v Bhawani Shankar*, (1904) ILR 26 All 72; *Inukhan v Naimudin*, (1906) 3 Cal LJ 377; *Somanatha v Ananta*, (1931) Mad WN 891 : 135 IC 911 : AIR 1932 Mad 18; *Krishna Chandra v Pabna Model Co*, (1932) ILR 59 Cal 76 : 137 IC 260 : AIR 1932 Cal 319; *Jay Prosad v Jasoda*, AIR 1958 Rang 649. The contrary decision in *Jasodtia v Kali*, (1930) 34 Cal WN 673 : 128 IC 111 : AIR 1932 Cal 619 is incorrect and misunderstands *Bhora Thakar Das v Collector of Aligarh*, (1906) ILR 26 All 593, on app (1910) ILR 32 All 612 : 37 IA 182 : 7 IC 732, discussed in the note under section 82 below.

1352. *Bisheshar Singh v Laik Singh*, (1882) ILR 5 All 257.

1353. *Mutty Lal v Nandu Lal*, (1907) 12 Cal WN 745.

1354. *Rashidunnissa v Muhammad*, (1912) ILR 34 All 474 : 16 IC 85.

1355. *Mutty Lal v Nandu Lal Neogi*, (1907) 12 Cal WN 745.

1356. *Shamser Bahadur v Lal Batuk Bahadur*, (1953) All LJ 203 : AIR 1953 All 147.

1357. *Sarju Kumar v Thakur Prasad*, (1920) ILR 42 All 544 : 58 IC 743.

1358. *Venkatasami Naicken v Ramanathan Chettiar*, (1910) 8 Mad LT 409 : 8 IC 153; *Moro Raghunath v Balaji*, (1888) ILR 13 Bom 45.

1359. *Soti Suraj v Than Singh*, (1922) ILR 44 All 146 : 64 IC 451 : AIR 1922 All 352.

1360. *Venkatchella Chetty v Srinivasa*, (1905) ILR 28 Mad 555.

partitioned into four equal shares between the defendant and his three cousins by a deed which directed that each share should bear a fourth of the mortgage debt. The mortgagee was not party to the deed, but he allowed the three cousins to redeem their shares, each for a fourth of the debt. Three-fourths of the mortgage being thus extinguished, the mortgagee was held entitled to recover the remaining one-fourth from the defendant. Similarly, in *Mahadaji v Ganpatshet*[1361] when three mortgagors divided the mortgaged property and apportioned their liability under the mortgage, and the mortgagee accepted bonds from two of them in discharge of their liability, two-thirds of the mortgage was extinguished and the mortgagee could only recover one-third of the debt from the third mortgagor. Similarly, in *HV Low & Co Ltd v Pulin Beharilal Sinha,*[1362] the lessor of a coal mine had a charge for the royalty due under the lease. The lease took a partner into the business, and a registered deed of partition was executed declaring the shares of the lessee and his partner. The lessor opened separate accounts for each partner as being each liable for a share of the royalty. This he did at the request of the partners, and it was held to effect a severance of the charge so that the lessor could enforce the charge against each sharer to the extent of his share. The mortgagee may exempt some portion of the mortgaged property from the suit, and realize the whole debt from the remainder.[1363] Cases in which it was held that such release made the mortgagee liable to contribution, are no longer law.[1364] A prior mortgagee's suit for sale has been held to be maintainable, although a puisne mortgagee is not made a party. This has been extended to a case where the mortgagee sues without making one of the heirs of the mortgagor a party. In such a suit the court may, under the Code of Civil Procedure, O 1 rule 9 deals with the matter in controversy so far as regards the rights and interests of the parties actually before it, and make an order for sale proportionate to the share of the defendant.[1365] This rule of procedure splits the security without the consent of the mortgagors, unless it be supposed that the omission of the parties to object implies consent. Where a mortgagor executed a new and later mortgage, part of the consideration for which was the old debt due under a previous mortgage and the later mortgage is found to be invalid, through no fault of the mortgagee, the mortgagee is entitled to sue on the earlier mortgage.[1366] Where both a prior and a subsequent mortgagee obtained decrees and in execution, purchased the mortgaged property, the remedy of the prior mortgagee who is a later purchaser is to redeem the subsequent mortgage.[1367]

1361. *Mahadaji v Ganpatshet*, (1891) ILR 15 Bom 257.
1362. *HV Low & Co Ltd v Pulin Beharilal Sinha,*, (1933) ILR 59 Cal 1372 : 143 IC 193 : AIR 1933 Cal 154.
1363. *Sheo Prasad v Behari Lal*, (1903) ILR 25 All 79; *Sheo Tahal v Sheodan Rai*, (1906) ILR 28 All 174; *Jugal Kishore Sahu v Kedar Nath*, (1912) ILR 34 All 606 : 16 IC 400; *Perumal v Raman Chettiar*, (1917) ILR 40 Mad 968 : 42 IC 352; *Sanwal v Ganeshi Lal*, (1913) ILR 35 All 411 : 20 IC 41 (suit against one co-mortgagor time barred): *Ghasi Khan v Kishori*, (1929) 27 All LJ 846 : 119 IC 437 : AIR 1929 All 380.
1364. *Mir Eusuff Ali v Panchanan*, (1901) 15 Cal WN 800 : 11 Cal LJ 619 : 6 IC 842; *Ponnusami Mudaliar v Srinivasa*, (1908) ILR 31 Mad 333; *Imam Ali v Baij Nath*, (1906) ILR 33 Cal 613; *Hakim Lal v Ram Lal*, (1907) 6 Cal LJ 46; *Surjiram v Barhamdeo*, (1905) 1 Cal LJ 337 : (1905) 2 Cal LJ 202; *Budhmal Kevalchand v Rama Valad Yesu*, (1920) ILR 44 Bom 223 : 55 IC 327; *Mayashankar v Burjorji*, (1925) 27 Bom LR 1449 : 91 IC 978 : AIR 1926 Bom 31; *Muktakeshi v Ramani*, 98 IC 504 : AIR 1927 Cal 195. See note 'Partial redemption' under section 60.
1365. *Shahasaheb v Sadashiv Supdu*, (1920) ILR 43 Bom 575 : 51 IC 223; *Han Kissen v Veliat Hossein*, (1903) ILR 30 Cal 755; *Har Chandra Roy v Mahomed Husain*, (1920) 25 Cal WN 594 : 66 IC 312 : AIR 1921 Cal 554; *Kherodamoyi Dasi v Habib Shaha*, (1925) 29 Cal WN 51 : 82 IC 638 : AIR 1925 Cal 152; *Waleyatunnissa v Chalakhi*, (1931) ILR 10 Pat 341 : 132 IC 100 : AIR 1931 Pat 164; *Haibat Shah v Bohra Tarachand*, 132 IC 31 : AIR 1931 All 235; *Ganeshi Lal v Charan Singh*, (1913) ILR 35 All 247 : 19 IC 614; *Bank of Poona v NC Housing Society*, (1967) 69 Bom LR 504 : AIR 1968 Bom 106.
1366. *Kannalal v Bhagwandas*, (1948) ILR Nag 913 : AIR 1949 Nag 5.
1367. *Pyli v Varkki Jacob*, AIR 1951 Tr & Coch 36.

ILLUSTRATION

A and *B* mortgage property to *C*. *B* dies and *C* files a suit for sale of the mortgage against *A* and *D*. It appears that *D* is not the heir of *B*. *C* is entitled to a decree for sale against *A* proportionate to his share.[1368]

Under section 67, the principle of "substituted security" is relevant. It has been applied to a mortgage of property held by a junior member of a *Marumakkattayam* family. The other members of the family are entitled to challenge the validity of the mortgage made by the junior member. If the mortgaged property is allotted to some other member, then the mortgagee can, by recourse to the principle of substituted security, proceed against any other property allotted to the mortgagor for realisation of the mortgage debt.[1369]

(20) Security for Performance of Decree

When a security bond is executed by a judgment debtor to secure the performance of a decree, the property can be realized in execution, and no suit under this section is necessary.[1370]

(21) Charge

In a charge, the property is realized by a suit for sale under this section, as if it were simple mortgage (section 100). But if the charge is created by a decree, it may be realized in execution of the decree.[1371] However, if the decree creating the charge is merely declaratory, the decree- holder is not entitled to sell the property charged in execution, but must file a suit to enforce the charge.[1372] Some cases requiring a suit for sale even when the charge was executory were decided under the repealed section 99, and are no longer law.[1373]

Where the land was mortgaged with the mortgagee in 1952, the limitation for redemption for a period of thirty years would expire in 1982 and thereupon the right of mortgagee to file for foreclosure would start and the right of the mortgagee to file for possession of property would start after three years , i.e., in 1985, which would expire in accordance with the law of limitation in 1994, and thus a suit filed in 1995 for possession of the property would be barred by limitation.[1374]

1368. *Kherodamoyi Dasi v Habib Shaha*, (1925) 29 Cal WN 51 :82 IC 638 : AIR 1925 Cal 152.
1369. *Gopal Pillai v State Bank of Travancore*, AIR 1979 Ker 224.
1370. *Jyoti Prakash v Mukti Prakash*, (1924) ILR 51 Cal 150 : 81 IC 734 : AIR 1974 Cal 485; *Subramanian v Raja of Ramnad*, (1918) ILR 41 Mad 327 : 43 IC 187; *Tata Iron & Steel Co v Charles Joseph Smith*, (1929) ILR 8 Pat 801 : 124 IC 90 : AIR 1930 Pat 108; *Raghubar Singh v Jai Indra Bahadur Singh*, (1919) ILR 42 All 158 : 46 IA 228 : 55 IC 550 : AIR 1919 PC 55; *Mukta Prasad v Mahadeo*, (1916) ILR 38 All 327 : 33 IC 982; *Shyam Sundar v Bajpai*, (1903) ILR 30 Cal 1060; *Rajindra Chandra Sarkar v Bipin Chandra Shaha Bhoumik*, (1933) ILR 60 Cal 1298 : (1933) 37 Cal WN 973 : 149 IC 399 : AIR 1934 Cal 64.
1371. *Kashi Chandra v Priyanath*, (1924) 28 Cal WN 550 : 83 IC 424 : AIR 1924 Cal 645; *Man v Tapai*, (1925) ILR 4 Pat 693 : 88 IC 923 : AIR 1976 Pat 31; *Raja Brajasunder v Sarat*, (1917) 2 Pat LJ 55 : 38 IC 791; *Ambalal v Narayan*, (1919) ILR 43 Bom 631 : 51 IC 929; *Shankar v Ganpat*, (1929) 31 Bom LR 439 : 119 IC 186 : AIR 1929 Bom 227; *Fatehchand v Indian Cotton Co*, 157 IC 292 : AIR 1935 Nag 129; *Kawtikabai v Bachraj*, 150 IC 492 : AIR 1934 Nag 147; *Venkatarao v Zunkari Marwadi*, 148 IC 196 : AIR 1934 Nag 83.
1372. *Gobinda v Kailas*, (1917) ILR 45 Cal 530 : 41 IC 73; *Gobind v Kailash*, (1916) 25 Cal LJ 354 : 40 IC 230; *Posti Mal v Radha Kisan Lalchand*, (1932) ILR 54 All 763 : 138 IC 603 : AIR 1933 All 439.
1373. *Chandranath Dey v Burroda Shoondury*, (1895) ILR 22 Cal 813; *Abhoyeswari v Gourisunkur*, (1895) ILR 22 Cal 859; *Matangini Dassi v Chooneymoney*, (1895) ILR 22 Cal 903; *Hem Ban v Behari Gir*, (1905) ILR 28 All 58; *Rameshar v Subbkaram*, (1911) 8 All LJ 418 : 10 IC 481.
1374. *Palo Ram v Guari*, AIR 2013 HP 1 : LNIND 2012 HP 51 : JC NO HP 2012 0421.

[1375][**67A. Mortgagee when bound to bring one suit on several mortgages.**—A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

Synopsis

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(2) Mortgagee Bound to Consolidate ... 638
(3) Same Mortgagor 639
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(7) Same Kind of Decree 640
(8) Section Not Applicable 640

(1) Amendment

This section was inserted by the amending Act 20 of 1929.

(2) Mortgagee Bound to Consolidate

This section is the counterpart of section 61, which deals with the mortgagor's right of redemption. The principle of consolidation is abolished by section 61 as regards mortgagors, and a mortgagor who has given different mortgages of different properties or successive mortgages of the same property is entitled to redeem each mortgage separately. However, the principle of consolidation which is abolished as regards the mortgagor, is applied by this section to the mortgagee. If the mortgagee holds different mortgages of different properties or successive mortgages of the same property from the same mortgagor, he must enforce all or none, unless there is a contract to the contrary.

The previous case law had been conflicting. The Madras High Court had inferred from section 60 that a mortgagee having successive mortgages of the same property from the same mortgagor cannot obtain an order for sale on one alone.[1376] This was approved in some case decided by Allahabad and Madras High Courts.[1377] The Bombay High Court held that if a mortgagee sues on a subsequent mortgage without reference to a prior mortgage, he is barred by *res judicata* from bringing a suit on the prior mortgage,[1378] and the Madras High Court held that a suit on a prior mortgage bars a suit on a subsequent mortgage of the same property.[1379] But it was generally held that a mortgagee might sue on a later mortgage reserving his rights on a prior mortgage. This was decided in the Madras Full Bench case of *Subramania v Balasubramania*,[1380] which adopted the view taken by the Allahabad High Court in *Sundar Singh v Bholu*[1381] that the two mortgages constituted different causes of

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1375. Ins. by Act 20 of 1929, sec. 32.
1376. *Dorasami v Venkataseshayyar*, (1902) ILR 25 Mad 108.
1377. *Ranjit Khan v Ramdhan*, (1909) ILR 31 All 482, p 492 : 2 IC 859; *Balasubramania v Sivaguru*, (1911) 21 Mad LJ 562, p 565 : 11 IC 629.
1378. *Dhondu v Bhikaji*, (1915) ILR 39 Bom 138 : 27 IC 1005; *Daluchand v Appi*, (1921) ILR 45 Bom 55 : 59 IC 347 : AIR 1921 Bom 282.
1379. *Nattu v Annangara*, (1907) ILR 30 Mad 353.
1380. *Subramania v Balasubramania*, (1915) ILR 38 Mad 927 : 30 IC 317; *Dhondo v Bhikaji*, (1915) ILR 39 Bom 138 : 27 IC 1005; *Jagenath Singh v Mohra*, (1917) 2 Pat LJ 118 : 39 IC 76; *Rangasami Nandan v Subbaroya*, (1907) ILR 30 Mad 408; *Radhakrishna v Muthusawmy*, (1908) ILR 31 Mad 530; *Shankar Sarup v Mejo Mal*, (1901) ILR 23 All 313 : 28 IA 203.
1381. *Sundar Singh v Bholu*, (1898) ILR 20 All 322; *Raghunath Prasad v Jamna*, (1907) ILR 29 All 233; *Nazirunnisa v Asifa*, 100 IC 577 : AIR 1927 All 341; *Dwarka Prasad v Ulfat Rai*, (1931) ILR 53 All 631 : 132 IC 803 : AIR 1931 All 549.

action, and which had been dissented from in a previous Madras case.[1382] As the law then stood, the Allahabad view was correct, and was generally followed.[1383] In *Nilu v Asirbad,*[1384] J Mookerjee quoted with approval the following passage from *Sundar Singh v Bholu:*[1385]

> There is nothing in the Code of Civil Procedure or in the Transfer of Property Act which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit.

The learned Judge, however, held that the right was subject to this reservation, that the mortgagee cannot sell the property twice over, nor sell it under the second decree subject to the first, and that the right course to follow was to direct that the property be sold free of both charges, whether the sale takes place in execution of the decree on the first mortgage or the decree on the second mortgage, and that the balance of the sale proceeds be applied in discharge of the dues on the first mortgage and the second mortgage one after the other, and the residue, if any, to stand to the credit of the holder of the equity of redemption. The decree made in *Nilu v Asirbad*[1386] was not warranted by any provision of the Code of Civil Procedure or the TP Act, but it showed that the court was conscious that it was a hardship to the mortgagor to have his property sold twice. Property sold subject to a prior mortgage will never realize its proper value. If the remedy were foreclosure, the hardship to the mortgagor would be still greater, for he might lose the whole property on a decree for one of the debts.

This equitable consideration has led to the amendment of the law, and sections 61 and 67A of TP Act lay down the simple rule that if a mortgagor has made two or more mortgages of the same property or of different properties to the same mortgagee, the mortgagor may redeem each separately, but the mortgagee must enforce all or none. This section is primarily for the benefit of the mortgagor, and he may waive its benefit, and such a waiver would be implied by his failure to object in good time.[1387] Unlike O 2, rule 2 of the Code of Civil Procedure, the disability imposed by this section is not fatal;[1388] the plaintiff may be given leave to withdraw a suit hit by this section with liberty to file a fresh suit.[1389]

(3) Same Mortgagor

This rule would not apply, unless the mortgagor were the same.[1390] A husband and wife are not one entity. When they own separate property and mortgage separately and jointly, a suit to enforce the joint mortgage does not bar a separate suit by either.[1391] The case of *Moro Raghunath v Balaji,*[1392] was decided on the principle of *res judicata,* but it will serve as an

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1382. *Nattu v Annangara,* (1907) ILR 30 Mad 353.
1383. *Lakshmanan v Muthaya,* (1921) 40 Mad LJ 126 : 62 IC 833; *Parmeshwar v Raj Kishore,* (1924) ILR 3 Pat 829 : 80 IC 34 : AIR 1925 Pat 59; *Udai Chand v Nagina Singh,* 50 IC 40; *Gobind v Harihar,* (1910) ILR 38 Cal 60 : 7 IC 320; *Nilu v Asirbad,* (1920) 25 Cal WN 129 : 60 IC 809; *Dwarka Nath v Mritunjoy,* 3 IC 175.
1384. *Nilu v Asirbad,* (1920) 25 Cal WN 129 : 60 IC 809, followed in *Muhammad Tabarak v Dalip Singh,* 98 IC 968 : AIR 1927 Pat 117.
1385. *Sundar Singh v Bholu,* (1898) ILR 20 All 322, p 324.
1386. *Nilu v Asirbad,* (1920) 25 Cal WN 129 : 60 IC 809.
1387. *Mohanraj Sowcar v Manicka Gounder,* (1956) 2 Mad LJ 77 : AIR 1956 Mad 467; *Har Sharan Lal v Surajmal,* AIR 1959 MP 426; *Konda Ready v Venkata Rao,* AIR 1961 AP 175.
1388. *Har Sharan Lal v Surajmal,* AIR 1959 MP 426.
1389. *Vishwanath v Haidarali,* AIR 1956 MP 63.
1390. *Naidu SR v Bank of Karaikudi,* AIR 1971 SC 884; affg on this point *Rajagopalaswami Naidu v Bank of Karaikudi,* (1965) 2 Mad LJ 233 : AIR 1965 Mad 537; *Bhaiyalal v Ramchandra,* (1937) ILR Nag 349 : 170 IC 126 : AIR 1937 Nag 99.
1391. *Naidu v Bank of Karaikudi,* AIR 1971 SC 884.
1392. *Moro Raghunath v Balaji,* (1889) ILR 13 Bom 45. See also *Ko Aung Bye v Ko Po Kyaing* 131 IC 725 : AIR 1931 Rang 208.

illustration. This first mortgage was by two brothers, and the second mortgage of part of the same property by one brother, and the Bombay High Court held that a suit to enforce the first mortgage did not bar a suit to enforce the second. Similarly, in *Rajani Kanta v Sourendra Nath*[1393] there was a first mortgage by one co-sharer of a one-seventh share, and then a second mortgage by all the sharers of the whole property. Chief Justice Rankin said that the second was an entirely different transaction, and that separate suits could be brought. In the case of a loan advanced by a bank, where it was impliedly stipulated in the mortgage deed that the mortgagee could sue on any one of the mortgages executed by the mortgagor, it was a '"contract to the contrary" as contemplated by section 67A and the suit to enforce one of the mortgages was not, therefore, hit by that section.[1394]

(4) Has a Right to Obtain

These words imply that the mortgage money has become due on both mortgages. The section would not prevent a mortgagee obtaining a decree on a prior mortgage before the debt secured on a subsequent mortgage had become due. Such a case is, however, not likely to arise, for it is not to the advantage of the mortgagee to destroy the security of the puisne mortgage.

(5) Charge

The section has no application to a statutory charge.[1395]

(6) Court-fee

The section does not affect section 17 of the Court Fees Act. If the suit embraces several mortgages, court fee will be separately assessed on each mortgage.[1396]

(7) Same Kind of Decree

The rule will not apply if the mortgagee is suing for foreclosure on one mortgage, and for sale on another mortgage.

(8) Section Not Applicable

If the suit on all mortgages cannot be brought in the same court, section 67A does not apply.[1397]

[1398][**68. Right to sue for mortgage-money.**—(1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely:—

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a

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1393. *Rajani Kanta v Sourendra Nath,* (1934) 38 Cal WN 124 : 151 IC 454 : AIR 1934 Cal 421.
1394. *United Bank of India v Suhas Kumar Ray,* (1977) 81 Cal WN 300.
1395. *Corpn of Calcutta v Arunachandra Singha,* (1934) ILR 61 Cal 1047 : (1934) 38 Cal WN 917 : 60 Cal LJ 312 : 153 IC 972 : AIR 1934 Cal 862.
1396. *Muthuswami Chettiar v Krishna Aiyar,* (1935) 68 Mad LJ 316 : 156 IC 435 : AIR 1935 Mad 262.
1397. *Daw Kyin v Ko Ba Tin,* 184 IC 284 : AIR 1939 Rang 247; *Hong Kong & Shanghai Banking Corp v Official Assignee,* (1958) 63 Cal WN 316 : AIR 1959 Cal 616.
1398. Subs. by Act 20 of 1929, sec. 33, for section 68.

reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor:

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.

Synopsis

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(1) Amendment

This section was substituted for the original section by the Amendment Act 20 of 1929.

(2) Scope of the Section

This section refers to the personal remedy of the mortgagee, while section 67 refers to the remedy against the property mortgaged.[1399] The section embraces two different classes of suit. The cause of action in a suit under clause (a) is different from the cause of action in a suit under clauses (b) or (c) or (d). The suit under clause (a) is a suit to enforce the personal covenant expressed or implied in the mortgage; but the suit under clauses (b), (c) or (d) is in the nature of a suit for compensation when the mortgagee is deprived of his security. The cause of action being different, there is a difference in the period of limitation.

1399. *Arunachalam Chetty v Ayyavayyan*, (1898) ILR 21 Mad 476, p 481; *Appasami Thevan v Virappa*, (1906) ILR 29 Mad 362; *Bhikkam Lal v Janki Dulari*, 171 IC 296 : AIR 1937 Oudh 517.

There is also a distinction as to interest. In cases under clause (a), the interest is at the contractual rate, and the interest which may be decreed is determined under O 34, rule 11 of the Code of Civil Procedure.[1400] In cases under clauses (b), (c) and (d), the suit being for compensation, interest is by way of damages and the rate is in the discretion of the court.[1401] The fact that the deed is not attested makes no difference, for the Privy Council have held that the position of the mortgagor under this section cannot by reason of the non-attestation of the deed be better than it would have been if the mortgage have been duly attested.[1402] The provisions of the section are designed for the purpose of indemnifying the mortgagee against any disturbance in the peaceful enjoyment of the property. The provisions are of an enabling nature, and do not preclude the mortgagee from suing a trespasser who has possession.[1403]

A bank sued for the realisation of money due on an overdraft account. The overdraft was secured by promissory note executed by the principal debtor, and guarantee agreements executed by the guarantors. Equitable mortgage of the principal debtor's property was also created. It was held that the suit as framed did not attract section 68, as it was not (and could not be) a suit by the creditor qua mortgagee. It was a suit essentially to enforce the promissory note, and the agreements of guarantee. To attract the provisions of section 68, it is necessary that the suit should be for recovery of mortgage money, and the suit must be by a mortgagee against the mortgagor for the mortgage money, on the basis of the mortgagor's personal covenant. The instant suit had not been instituted by the plaintiff bank in his capacity as mortgagee, for mortgage money. The claim of the bank is for a money decree which was advanced in the overdraft account. The personal liability of mortgagor arose not on the mortgage, but was created by independent transactions. The personal liability to repay the loan arose independently of any existing mortgage. Hence, section 68 had no application.[1404] The section does not provide a remedy for a breach of the personal covenant; it merely enumerates the conditions under which a suit for the mortgage money may lie. Where, therefore, after finding that the mortgagor had no title to one of the properties mortgaged and leased back to the mortgagor, the mortgagee recovered possession of the other properties, and continued in possession, it was held that he had acquiesced in the diminution of the security, and could not sue for the mortgage money under this section.[1405]

In case of an enforcement of mortgage in favour of a bank in respect of a permanent lease of government property, where sale of property was prohibited, on payment of necessary charges fixed by Government of India, a purchaser in auction sale could apply to the government for issue of necessary certificates in that behalf, and the government could issue such necessary certificates and orders permitting sale of property on such terms and conditions which the government may fix.[1406] The position of anomalous mortgagees is also governed by section 98.

(3) Referral to Arbitration

An agreement to sell or an agreement to mortgage does not involve any transfer of right in *rem* but creates only a personal obligation. Therefore, if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific

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1400. See *Mulla's Code of Civil Procedure*, 12th edn, pp 1120-1121, and *Jagannath Prasad v Surajmal*, 54 IA 1 : 99 IC 686 : AIR 1927 PC 1; *Chhote Lal v Raja Mahommad Ahmad Ali Khan*, (1933) ILR 8 Luck 315 : 144 IC 983 : AIR 1933 Oudh 128.
1401. *Rudra Prasad v Nasiruddin*, 102 IC 630 : AIR 1927 Oudh 315.
1402. *Ram Narayan Singh v Adhindra Nath*, 44 IA 87 : 38 IC 932 : AIR 1916 PC 119.
1403. *A Kumar v Sanjoga*, (1953) 32 ILR Pat 903.
1404. *Pradeep Chand Lall v Grindlays Bank Ltd*, AIR 1987 Cal 157.
1405. *Pais v Mapanna*, AIR 1956 Mad 128.
1406. *State Bank of India v Krishna Embfastners, (Pvt) Ltd*, AIR 1998 Del 6.

performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in *rem*. A mortgage suit for sale of the mortgaged property is an action in *rem*, for enforcement of a right in *rem* will have to be decided by courts of law and not by arbitral tribunals. The provisions of the TP Act read with O 34 of the Code of Civil Procedure relating to the procedure prescribed for adjudication of the mortgage suits , the rights of the mortgagees and mortgagors, the parties to a mortgage suit and the powers of a court adjudicating a mortgage suit makes it clear that such suits are intended to be decided by courts and therefore impliedly barred from being referred to or decided by private fora (Arbitration Tribunals).

A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration agreements). Therefore a suit for sale, foreclosure or redemption of a mortgaged property can only be tried by a public forum and not by an arbitral tribunal. Consequently it follows that a court where the mortgage suit is pending should not refer the parties to arbitration.[1407]

(4) Limitation

The suit under clause (a) is a suit to enforce the personal covenant, and limitation was six years from the due date under the Limitation Act, 1963.[1408] If the mortgage money is payable on demand, time runs from the date of the mortgage bond.[1409] The decision of the Privy Council in *Ram Raghubir Lal v United Refineries,*[1410] makes it clear that Article 116 of the old Limitation Act was applicable.[1411] There is no article corresponding to Article 116 in the Limitation Act, 1963. Such suit would, therefore, be governed by Article 55, which provides a period of three years for suits for compensation for the breach of any contract, the period to commence from the breach.

The suit under clause (b) or (c) or (d) is in the nature of a suit for compensation when the mortgagee is deprived of his security. The mortgagee is not bound to wait for the expiry of the period fixed by the mortgage.[1412] The period of limitation under Limitation Act, 1963, Article 113, is three years. The period is to be calculated from the date of deprivation,[1413] and not from the date when the mortgage money is payable.[1414]

(5) Sub-section (1)—Clause (a)

The suit under this clause is a suit on the personal covenant, expressed or implied. The mortgagor is liable to be sued on the personal covenant at due date. Under O 34, rule 14 the

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1407. *Booz Allen and Hamilton Inc v SBI Home Finance Ltd,* AIR 2011 SC 2507 : (2011) 5 SCC 532.
1408. *Miller v Runga Nath,* (1885) ILR 12 Cal 389; *Ramdin v Kalka Prasad,* 12 IA 12; *Lachmi Narain v Turabunissa,* (1912) ILR 34 All 246 : 14 IC 505; *Shyam Behari Singh v Rameshwar Prasad,* (1941) ILR 20 Pat 904 : 198 IC 208 : AIR 1942 Pat 213.
1409. *Kamalambal v M Purushotam Naidu,* (1934) 67 Mad LJ 499 : 152 IC 437 : AIR 1934 Mad 644.
1410. *Ram Raghubir Lal v United Refineries,* 60 IA 183 : (1933) 37 Cal WN 633 : 57 Cal LJ 308 : 64 Mad LJ 655 : 35 Bom LR 753 : 142 IC 788 : AIR 1933 PC 143 : (1933) All LJ 541.
1411. *PSA Alagan v Maung Po Peik* 151 IC 426 : AIR 1934 Rang 227; *Shambu Dat v Shiam Narain* 151 IC 448 : AIR 1934 Oudh 415; *Latta Singh v Mathura Upadhia,* (1931) ILR 6 Luck 374 : 129 IC 168 : AIR 1931 Oudh 5.
1412. *Linga Reddi v Sama Rau,* (1894) ILR 47 Mad 469; *Hiralal v Ghasitu,* (1894) ILR 16 All 318; *Venkatrao v Mahableshwar,* (1902) ILR 26 Bom 241; *Samayya v Nagalingam,* (1889) ILR 15 Mad 174.
1413. *Monimala Devi v Indu Bala Debya,* AIR 1964 SC 1295; *Unichaman v Ahmed,* (1898) ILR 21 Mad 242; *Ram Jewan v Jagamath,* (1898) ILR 25 Cal 450; *Maung Yan Kuin v Maung Po Ka,* (1925) ILR 3 Rang 60 : 89 IC 56 : AIR 1925 Rang 223; *Shambu Hat v Shiam Narain,* 151 IC 448 : AIR 1934 Oudh 415.
1414. *Appasami v Virappa,* (1906) ILR 29 Mad 362; *Afiruddi v Chandra,* (1930) 35 Cal WN 103 : 129 IC 108 : AIR 1930 Cal 703.

mortgagee may sue on the personal covenant first, and then sue for sale on the mortgage. The Calcutta High Court has held that when a mortgagee is suing on the covenant under section 68(a), it is not open to him to ignore the mortgage.[1415] This is not a correct statement of the law before the amending Act 20 of 1929. It was no doubt a hardship that the mortgagee should be able to enforce a personal decree while maintaining his security intact, and it was this hardship which led to the amendment of the section by the addition of sub-section (2).

(6) Personal Liability of the Mortgagor

In a suit for recovery of balance amount after adjusting sale proceeds from sale of mortgaged property, there may be personal liability of mortgagor/surety/ guarantor to pay mortgage money subject to sections 67 and 68.[1416] As pointed out by Lord Parker in a case already cited,[1417] a loan prima facie involves a personal liability, but the nature and the terms of the security may negative any personal liability. Thus, there is a personal liability express or implied, in a simple mortgage[1418] or in an English mortgage; there is none in a mortgage by conditional sale[1419] or in a usufructuary mortgage.[1420] Therefore, in the last two classes of a mortgage, a personal liability can be created only by a covenant expressed or clearly implied.[1421] Again, a promise to pay does not give the right of personal remedy, if the mortgagor binds himself to pay only out of the property mortgaged or a particular fund.[1422] It is always a matter of construction whether there is a covenant enforceable against the person of the mortgagor personally.[1423] The personal covenant may be contingent as where the mortgagor covenants that if the property mortgaged is sold for arrears of revenue or other causes, the mortgage money may be recovered from him personally, and if it is contingent, it cannot be enforced until the contingency has happened.[1424] The personal covenant has in some cases been too readily assumed on the analogy of English mortgages without regard to the nature of the security.[1425] In the case of an equitable mortgage, the mortgagor must be deemed to bind himself personally to pay the mortgage money.[1426] Express covenants take

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1415. *Sakhada Kanta Bhattacharjee v Joginee Kant Bhattacharjee*, (1933) ILR 60 Cal 1197 : (1933) 37 Cal WN 1087 : 149 IC 878 : AIR 1934 Cal 73.
1416. *Deepak Bhandari v HP State Industrial Development Corporation Ltd*, (2015) 5 SCC 518 : LNIND 2014 SC 60 : 2014 2 MLJ 241 : AIR 2014 SC 961 15.
1417. *Ram Narayan Singh v Adhindra Nath*, 44 IA 87 : 38 IC 932 : AIR 1916 PC 119; cf *Kerr v Ruxton*, (1904) 4 Cal LJ 510.
1418. *Wahid-un-nissa v Gobardhan*, (1900) ILR 22 All 453, p 461; *Abbakke v Kinhiamma*, (1906) ILR 29 Mad 491; *Bhugwan v Parmeshwari*, (1907) 5 Cal LJ 287; *Jangi Singh v Chander Mal*, (1908) ILR 30 All 388; *Ram Kishore v Surajdeo*, (1911) 9 Cal LJ 5 : 1 IC 442.
1419. *Balkishen v Legge*, (1900) ILR 22 All 149, p 159 : 27 IA 58; *Ramasami v Samiyappanayakan*, (1882) ILR 4 Mad 179, p 183; *Bhikkam Lal v Janak Dulari*, 171 IC 296 : AIR 1937 Oudh 517; *Bishen Dutt v Mathura Prasad*, AIR 1939 All 260.
1420. *Gopalasami v Arunachella*, (1892) ILR 15 Mad 304.
1421. *Pell v Gregory*, (1925) ILR 52 Cal 828, p 844 : 89 IC 1 : AIR 1925 Cal 834; *Paras Ram Jaishi Ram v Brij Mohan*, (1932) ILR 13 Lah 259 : 135 IC 33 : AIR 1932 Lah 164.
1422. *Narotam Das v Sheo Pargash*, (1884) ILR 10 Cal 740 : 11 IA 83; *Kalka Singh v Parasram*, (1895) ILR 22 Cal 434 : 22 IA 68; *S'ingjee v Tiruvengadam*, (1890) ILR 13 Mad 192; *Anglo-Indian Trading Co v Brierly*, 8 IC 302 (covenant to payout sale proceeds of manganese ore).
1423. *Ghasiram v Raja Mohan Bikram*, (1907) 6 Cal LJ 639, p 649; *Rajagopalachariar v Thiagaraya*, 86 IC 481 : AIR 1925 Mad 991; *Bhikam Lal v Janak Dulari*, 171 IC 296 : AIR 1937 Oudh 517.
1424. *Bunseedhur v Sujaat*, (1889) ILR 16 Cal 540; cf *Miller v Runga Nath*, (1886) ILR 12 Cal 389.
1425. *Kalee Pershad v Raye Kishoree*, (1873) 19 WR 281; *Musaheb Zaman v Inayatullah*, (1892) ILR 14 All 513, p 519 ('the mortgage contains within itself so to speak a personal liability to repay'); *Parbati v Gobinda* (1906) 4 Cal LJ 246; *Bhugwan v Parmeshwari*, (1907) 5 Cal LJ 287; *Seth Jiwandas v Janki*, (1922) 18 Nag LR 145 : 65 IC 53 : AIR 1922 Nag 98; *Gopikisan v Mankuar*, (1924) 20 Nag LR 46 : 78 IC 239 : AIR 1924 Nag 97.
1426. *Nityanand Ghose v Rajpur Chhaya Bani Cinema Ltd*, AIR 1953 Cal 208.

many forms.[1427] The words "whenever we pay the same to you, you shall receive it and give back the deed," were held not to amount to a covenant to repay, as they merely gave the mortgagor the option of paying.[1428] Again the words "having paid the principal money in the month of *Chaitra* 1927 we shall take back the document and the land. In case we fail to repay the principal money at due date, this *subdharna* bond shall remain in force," were held not to import a personal covenant, but merely to express the right of redemption.[1429] In a Lahore case,[1430] a provision that the mortgagees could recover the interest for the first five years in any way they liked was held to import a personal covenant. In an anomalous mortgage, the right of the mortgagee to sue on a personal covenant is not affected by his right to enforce his right to recover possession.[1431] In another case, where by the terms of the deed, the mortgagee was to repay himself as far as the interest was concerned out of the rents and profits, but the deed provided that after the expiry of a certain period the mortgagor was bound to pay the entire sum, it was held that the deed contained a personal covenant to pay the mortgage money, and the mortgagee was entitled to a decree under the section.[1432] Where there is a personal covenant which the mortgagee is entitled to enforce, the mere fact that he acquires the mortgaged property does not debar him from recovering the debt under the personal covenant unless the acquisition has the effect of extinguishing the debt, i.e., unless it was acquired for that express purpose. But in cases where the consideration was not the extinguishment of the debt, the right to recover on personal covenant remains, though the right to enforce the mortgage *qua* the mortgagee may go.[1433]

(7) Personal Liability Not Enforceable Against Purchaser from Mortgagor

The personal covenant does not run with the land, and no personal decree can be made against a purchaser of the equity of redemption.[1434] Thus, in *Jamna Das v Ram Autar*[1435] a purchaser of the equity of redemption retained a part of the purchase money under an agreement with the mortgagor to pay the mortgage debt, but the Judicial Committee held that he was not personally liable to the mortgagee under section 90 of the TP Act, nor the Code of Civil Procedure, O 34, rule 6 as he was not party to the sale, nor could he be held liable on the ground that he held the money in trust for the mortgagee.[1436] There is, however, an implied covenant by the purchaser of the equity of redemption to indemnify the mortgagor.[1437] The word "mortgagor" includes persons who derive title from the mortgagor, unless otherwise expressly provided; but that section does not by itself make the purchaser of an equity of redemption personally liable for a mortgage-debt where, but for the section he

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1427. Cf *Jogeswar v Nitaichand*, (1870) 4 Beng LR 48; *Annaswami v Narranaiyan*, (1862) 1 Mad HCR 114; *Sivakami v Gopala*, (1894) ILR 17 Mad 131 : AIR 1963 Raj 100.
1428. *Rangappa v Thamavappa*, (1914) 26 Mad LJ 514, p 516 : 24 IC 372.
1429. *Luchmeshar v Dookh*, (1897) ILR 24 Cal 677, p 679, followed in *Kamal Nayan v Ram Nayan*, 120 IC 308 : AIR 1930 Pat 152; *Jamuna Singh v Sheonandan Singh*, 194 IC 392.
1430. *Pars Ram Jaishi Ram v Brij Mohan*, (1932) ILR 13 Lah 259 : 135 IC 33 : AIR 1932 Lah 164.
1431. *Har Kuar v Udham Singh*, AIR 1939 Lah 112.
1432. *Raj Kumar Bharathi v Surajdeo Sahi*, (1938) ILR 17 Pat 737 : 177 IC 533 : AIR 1938 Pat 585; *Ramgopal v Ramchandra*, (1949) ILR Nag 284 : AIR 1949 Nag 354.
1433. *Ramgopal v Ramchandra*, (1949) ILR Nag 284.
1434. Re *Errington, Ex parte Mason*, (1894) 1 QB 11; *Jamna Das v Ram Autar*, (1912) ILR 34 All 63 : 39 IA 7 : 13 IC 304; *Tara Chand v Brojo Gopal*, (1913) 17 Cal LJ 120; 18 IC 747; *Nanku Prasad v Kamia Prasad*, (1923) 26 Cal WN 771 : 95 IC 970 : AIR 1923 PC 54; *Boota v Gur Prasad*, (1936) ILR 12 Luck 313 : 164 IC 817 : AIR 1937 Oudh 20.
1435. *Jamna Das v Ram Autar*, 13 IC 304.
1436. *Jamna Das v Ram Autar*, (1912) ILR 34 All 63 : 39 IA 7 : 13 IC 304.
1437. Transfer of Property Act 1882, section 55(5)(d); *Ram Barai Singh v Sheodeni*, (1912) 16 Cal WN 1040 : 16 IC 73; *Izzat- un-Nissa Begam v Kunwar Pertab Singh*, 36 IA 203, p 208 : 3 IC 793; *Janki Saran Singh v Syed Mahammad Ismail*, 139 IC 525 : AIR 1932 Pat 273; *Warington v Ward*, (1802) 7 Ves 332 : p 337; *Bridgeman v Daw*, (1891) 40 WR 253.

would not have been.[1438] The word "himself", therefore, excludes the liability of a transferee or an heir, though an heir would be liable to the extent of the assets of the deceased in his hands. The assignee can make himself liable by entering into a fresh covenant with the mortgagee,[1439] but liability is not implied from the payment of interest.[1440] The mortgagor continues to be liable for the payment of the mortgage debt after he has assigned the equity of redemption, but if he is sued for payment, it has been held that he acquires a new right to redeem.[1441] The mortgagee when so redeemed conveys the property to him subject to the right of redemption vested in the assignee.

A purchaser of a portion of the mortgaged property who retained a part of the sale consideration agreeing to pay it towards the discharge of the mortgage debt cannot be sued personally by the mortgagee under this section. So also a co-sharer in a village cannot be made responsible under the section, for the diminution of the mortgage security caused by the wrongful act of the *lambardar* if he did it without his consent.[1442] Such personal liability arises from the contract of borrowing, whether express or implied, and no personal liability can exist where there is no privity of contract as between the first and second mortgagees, even in respect of money left with the latter to pay the debt of the former.[1443]

(8) Personal Liability Not Affected by Want of Registration or of Attestation

The remedy on the personal covenant is available if the mortgage is invalid for want of registration.[1444] The remedy is also available even though the mortgage be invalid for want of attestation.[1445]

(9) No Personal Liability if Mortgage Illegal

A suit will not lie on the personal covenant if the transaction of mortgage is illegal.[1446] If the mortgage is forbidden by law, any subsidiary covenants also fails.[1447] But where the mortgage was void under para 11 of the third schedule to the Code of Civil Procedure, it has been held that the personal covenant is not affected and even if the claim on the personal covenant is abandoned, the mortgagee may claim restitution under section 65 of the Indian Contract Act, 1872.[1448]

1438. *Manubhai Mahijibhai v Trikamlal*, (1958) ILR Bom 1429 : 60 Bom LR 1092 : AIR 1960 Bom 247.
1439. *Shore v Shore*, (1847) 2 Ph 378.
1440. Re *Errington, Ex parte Mason*, (1894) 1 QB 11.
1441. *Kinnaird v Trollope*, (1888) 39 Ch D 636, p 645; *Delhi and London Bank v Bhikari*, (1902) ILR 24 All 185; *Dhana Koeri v Ram Kewal*, 129 IC 664 : AIR Pat 570; *Lockhart v Hardy*, (1845) 9 Beav 349.
1442. *Gajadhar Prasad v Rishabhkumar*, (1949) ILR Nag 122.
1443. *Babu Ram v Dhan Singh*, AIR 1957 Punj 169.
1444. *Krishnaswami v Kamalamma*, 68 IA 136 : (1942) ILR Mad 82 : 44 Bom LR 191 : (1942) 46 Cal WN 29 : (1941) 2 Mad LJ 894 : 196 IC 497 : AIR 1941 PC 90 (where the memorandum of deposit of title deeds being ineffective for want of registration, a personal decree was passed on the pronote).
But see *Kesari Ram v Musafir Tewari*, AIR 1937 All 711, where in a similar case a personal decree was not passed as there was no personal covenant.
1445. *Ram Narayan Singh v Adhindra Nath*, 44 IA 87 : 38 IC 932 : AIR 1916 PC 119. See note 'Attested' under section 59.
1446. *Tulshi Ram v Sat Narain*, (1921) ILR 43 All 81 : 57 IC 445 : AIR 1921 All 392; *Har Prasad v Sheo Gobind*, (1922) ILR 44 All 486 : 67 IC 793 : AIR 1922 All 134; *Kanhai v Tilak*, 16 IC 42; *Hamad Yar Khan v Shankar Das*, 85 IC 802 : AIR 1923 Lah 357 (mortgage in contravention of the colonization of Government Lands Act); *Bhikkan Lal v Janaki Dulari* 171 IC 296 : AIR 1937 Oudh 517. (Mortgage in contravention of para 11 of schedule 3, Code of Civil Procedure).
1447. *Bhusi Ram v Ganesh Rai*, (1927) 25 All LJ 793 : 103 IC 160 : AIR 1927 All 499.
1448. *Nisar Ahmad Khan v Raja Mohan Manucha*, AIR 1940 PC 204 : 67 IA 431; *Raja Mohan Manucha v Manzoor Ahmad Khan*, 70 IA 1 : 206 IC 457 : AIR 1943 PC 29; *Sanaullah v Jai Narain*, AIR 1942 All 409.

ILLUSTRATION

A executes an usufructuary mortgage of his occupancy holding to *B*, and covenants that in case of dispossession, *B* shall have the right to recover the principal money with damages or interest. The deed also contains a subsidiary simple mortgage of two houses to secure repayment of the principal money with damages or interest. The mortgage of the occupancy holding is illegal under the provisions of the Agra Tenancy Act. The subsidiary mortgage of the houses falls with it.[1449]

The Punjab Alienation of Land Act, 1900, does not forbid mortgages, but only requires mortgages of land of an agricultural tribe to be in particular form, and renders null and void conditions that do not accord with that form. Under that Act, a condition for possession by the mortgagee for more than 20 years is illegal. Therefore, a simple mortgage usufructuary which provides for possession for more than 20 years is invalid as a usufructuary mortgage, but will be effective as a simple mortgage; but as the TP Act forbids sale of such land in execution, the mortgagee can only obtain a decree on the personal covenant, expressed or implied.[1450] Such a suit may be filed either within the prescribed period after the moneys became due under the deed or by reason of the default of the mortgagor; the right conferred under section 68 (1)(d) upon the mortgage to sue earlier in the event of the mortgagor's default does not mean that the period is to be computed from the date of the default, for that would enable the mortgagor to gain by his own default.[1451]

(10) Proviso

The liability on the personal covenant does not run with the land, and no personal decree can be made against the purchaser of an equity of redemption. In this connection, the note, "Personal liability not enforceable against purchaser from mortgagor" may be also referred.

(11) Sub-section (1)—Clause (b)

This clause refers to cases where the security is destroyed by accidental causes such as a fire or flood or *vis major,* without default of either party. When the mortgagor being in possession as lessee of the mortgagee got his rent reduced by the Revenue Court, the Allahabad High Court held that the mortgagee was entitled to sue for the debt.[1452] In a later case, the same High Court held that such a case would not fall under the old clause (b), i.e., the present clause (c), as the reduction of the rent was not a default or wrongful act.[1453] It is open to the mortgagee to relinquish his security and sue only on the personal covenant of the mortgagor to pay,[1454] but he cannot, on receipt of some money from the assignee of the equity of redemption, give up the security, and sue the heirs of the mortgagor on the personal covenant.[1455] It is submitted that it would fall under the present clause (b). As the mortgagor is not in default, the mortgagee must first give him an opportunity of substituting another security that is sufficient as explained in section 66. He must, therefore, before suing require the mortgagor to furnish another sufficient security,[1456] and allow him a reasonable

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1449. *Bhusi Ram v Ganesh Rai,* (1927) 25 All LJ 793 : 103 IC 160 : AIR 1927 All 499.
1450. *Sochet Singh v Hidayat Ullah,* (1932) ILR 13 Lah 508 : 140 IC 863 : AIR 1932 Lah 630; *Quader Parast Khan v Nur Mahomed,* (1935) ILR 16 Lah 612 : 158 IC 206 : AIR 1935 Lah 103.
1451. *Sidramaya Nilakanthayaswami v Danva Shidramappa,* (1954) ILR Bom 717 : 56 Bom LR 407 : AIR 1954 Bom 407; *Ramanatha v Annamalai Chettiar,* (1963) ILR Mad 580 : (1963) 1 Mad LJ 263 : AIR 1963 Mad 342.
1452. *Fateh Din v Kishen Lal* 73 IC 902 : AIR 1923 All 584.
1453. *Boochi v Bohre Nath* 133 IC 402 : AIR 1932 All 51.
1454. *Mote Ram v Bisheshwar Nath* 183 IC 833 : AIR 1939 Pesh 34.
1455. *Boota v Gur Prasad,* (1936) ILR 12 Luck 313 : 164 IC 817 : AIR 1937 Oudh 20.
1456. *Kuppier v Periakaruppa,* (1919) ILR 42 Mad 578, p 580 : 50 IC 758; *Kamalambal v M Purushotam Naidu,* (1934) 67 Mad LJ 499 : 152 IC 437 : AIR 1934 Mad 644.

time for that purpose. What is reasonable time depends upon the circumstances of each case. In one case, the court assumed that six months would be reasonable time.[1457] Cases have arisen, both before and after the act of destruction by deluging,[1458] and by fire.[1459] If the land is wholly or partially destroyed by deluge, the mortgagee has a right to sue for the mortgage money under section 68, but limitation for a suit under section 67 is not suspended while the land is submerged.[1460]

The acquisition of the property under the Land Acquisition Act is destruction of the security.[1461] Section 68 has been applied where the mortgaged property was sold under the provisions of the Evacuee Property Act, though it was found that the mortgagee was not to blame for such sale.[1462] This case is now specially provided for in section 73(2).

What amounts to an impairment of security is a question of fact. In *Ratti Ram & Sons v Motilal*,[1463] the Privy Council held that the removal and sale of the roofing of a factory, materially affected the security of the mortgagee of the factory. In an Allahabad case, the mortgage-deed itself provided for the substitution of another security in case the house mortgaged was destroyed or proved insufficient to satisfy the debt, and this was enforced when the house was sold in execution by a prior mortgagee.[1464] Where, however, the mortgagee knows already, that the mortgagor is not in possession of the property, but has only a doubtful and disputed title thereto, the transaction is not a mortgage and the section has no application, and further that a compromise by the mortgagor with the person disputing his title cannot be regarded as a wrongful act of default within the meaning of the section.[1465]

(12) Sub-section (1)—Clause (c)

Where the mortgagee is deprived of his security wholly or in part by the wrongful act or default of the mortgagor, the mortgagee may sue the mortgagor for the mortgage money. It is not reasonable that, if the mortgagee's security is impaired, he should be obliged to realize the security before enforcing the personal covenant if there is one, and this rule applies equally if there is no personal covenant, or if the remedy under the personal covenant is time-barred.[1466] A breach of duty imposed upon the mortgagor by section 65 is a default, so that if the mortgagor does not pay off a prior encumbrance when it becomes due, the mortgagee is entitled to sue the mortgagor personally.[1467] So also, if the title of the mortgagor is defective, e.g. when the property is subject to a prior mortgage which has not been disclosed,[1468] or when the mortgagor knows that the property mortgaged is not transferable.[1469] However, in some cases in which the mortgagor included in the security property which was not his own,

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1457. *Bhawani v Jang Bahadur*, (1909) 7 All LR 391 : 6 IC 569.
1458. *Sheo Golam v Roy Dinkar Dayal*, (1874) 21 WR 226; *Bhawani v Jang Bahadur*, 6 IC 569. *Ram Sewak v Sheo Nath*,, (1923) ILR 45 All 388 : 73 IC 945 : AIR 1923 All 433.
1459. *Vithoba v Chotalal*, (1871) 7 Bom HC 116; *Venkateshwara v Kesava*, (1879) ILR 2 Mad 187.
1460. *Raghunath Bhagat v Maghu Mander*, 146 IC 856 : AIR 1933 Pat 693.
1461. *Sajjadi Begum v Janki Bibi*, 20 OC 256 : 42 IC 793; *Prokash Chandra v Hasan Banu*, (1918) ILR 42 Cal 1146, p 1152 : 28 IC 450.
1462. *Shamsuddin v Mansha Singh*, (1968) 69 Punj LR 867 : AIR 1968 P&H 35.
1463. *Ratti Ram & Sons v Motilal*,75 IA 160 : AIR 1949 PC 68. See also cases under note 'Waste' under section 66.
1464. *Ganesh Das v Maya Ram*, (1882) All WN 99.
1465. *Gajanand v Rani Prayag Kumari*, AIR 1938 Cal 48.
1466. *Appasami Thevan v Virappa*, (1906) ILR 29 Mad 362; *Ram Narayan Singh v Adhindra Nath*, (1916) ILR 44 Cal 388 : 38 IC 932 : AIR 1916 PC 119.
1467. *Singjee v Tiruvengadam*, (1890) ILR 13 Mad 192.
1468. *Radha Churn v Parbuttee Churn*, (1876) 25 WR 51; *Bhola Nath v Hira Mohan*, 7 IC 251.
1469. *Ganesh Singh v Sujhari*, (1888) ILR 10 All 47; *Kunhiraman v Aruthalai Kutti*, 7 IC 173; cf *Bhugwan Acharjee v Gobind*, (1883) ILR 9 Cal 234 (a case before the Act).

the court held that the remedy was by action for deceit, and not under this section.[1470] In two Oudh cases, when a mortgagor mortgaged joint family property without authority, the mortgagee was given a personal decree.[1471] It is not sufficient that the mortgagee merely suspects a defect in title.[1472] Again a breach of duty under section 66 is a default and if the mortgagor commits waste, the mortgagee may sue him personally for the debt.[1473] Where the mortgaged property was allowed to fall in disrepair so as to diminish its letting value, it was held that the mortgagee could enforce his right under clause (c).[1474] When the mortgagor sold the property by a registered deed to a vendor who has no notice of the unregistered mortgage, the mortgagee was deprived of his security and was, therefore, entitled to sue the mortgagor personally.[1475]

ILLUSTRATIONS

(1) *A* mortgaged property to *B* and then to *C*. *A* failed to perform the covenant implied by section 65(e) to pay off the prior encumbrance when it became due and *B* brought the property to sale. C was entitled to sue at once for his mortgage money.[1476]

(2) A Hindu coparcener under the Mitakshara law as administered in Oudh mortgaged property to *B* by simple mortgage for a term of 12 years. *B* discovered that the property was coparcenary property and that the mortgage was without legal necessity. *B* was entitled to sue for the mortgage money although the term had not expired.[1477]

(3) *A* mortgaged certain property to *B* by a usufructuary mortgage, but remained in possession as *B*'s tenant. *A*'s failure to pay rent would not entitle *B* to sue under this section.[1478]

(4) *A, B, C & D* executed a mortgage in favour of *E* of two properties. One of the properties which belonged to *A* was sold under the Public Demand Recovery Act and it was purchased by the landlord at the sale for arrears of rent due under the Bengal Tenancy Act. But the mortgagee was dispossessed. It was held that a mortgagee could file a suit under section 68(l)(c) of this Act. It was immaterial that the property sold did not belong to *C & D* who were liable to pay the mortgage-money.[1479]

A sale by the mortgagor of the equity of redemption, whether voluntary[1480] or enforced by an execution creditor,[1481] is not a wrongful act or default so as to attract the application of this section. The default or wrongful act of the mortgagor must be anterior to the deprivation. Thus, although it is the duty of the mortgagor to defend his title to the mortgaged property, he will not be liable under this clause if he fails to perform this duty when called upon after strangers have dispossessed the mortgagee.[1482] The mortgagee has of course no remedy under this section when he is deprived of his security by his own default.[1483] There was a mortgage to *A* which was not as yet registered. *B* advanced money on a mortgage of the same property

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1470. *Raghunath v Dadaji*, 70 IC 423 : AIR 1922 Bom 217; *Shahzad Singh v Narain Kurmi*, (1927) 25 All LJ 37 : 101 IC 257 : AIR 1927 All 190.
1471. *Rudra Prasad v Nasiruddin*, 102 IC 630 : AIR 1927 Oudh 315; *Debi Prasad v Sheo Narain*, 21 IC 581.
1472. *Amirulla v Rasul Baksh*, (1919) 17 All LJ 474 : 50 IC 744.
1473. *Ramakrishnama Chetty v Vuvvati Chengu*, (1914) 27 Mad LJ 494 : 33 IC 321.
1474. *Mt Mathura Devi v Mohan Lal*,AIR 1938 Oudh 210.
1475. *Appasami Thevan v Virappa*, (1906) ILR 29 Mad 362.
1476. *Singjee v Tiruvengadam*, (1890) ILR 13 Mad192.
1477. *Rudra Prasad v Nasiruddin*, 102 IC 630 : AIR 1927 Oudh 315.
1478. *Balu Ram Kumar v Mahpal Singh*, (1938) ILR All 218 : 174 IC 292 : AIR 1938 All 188.
1479. *Rai Mohan Majumdar v Comilla Union Bank*, (1945) ILR 2 Cal 473 : AIR 1945 Cal 530.
1480. *Jhabbu Ram v Girdhari*, (1884) ILR 6 All 298; *Gokul v Shrimal*, (1904) 6 Bom LR 288; cf *Janki Singh v Sheomangal Singh*, (1881) All WN 59; *Ma Pwa Thein v Ma Me Tha*, 161 IC 461 : AIR 1936 Rang 80.
1481. *Gopalasami v Arunachella*, (1892) ILR 15 Mad 304.
1482. *Kuppier v Periakaruppa*, (1919) ILR 42 Mad 578 : 50 IC 758.
1483. *Chitkale v Mathura*, (1905) 3 Cal LJ 220.

and took and registered a second mortgage in the erroneous belief that prior registration would give him priority over *A*. When *A's* mortgage was completed by registration, *B* had no right to sue for the mortgage money on grounds that his security had been impaired.[1484] Where, however, both the mortgagor and the mortgagee migrated to India from Pakistan after the partition, leaving the property there, it was held that there was no destruction of the security.[1485]

Before the TP Act it was held that the mortgagee, when deprived of part of his security by wrongful act or default of the mortgagor, was entitled to sue not for the whole of the mortgage-money, but for a proportional part of it.[1486] If the mortgagor's heir succeeding to possession as mortgagor commits waste, he is liable under this sub-section;[1487] and the same would apply to a transferee of the mortgagor[1488]

(13) Sub-section (1)—Clause (d)

This clause refers to usufructuary mortgages, and is not applicable to conditional mortgages.[1489] The mortgagor by the terms of the mortgage is bound to deliver possession, and to authorize continuance of possession until payment of the mortgage money. If the mortgagor performs these duties he is entitled to recover possession when the debt is discharged, out of the usufruct or otherwise. On the other hand, if he makes default, the mortgagee is entitled under this clause to sue him personally for the mortgage money. This is a statutory right irrespective of any express covenant.[1490] If the mortgage deed provided for a personal contract to pay, the mortgagee may either exercise his option under section 68(1)(d), or may act under the personal contract to pay.[1491] If the mortgagee omits to sue under this clause so that his remedy under clause (d) is time barred, then, if there is no personal covenant in the usufructuary mortgage, the mortgagee has no other cause of action.[1492] However, a decision to proceed under section 68(l)(d) does not constitute an abandonment of the mortgagee's right to sue under the personal covenant, though it may amount to an election to sue for the mortgage- money, and thus a waiver of the right to obtain possession.[1493] If the mortgagee fails to obtain possession from the mortgagor on the execution of the mortgage,[1494] or during the term of the mortgage in accordance with a mortgagor covenants for possession in default of payment of interest,[1495] the mortgagee may recover the debt by personal suit. So also, if the mortgagee is dispossessed either by the

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1484. *Jowand Singh v Sawan Singh,* 149 IC 1030 : AIR 1933 Lah 836.
1485. *Allah Singh v Tara Singh,* AIR 1955 All 706.
1486. *Pitambur v Ram Surun,* (1876) 25 WR 7.
1487. *Ramkrishna Chetty v Vuvvati Chengu,* (1914) 27 Mal LJ 494 : 33 IC 321.
1488. *Haridas v Jagannath,* (1940) ILR Nag 63 : 184 IC 579 : AIR 1939 Nag 256.
1489. *Badri Das v Besu,* 145 IC 159 : AIR 1933 Lah 174; *Kehar Singh v Jeon Singh,* AIR 1962 Punj 465. See, however, *Bachan Singh v Waryam Singh,* AIR 1961 Punj 174, where it was held that an action could lie under this clause even if there is no usufructuary mortgage within the Act. This is erroneous, for the right of the intended mortgagee cannot arise under this section as there was no mortgage at all.
1490. *Unichaman v Ahmed,* (1898) ILR 21 Mad 242; *Laljimal v Mohan Lal,* (1881) All WN 71; *Abdul Iaslam v Rafiat,* (1905) 2 Cal LJ 493; *Revanna v Sanna Setty,* (1957) ILR Mys 125 : AIR 1958 Mys 32.
1491. *Sidramaya Nilakanthayaswami v Danya Shidramappa,* (1954) ILR Bom 717 : 56 Bom LR 407 : AIR 1954 Bom 407; *Ramanatha v Annamalai Chettiar,* (1963) ILR Mad 580 : (1963) 1 Mad LJ 263 : AIR 1963 Mad 342.
1492. *Kirti Narayan v Surendra Mohun* 152 IC 897 : AIR 1934 Pat 624.
1493. *Ramanatha v Annamalai Chettiar,* AIR 1963 Mad 342.
1494. *Moidin Kutti v Valia,* (1866) 2 Mad HC 315.
1495. *Saravana v Chinnammal,* (1892) ILR 15 Mad 65; *Dip Narain Singh v Nageshar,* (1930) ILR 52 All 338 : 122 IC 872 : AIR 1930 All 1.

mortgagor,[1496] or by the mortgagor's co-sharer,[1497] or by title paramount,[1498] or by a prior encumbrancer, although the mortgagee omits to redeem that prior encumbrancer,[1499] or himself purchases the property at a sale enforced by that encumbrancer;[1500] or if the mortgagor who is in possession as the mortgagee's lessee, wrongfully holds over,[1501] or where the mortgagor to whom the property has been leased back by the mortgagee commits a breach of the conditions of the lease.[1502]

A liability under this section has been enforced when the mortgagor gave two successive usufructuary mortgages;[1503] when the mortgagee could not get possession of some plots because they did not belong to the mortgagor;[1504] and also when the mortgagor deprived a usufructuary mortgagee of the rents and profits.[1505] A transferee of the mortgagor may be liable under this clause, and when a usufructuary mortgagee was dispossessed at a collector's partition, he was held to be entitled to recover the mortgage money from a purchaser of the equity of redemption.[1506] Similarly, a usufructuary mortgagee who was dispossessed at a collector's partition was held entitled to recover the mortgage money from a co-sharer of the mortgagor to whom the property had been allotted.[1507] This section enables a mortgagee when dispossessed from a part of the mortgaged property to repudiate the mortgage, and to recover the entire amount of the mortgage money personally from the mortgagor.[1508] The expression "being entitled to possession" in section 68(l)(d) means entitled to possession not only under the terms of the mortgage-deed, but also entitled to possession according to law. Thus, a mortgagee of the undivided share of a coparcener not being entitled to the possession thereof under Hindu law, is not entitled to recover the mortgage money under the section.[1509] A usufructuary mortgagee who is dispossessed by a subsequent simple mortgagee in execution of a decree in a suit brought by the latter, and in which he was not made a party could sue not merely for the recovery of his mortgage- money, but also for possession of the mortgaged property.[1510]

The words "any person claiming under a title superior to that of the mortgagor" have been substituted for the words "any other person" in the old section. It is now clear that the liability under this section does not arise if the disturbance is by a trespasser. Under the old section also, it was held that the mortgagor was liable under this section for disturbance by title paramount.[1511]

1496. *Pargan Panday v Mahatam Mauto*, (1905) 6 Cal LJ 143.
1497. *Talik Singh v Jalal Singh*, (1910) 11 Cal LJ 136 : 5 IC 130; *Ramranandan Parbat v Deni Sahi*, 74 IC 877 : AIR 1924 Pat 91; *Nand Bahadur v Sita Ram*, AIR 1936 Oudh 174.
1498. *Sawaba Khandapa v Abaji*, (1887) ILR 11 Bom 475; *Ram Surat v Gur Prasad*, (1921) ILR 43 All 484 : 63 IC 998 : AIR 1921 All 48.
1499. *Ramjanam v Kunj Behari*, (1921) 6 Pat LJ 670 : 63 IC 252 : AIR 1922 Pat 154.
1500. *Ahmadullah Khan v Salar Bakhsh*, (1905) ILR 27 All 488.
1501. *Hira Lal v Ghasitu*, (1894) ILR 16 All 318.
1502. *Ramnarain v Sukhi* AIR 1957 Pat 24.
1503. *Sukhdeo Misr v Sheo Dial*, (1901) All WN 52.
1504. *Fateh Din v Kishen Lal*, 73 IC 902 : AIR 1923 All 584.
1505. *Ram Narain Singh v Adhindra*, (1916) ILR 44 Cal 388 : 38 IC 932 AIR 1946 PC 252; *Pinto v Narayan*, (1932) 34 Bom LR 984 : 141 IC 471 : AIR 1932 Bom 558.
1506. *Janki Saran v Mohammad Ismail*, (1932) 13 Pat LT 373 : 139 IC 525 : AIR 1932 Pat 273.
1507. *Jeleshwar Kuer v Sheonarayan Sah* 148 IC 23 : AIR 1934 Pat 1.
1508. *Parbati Kuar v Durga Prasad*, AIR 1949 Pat 467.
1509. *Kanaiyalal v Dhanji*, AIR 1952 Kutch 18.
1510. *Surji Mahton v Parbhu Chand Sao*, AIR 1950 Pat 34.
1511. *Jhabbu Dam v Girdhari*, (1884) ILR 6 All 298; *Gopalasami v Arunachella*, (1892) ILR 15 Mad 304; *Nakchedi Ram v Ram Charitar*, (1897) ILR 19 All 191; *Kuppier v Periakamppa*, (1919) ILR 42 Mad 578 : 50 IC 758; *Sawaba Khandapa v Abaji*, (1887) ILR 11 Bom 475; *Sadhu Saran v Bahramdeo*, 103 IC 592 : AIR 1927 Pat 230; *Ram Surat v Gur Prasad*, (1921) ILR 43 All 484 : 63 IC 998 : AIR 1921 All 48; *Labh Singh v Jamnun*, 134 IC 1116 : AIR 1931 Lah 694.

If the mortgagee is dispossessed by a trespasser, he is entitled to sue him for possession,[1512] but if dispossessed by the mortgagor he may sue either under this section for the mortgage money, or for possession.[1513] A mortgage provided that if the mortgagee did not obtain possession or if he lost possession, he could recover his money with interest by sale of the mortgaged property or any other property of the mortgagor. It was held that the mortgagee could sue either for possession, or for the mortgage money.[1514] Where after creating a mortgage with possession, the mortgagor obtains a lease of the property from the mortgagee, where no period is fixed for the lease, and the mortgagor then sells the property and hands over possession to the third person, the mortgagee cannot bring a suit for possession against the transferee treating him as a trespasser.[1515]

ILLUSTRATIONS

(1) *A* mortgaged several plots of land to *B* by usufructuary mortgage. Two of the plots did not belong to *A*, and therefore *B* could not get possession of them. *B* was entitled to sue for the mortgage money.[1516]

(2) *A* mortgaged property to *B* by simple mortgage, and subsequently to *C* by usufructuary mortgage. *C* took possession under this mortgage. But *B* brought the property to sale and the execution purchaser evicted *C*. *C* was evicted by superior title and was entitled to sue for the mortgage money although he might have redeemed *B*.[1517]

(3) *A* mortgaged property to *B* by usufructuary mortgage. The property had been leased to tenants who wrongfully and without any instigation from *A* refused to pay rent to *B*. This was not dispossession by superior title. *B*'s remedy was against the tenants and he had no remedy against *A* under section 68.[1518]

The mortgagee is not entitled to relief under this clause if he is dispossessed by his own default, e.g. when he neglects to pay the government revenue out of the income and the land is sold for arrears of assessment,[1519] or when he omits to make a defence to a suit by a subsequent mortgagee which would have preserved his security,[1520] or when a mortgagee's claim proceedings were disallowed under O 21, rule 62 of Code of Civil Procedure omits to file a suit for the recovery of possession.[1521] Again, the mortgagee may lose his remedy by acquiescence in his dispossession.[1522] If a usufructuary mortgagee does not get possession of the whole of the property mortgaged and does not enforce his remedy under the section, he cannot claim interest in lieu of profits,[1523] unless there is an express stipulation to that

1512. *Bechu Sahu v Arjun*, (1918) 3 Pat LJ 162 : 43 IC 917; *Thakur Chowdhury v Manrup Mahton*, 16 IC 735; *Sankata v Jagat Narain*, (1899) 2 OC 24.
1513. *Linga Reddi v Sama Rau*, (1894) ILR 17 Mad 469.
1514. *Ram Padarath v Nimar Singh*, (1941) ILR 17 Luck 362 : 197 IC 164 : AIR 1942 Oudh 172.
1515. *Gopiram v Shankar Rao*, AIR 1950 MB 72.
1516. *Fateh Din v Kishen Lal*, 73 IC 902 : AIR 1923 All 584.
1517. *Ramjanam v Kunj Behari*, (1921) 6 Pat LJ 670 : 63 IC 252 : AIR 1922 Pat 154.
1518. *Nakchedi Ram v Ram Charitar Rai*, (1897) ILR 19 All 191.
1519. *Kashi Lal v Shaikh Nurul Huq*, (1929) ILR 8 Pat 569 : 121 IC 466 : AIR 1929 Pat 209.
1520. *Dunia Lal v Musst Nowratan*, (1917) 2 Pat LJ 490 : 41 IC 806.
1521. *Bharat Ram v Beni Dutt*, 161 IC 821 : AIR 1936 Oudh 263.
1522. *Raja Pertab Bahadur v Gajadher*, (1902) ILR 24 All 521 : 29 IA 148; *Khuda Bakhsh v Alim-un-nissa*, (1905) ILR 27 All, 313; *Uchit Mandar v Gosain Singh*, 51 IC 816; *Jhunku Singh v Chhotkan Singh*, (1909) ILR 31 All, 325 : 2 IC 221; *Amjad Husain v Zaimul Iba*, 98 IC 778 : AIR 1927 Oudh 87; *Pranpati v Hasiban*, 135 IC 892 : AIR 1932 Oudh 57; *Prasanna Kumar Halder v Girish Chandra*, (1934) 58 Cal LJ 80 : (1933) 37 Cal WN 1162 : 149 IC 667 : AIR 1934 Cal 149; *LC Pais v Mapanna Bhatta*, AIR 1956 Mad 128.
1523. *Mahadaji v Joti*, (1892) ILR 17 Bom 425; *Jhunku Singh v Chhotkan Singh*, 2 IC 221; *Uchit Mandar v Gosain Singh*, 51 IC 816; *Bhawani Prasad v Saheb Din*, (1906) 9 OC 144; *Dubri v Ram Naresh*, 93 IC 297 : AIR 1920 Cal 224; *Mahadeo v Sitla Baksh* 53 IC 408 : AIR 1922 Oudh 102; *Sheo Shankar v Raj Jas*, (1927) ILR 2 Luck 676 : 105 IC 164 : AIR 1927 Oudh 594; *Narul Hasan v Mahbub Bux*, AIR 1945 All 203. But see *Joseph Mattom v Free India Bank Ltd*, (1966) ILR 1 Ker 345 : AIR 1966 Ker 234.

effect.[1524] He is deemed in law to have acquiesced in his diminished security. A Privy Council case on this point is that of *Rajah Pertab Bahadur v Gajadher,*[1525] a suit to redeem five out of 12 villages mortgaged by an Oudh *zamindar* in 1851. The mortgage was with possession, but there was a covenant to pay interest until delivery of possession. The mortgagee was dispossessed of six villages by a *kabulayatdar* of the King of Oudh in 1853, then recovered possession, but was again dispossessed of seven villages at the Summary Settlements of 1858 and 1864. The mortgagee claimed interest as he was dispossessed. But the Judicial Committee held that as he brought no suit to recover the mortgage money when he was dispossessed, he had acquiesced in his dispossession, and decreed redemption on payment of the principal sum only. However, the mortgagee is not obliged to repudiate the mortgage because he is dispossessed of part of his security. In a case where the mortgage was of nine villages, seven of which were subject to a prior mortgage, and the mortgagee was dispossessed first of the seven and then some years later of the two villages, the fact that he acquiesced in the dispossession of the seven villages did not prevent his recovering the mortgage money when dispossessed of the two villages.[1526]

(14) Charge

The privilege conferred by this section on a mortgagee to sue for money cannot be availed of by a charge-holder, in proceedings in execution of a decree, without resorting to a suit, even if the security has been impaired by the conduct of the person creating the charge.[1527]

(15) Succession Certificate

The heirs of a mortgagee can sue on a cause of action accruing after the death of the mortgagee without obtaining a succession certificate, but not if the cause of action accrued in his lifetime.[1528]

(16) Interest

A usufructuary mortgagee who is dispossessed may not only require payment of the debt but also interest, by way of damages, for the unexpired period of the mortgage.[1529] So also he is entitled to interest, if he never obtained possession owing to the fault of the mortgagor.[1530] It has, however, been held by a Full Bench of the Allahabad High Court that the mortgagee at the time of redemption cannot claim by way of interest the profits of the property which have not been delivered to him.[1531]

(17) Sub-section (2)

A suit under section 68 is not a suit on the mortgage. However, it must be a suit by the mortgagee for the mortgage money.[1532] A suit on the mortgage is a suit under section 67,

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1524. *Phulchand v Sandilands,* (1907) 10 OC 29.
1525. *Rajah Pertab Bahadur v Gajadher,* (1902) ILR 24 All 521 : 29 IA 148.
1526. *Muhammad Hanif v Ishri Prasad,* (1922) ILR 44 All 77 : 64 IC 768 : AIR 1922 All 197.
1527. *Kesar Chand v Uttam Chand,* 72 IA 169 : 47 Bom LR 945 : (1945) 49 Cal WN 685 : (1945) 2 Mad LJ 160 : AIR 1945 PC 91.
1528. *Umesh Chandra v Mathura Mohan,* (1901) ILR 28 Cal 246.
1529. *Sita Nath v Thakurdas,* (1919) ILR 46 Cal 448 : 52 IC 433; *Linga Reddi v Sama Rao,* (1894) ILR 17 Mad 469; *Mahesh Singh v Chauharaja,* (1882) ILR 4 All 245; *Subramania v Panchanada,* (1931) Mad WN 751 : 136 IC 785 : AIR 1932 Mad 175; *Kumarappa v Suppan* 145 IC 744 : AIR 1933 Mad 672.
1530. *Dalsingh v Sunder Koer,* AIR 1944 Oudh 208 following *Pratap Bahadur Singh v Gajadhar Bakshi Singh,* (1902) ILR 24 All 529.
1531. *Nurul Hasan v Mahbub Baksh,* (1945) ILR All 676.
1532. *Nityanand Ghose v Rajpur Chhaya Bani Cinema Ltd,* AIR 1953 Cal 208.

while in a suit under section 68 the only decree that can be passed is a decree for money.[1533] A usufructuary mortgagee who has been dispossessed has no remedy either by foreclosure or by sale, but can only be given a simple money decree.[1534] He may also sue for possession, but he cannot sue for sale. This is because there is no personal covenant in a pure usufructuary mortgage. But if there is a personal covenant which implies a right of sale, it would seem that if the mortgage money has become payable under section 68, the mortgagee may also under section 67, sue for sale.[1535] A mortgagor who wishes to avail himself of the benefit of section 68(2) can only do so on the tacit assumption that there was a valid mortgage. He cannot deny the mortgage, and at the same time invoke the discretionary relief under section 68(2).[1536]

The suit under section 68 not being a suit on the mortgage, O 34, rule 6 of the Code of Civil Procedure does not apply. It is, therefore, open to the mortgagee to execute his decree against the mortgagor personally, while preserving his rights under the mortgage. This might be a great hardship to the mortgagor who finds himself pressed to pay while his property is under mortgage. To avoid this hardship, the sub-section enacts that in cases where the mortgagor is not in default, i.e., in clauses (a) and (b), the suit under section 68 shall be stayed until the mortgagee has exhausted his remedy against the security or what remains of the security. However, the mortgagee may avoid the stay order and proceed with the suit if he surrenders his security, for a mortgagee who abandons his security is competent to bring a simple suit for the money advanced by him.[1537] When the security is released, the enforcement of the money decree is no hardship on the mortgagor, the mortgage is then no longer subsisting and O 34, rule 14 is no bar to the sale of the mortgaged property in execution of the decree.[1538]

Sub-section (2) only applies to mortgages upon which a suit could be filed in that court. The right of an equitable mortgagee of properties in Burma to sue the mortgagor in Madras because the deposit was made in Madras, was not affected by sub-section (2) as no suit could have been filed on the mortgage in Madras.[1539]

In cases under clause (c), the mortgagor is in default and is not entitled to this protection. Thus, if the mortgagor in possession commits waste, the mortgagee would be entitled to sue for the mortgage money while still preserving his mortgage rights. He would not, however, be able to sell the mortgaged property in execution of the decree under section 68 by reason of O 34, rule 14. But if there were a personal covenant in the mortgage which implied a right of sale, it would seem that the mortgagee might sue both under section 68 and under section 67 to recover the mortgage money, and to realize the security. This was so decided by the

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1533. *Arunchalam Chetti v Ayyavayyan*, (1898) ILR 21 Mad 476, p 481; *Appasami Thevan v Virappa*, (1906) ILR 29 Mad 363.
1534. *Aghore Nath v Naiabar* ,41 IC 406; *Lazarannassa Bibi v Mahomed Jaffer*, 13 IC 336.
1535. *Mohammad Narsing Pratab v Yakub*, 56 IA 299 : 116 IC 414 : AIR 1929 PC 139; *Gajadhar v Sibananda*, (1924) 28 Cal WN 532 : 81 IC 768 : AIR 1924 Cal 592 (the right to sue under section 68 would give a right to sell under section 67); *Ram Khilawan v Ghulam Husain*, (1933) ILR 8 Luck 190 : 141 IC 464 : AIR 1933 Oudh 35; *Savitri Devi v Beni Devi*, (1967) ILR 46 Pat 1202 : AIR 1968 Pat 222.
1536. *Nityanand Ghose v Rajpur Chhaya Bani Cinema Ltd*, AIR 1953 Cal 208.
1537. *Durga Charan v Ambica Charan*, (1927) ILR 54 Cal 424, pp 429-430 : 101 IC 130 : AIR 1927 Cal 393; *Sarajbala v Kamini Kumar*, (1926) 43 Cal LJ 142 : 94 IC 811 : AIR 1926 Cal 765; *Ramanathan v Somasundaram*, (1964) ILR 1 Mad 832 : (1964) 2 Mad LJ 12 : AIR 1964 Mad 519.
1538. *Chedi Lal v Saadat-un-nissa*, (1917) ILR 39 All 36 : 36 IC 907; *Ganesh Singh v Debi Singh*, (1910) ILR 32 All 377 : 5 IC 419; *Tansukh Rai v Sri Gopal*, (1921) ILR 43 All 677 : 63 IC 445 : AIR 1921 All 131; *Suraj Narain v Jagbali Shukul*, (1920) ILR 42 All 566 : 57 IC 14; *Gomathi Ammal v Alagappa*, (1921) 41 Mad LJ 160 : 62 IC 756 : AIR 1921 Mad 477.
1539. *CVRM Ramaswami v Jeevarathunammal*, (1956) 2 Mad LJ 908 : AIR 1957 Mad 106.

Privy Council in the case of a simple mortgage usufructuary in *Narsingh Partab v Mohammad Yaqub.*[1540]

In cases under clause (d), the mortgage is usufructuary, and there is no question of realizing the security, for a usufructuary mortgagee is not entitled to a decree either for foreclosure, or for sale. He would sue on title to recover possession,[1541] and in such a suit no question as to the amount due on the mortgage would arise.[1542] However, he would also have a right to sue for the mortgage money under section 68(d). This right is supplemental so that he can file a suit in the alternative for recovery of possession, or for the mortgage money.[1543] If the decree were for the mortgage money, he could not bring the mortgaged property to sale[1544] except in execution of the decree for costs, for that part of the decree would not be under the mortgage and O 34, rule 14 would not be applicable to it.[1545]

(18) Abandon his Security

These words refer to the whole of the security. An abandonment of part of the security would be insufficient; for in that case the mortgage as to the remainder would subsist and O 34, rule 14 would be a bar to its sale. Again a release of part of the security would be inadequate relief to the mortgagor, for its effect would only be to increase the burden on the rest of the property. On the other hand, if part of the security has ceased to exist, a release of the remainder would be sufficient. This was recognised in a Calcutta case[1546] under O 34, rule 6. Of course, the section has no application where the mortgagee has no security to abandon, as when his right to enforce security is barred by the provisions of O 2, rule 2 of the Code of Civil Procedure.[1547]

(19) Section 68(b)

It has been held by the Patna High Court that the right to enforce personal liability, and the right to enforce a security are distinct and independent rights. The mortgagee is not bound to sue for realisation of the security where he sues to enforce the personal covenant, as the two claims arise out of distinct causes of action. Hence, the action would not be barred by O 2, rule 2 of the Code of Civil Procedure 1908. The two obligations of the debtor are independent of each other.[1548]

(20) Limitation

Where a mortgage deed contains a covenant to repay the mortgage money within five years, and also a covenant to put the mortgagee in possession of the mortgaged property by way of security and the mortgagor fails to deliver possession to the mortgagee, the right to sue for the mortgage money accrues to the mortgagee under this section immediately on the

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1540. *Narsingh Partab v Mohammad Yaqub,* (1929) ILR 4 Luck 363 : 56 IA 299 : 116 IC 414 : AIR 1929 PC 139.
1541. *Kalka Singh v Himayat Ally,* (1907) 10 OC 218; *Gauri Singh v Bechu Singh,* (1962) All LJ 1092 : 142 IC 779 : AIR 1933 All 97 distinguishing *Narsingh Partab v Mohammad Yaqub,* AIR 1929 PC 139; *Ramchandra Rao v SV Co Ltd,* (1953) ILR Mys 1 : AIR 1952 Mys 125.
1542. *Fazal Din v Milka Singh,* 145 IC 182 : AIR 1933 Lah 193.
1543. *Linga Reddi v Sama Rau,* (1894) ILR 17 Mad 469; *Arunachalam Chetti v Ayyavayyan,* (1898) ILR 21 Mad 476.
1544. *Madho Prasad v Debi Dial,* (1891) All WN 168; *Kadma v Muhammad Ali,* (1919) ILR 41 All 399 : 50 IC 134.
1545. *Haribans Rai v Sri Niwas,* (1913) ILR 35 All 518 : 20 IC 896.
1546. *Chand Mall v Ban Behari,* (1924) ILR 50 Cal 718 : 74 IC 102 : AIR 1924 Cal 209.
1547. *Chunnilal v Amir Ahmedi Bee,* AIR 1958 AP 608.
1548. *Bihar State Electricity Board v Goya Cotton and Jute Mills Ltd,* AIR 1976 Pat 372. Contra AIR 1958 AP 658 and see also AIR 1916 PC 119.

mortgagor's failure to deliver possession of the mortgaged property, and the suit is governed by Article 62 of the Limitation Act 1963.[1549]

(21) Burden to Prove Discharge

In a suit for recovery of mortgage loan, when the defendant admits the mortgage, the burden is on the defendant to prove the discharge. However, by production of the original mortgage deed, the defendant is entitled to invoke the presumption under section 114(i) of the Indian Evidence Act, 1872 to show that the document was returned by the mortgagee in token of discharge. If the original is produced by the defendant, the plaintiff has to rebut the presumption raised in favour of the defendant.[1550]

69. Power of sale when valid.—[1551][(1)] [1552][[1553][***] A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist [1554][or a member of any other race, sect, tribe or class from time to time specified in this behalf by [1555][the State Government] in the official Gazette]

(b) where [1556][a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgagee is [1557][the Government];

(c) where [1558][a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgaged property or any part thereof [1559][was, on the date of the execution of the mortgage-deed, situated within the towns of Calcutta, Madras, Bombay [1560][***] [1561][or in any other town[1562] or area

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1549. *Dnyanoba Gangaram Dattoba*, AIR 1947 Bom 152. See Article of the 1908 Act.
1550. *Shivalingamma v T Ramaiah*, AIR 2004 Kant 307 : (2004) 1 KCCR 556.
1551. Section 69 re-numbered as sub-section (1) of that section, by Act 20 of 1929, sec. 34.
1552. Subs. by Act 20 of 1929, sec. 34, for certain words.
1553. The words and figures "Notwithstanding anything contained in the Trustees' andMortgagees' Powers Act, 1866" omitted by Act 48 of 1952, sec. 3 and Sch. II (w.e.f.2-8-1952).
1554. Ins. by Act 3 of 1885, sec. 5.
1555. The words "the L.G., with the previous sanction of the G.G. in C" successively amendedby the A.O. 1937 and the A.O. 1950 to read as above.
1556. Ins. by Act 20 of 1929, sec. 34.
1557. The words "the Secretary of State for India in Council" successively amended by the A.O.1937 and the A.O. 1950 to read as above.
1558. Ins. by Act 20 of 1929, sec. 34.
1559. Subs. by Act 20 of 1929, sec. 34, for "is".
1560. The word "Karachi" omitted by the A.O. 1948.
1561. The words "or Rangoon" have been successively amended by Acts 6 of 1904, 11 of 1915,20 of 1929, the A.O. 1937 and the A.O. 1950 to read as above.
1562. For notifications relating to the towns of—Ahmedabad, see Gazette of India 1935, Pt. I, p. 936.Bandra, Kurla and Ghatkoper-Kirol, see Gazette of India, 1924, Pt. I, p. 1964.Cawnpore, Allahabad and Lucknow, see Gazette of India, 1933, Pt. I, p. 158.Coimbatore, Mudura, Cocanada and Cochin, see Gazette of India, 1935, Pt. I, p. 526.Delhi (Contonment), see Gazette of India, 1963, Pt. II, Section 3, Sub-section (1), p. 1020.

which the State Government may, by notification in the Official Gazette, specify in this behalf.]

[1563][(2)] [1564][***] No such power shall be exercised unless and until—

[1565][(a)] notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

[1566][(b)] some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

[1567][(3)] When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

[1568][(4)] The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into court under section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

[1569][(5) Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.]

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1563. Second paragraph re-numbered as sub-section (2) by Act 20 of 1929, sec. 34.
1564. The word "But" omitted by Act 20 of 1929, sec. 34.
1565. Clause (1) lettered as clause (a) by Act 20 of 1929, sec. 34.
1566. Clause (2) lettered as clause (b) by Act 20 of 1929, sec. 34.
1567. Third paragraph numbered as sub-section (3) by Act 20 of 1929, sec. 34.
1568. Fourth paragraph numbered as sub-section (4) by Act 20 of 1929, sec. 34.
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(1) Amendments

The section has been remodelled by the amending Act 20 of 1929.

(2) Expressly Conferred

The power of sale in clauses (b) and (c) must be expressed. A provision in a mortgage deed that the mortgagee should "have all the rights, powers, remedies and privileges conferred upon a mortgagee by Act 4 of 1882" does not confer an express power of sale under this section.[1570]

(3) Power of Sale without Intervention of the Court

The power of sale referred to in this section is a power of sale without the intervention of the court, and is distinct from the power of a simple mortgagee to cause the mortgaged property to be sold, i.e., under section 67, by decree of the court.[1571] It refers to a clause expressly included in a mortgage.[1572]

If there is a fraud then there may be cause of action against the purchaser to have the sale declared void or to have it set aside on the ground of fraud.[1573] The power of sale cannot be exercised except in one of the three cases:

(a) Where the mortgage is an English mortgage, and the parties are not Hindus, Mahomedans, Buddhists or members of a notified class. In *LV Apte v RGN Price,*[1574] the Andhra Pradesh High Court applied section 69 to an English mortgage between a company, and trustees for debenture-holders, some of the trustees being Hindus. The court applied certain observations of the Privy Council in *Kanhaya Lal v National Bank of India*[1575]—a case from the Punjab where the TP Act was not in force—to the effect that a limited company stood in no need of protection from the trustees for the debenture-holders.

(b) When the mortgagee is the government, and an express power of sale is conferred in the mortgage-deed.

(c) When the mortgaged property is situated in one of the specified towns, and the deed contains an express power of sale. In addition of the Presidency Towns mentioned, the following other areas have been notified: city of Ahmedabad,[1576] and towns of Delhi and New Delhi.[1577] It was held in *Trimbak Gangadhar v Bhagwandas*[1578] that the expression "town of Bombay" in section 69 was to be

1570. *Mataprasad Upadhya v Kunnon Devi,* (1928) ILR 6 Rang 134, p 135 : 110 IC 698 : AIR 1928 Rang 128.
1571. *Kishan Lal v Ganga Ram,* (1891) ILR 13 All 28.
1572. *Mulraj v Nanumal,* (1942) ILR Bom 83 : 43 Bom LR 890 : 198 IC 646 : AIR 1942 Bom 46.
1573. Satyapal Uttamchand Chowdhary v Rukayyabai Husseinbhai Bandukwala, AIR 1993 Bom 203, p 211.
1574. *LV Apte v RGN Price,* AIR 1962 AP 274, p 297.
1575. *Kanhaya Lal v National Bank of India,* (1923) ILR 4 Lah 284 : 50 IA 162, p 171 : 75 IC 7 : AIR 1923 PC 114.
1576. Bombay Government Gazette, 1960, part IVA, p 902.
1577. Gazette of India, 1962, part 11, p 1944.
1578. *Trimbak Gangadhar v Bhagwandas,* (1899) ILR 23 Bom 348.

construed as referring to the area within the limits of the ordinary original civil jurisdiction of the Bombay High Court. This position is now accepted by an express provision in section 8 of the Greater Bombay Laws and Bombay High Court (Declaration of Limits) Act, 1945.[1579] In a Madras case,[1580] this territorial limitation was challenged as being discriminatory, and unreasonable, contrary to Articles 14 and 19 of the Constitution, but this contention was rejected. The situation of the property is immaterial in cases (a) and (b).

A power of sale without the intervention of the court does not affect the mortgagee's ordinary right of realization by suit.[1581] The right recognised by this section is independent of the right to have a receiver appointed under section 69-A, and may be exercised even after a receiver has been appointed under section 69-A.[1582]

(4) Attachment—Effect of

The words "private transfer" occurring in section 64, Code of Civil Procedure 1908, would only mean a transfer by the person against whom the attachment was made, or a prohibitory order was issued in respect of the immovable property, or whose interest (including his legal representative) is attached. The words "private transfer" would not include sale or transfer made by a mortgagee with a power of sale. In fact, O 38, rule 10 of the Code of Civil Procedure also provides that attachment before judgment shall not affect the rights of persons not parties to the suit, nor bar any person holding a decree against the defendant applying for the sale of the property under attachment in execution of such decree.

A sale held in exercise of the power conferred by section 69 of the TP Act is not affected by the attachment made. The purchaser in such an auction held by the mortgagee gets an absolute title, free from all encumbrances. Therefore, no execution could be proceeded (even to the extent of the interest of judgment-debtor), against the property which is sold in auction under section 69. In fact, section 69 is one of those rare instances where a person who is not the owner of the property, could convey the right, title and interest in the property along with his own interest and, while exercising such power of sale, he is not acting under the mortgagor or as an agent of the mortgagor. The attachment order will have, therefore, no effect on the power of sale exercised by the mortgagee.[1583]

(5) Leave of Court if Required

Failure to obtain leave from the court (which had appointed a receiver) for the exercise of the mortgagee's power of sale does not, in itself, invalidate the sale. A party, challenging the sale must state the grounds on which the sale should be avoided.[1584]

(6) Who may Exercise the Power

The statutory power in England is exercisable by the person for the time being entitled to the mortgage money.[1585] The present section only refers to the mortgagee, but this includes the assignee of the mortgagee.

1579. Bombay Act 17 of 1945.
1580. *Narasimhachariar v Egmore Benefit Society,* AIR 1955 Mad 135.
1581. *Goburdhun Bysack v Sonatum,* (1874) 23 WR 84; *Muthialpet Benefit Fund v Devarajulu,* AIR 1955 Mad 455.
1582. *Saraswathi Bai v Varadarajulu N dicker,* (1955) ILR Mad 1310 : (1956) 1 Mad LJ 223 : AIR 1956 Mad 385; *Krishnammal v N Krishna,* (1956) ILR Mad 1174 : (1956) 2 Mad LJ 30 : AIR 1956 Mad 424.
1583. *SUS Davey Sons v PM Narayanaswami,* AIR 1983 Mad 217.
1584. *P Kasturi Bai v T Varadam,* (1981) 2 Mad LJ 247.
1585. Conveyancing Act 1881, section 21(4); Law of Property Act 1925, section 106(1).

In a Madras case,[1586] the mortgage deed provided for the exercise of the power of sale by the mortgagee or his assignee, and it was held that it could be exercised by sub-mortgagee of the assignee. Such power can be exercised by the second mortgagee, even if the first mortgagee had not been given it.[1587]

The words "any person acting on his behalf" show that the mortgage deed may provide for the exercise of the power of sale by an agent of the mortgagee. In an English case it was held that an agent expressly authorised by the mortgagee to exercise the power of sale may do so, but not if the authority is only a general authority to sell property and receive money.[1588] A power of sale to two joint mortgagees may be exercised by the survivor of them.[1589] If the mortgagees are partners, the power of sale must be exercised by all, unless otherwise expressed in the mortgage.[1590] The words "sell or concur in selling" refer to such a case. A state financial corporation has remedies to proceed under sections 29 and 31 of the State Finance Corporation Act both against the principal debtor and the guarantor, under section 69 of the TP Act against the immovable property, and in certain cases it may file a civil suit to recover its dues.[1591] A bare reading of sub-sections (1) and (4) of section 29 of the State Finance Corporation Act shows that it is similar to section 69 of the TP Act under which it is stipulated that a mortgagee exercising the power of sale is a trustee of the surplus sale proceeds, and after satisfying his own charge he holds the surplus for the subsequent encumbrances and ultimately for the mortgagor.[1592]

(7) What may be Sold

The section says that the mortgaged property or any part thereof may be sold. In England, a mortgagee is not allowed to sell fixtures separately from the land,[1593] and these cases would probably be followed in India.

(8) Conditions of Exercise of Power

These are specified in sub-section (2). The said conditions are imperative, and cannot be varied even by agreement.[1594] The power arises when default is made in the payment of the mortgage money, either of the principal, or part of the principal, or of interest amounting to at least ₹ 500. If no time is fixed for payment, there can be no default till demand is made.[1595] But the power is not exercisable till after three months' notice in writing, if the default is in payment of the principal.[1596] No notice is necessary when default is made in the payment of interest. It is sufficient that interest amounting to at least ₹ 500 has been due for three months; and in such a case the power may be exercised before the expiry of the period allowed for redemption.[1597] The proviso as to interest is designed to secure punctual payment during the term of the mortgage; and it has the effect of overruling the Privy Council decision that a power of sale in default of payment of interest is invalid as a penalty.[1598] If the mortgagee has given three months' notice for default of principal and interest, he cannot sell for arrears of interest

1586. *Ramakrishna v Official Assignee*, (1922) ILR 45 Mad 774 : 69 IC 407 : AIR 1922 Mad 390.
1587. *Paramanand v Nanulal*, AIR 1942 Mad 232.
1588. Re *Dowson and Jenkins Contract*, (1904) 2 Ch 219 (CA).
1589. *Hind v Poole*, (1885) 1 K & J 383, 3 Eq Rep 449.
1590. *Warr v Jones*, (1876) 24 WR 695.
1591. *MS Khalid v KR Rangaswamy*, AIR 2003 Kant 174, p 176 : (2003) 2 Kar LJ 247 : (2003) 1 KCCR 711.
1592. *Gajraj Jain v State of Bihar*, (2004) 7 SCC 151 : (2004) 7 SCC 151.
1593. Re *Brooke, Brooke v Brooke*, (1894) 2 Ch 600, Re *Yates Batcheldor v Yates*, (1888) 38 Ch D 112 (CA); *Southport and West Lancashire Banking Co v Thompson*, (1887) 37 Ch D 64 CA).
1594. *Babamiya v Jehangir*, AIR 1941 Bom 339.
1595. *Purasawalkam v Kuddus*, 94 IC 806 : AIR 1926 Mad 841.
1596. *Kamalambaii v M Purushotam Naidu*, (1934) 67 Mad LJ 499 : 152 IC 437 : AIR 1934 Mad 644.
1597. *AC Kundu v Banu Rukmanand*, 43 IC 921.
1598. *Vencatavarada v Venkata*, (1875) 23 WR 91 (PC).

before the expiry of that period;[1599] and if the power of sale in the mortgage deed is limited to default in payment of principal, the mortgagee cannot sell for default in the payment of interest.[1600] As to principal, a provision as to notice is necessary, for a power of sale without notice would be oppressive, and enable the mortgagee at any time to extinguish the equity of redemption.[1601] The period of three months fixed by the TP Act cannot be curtailed by the terms of the deed. A stipulation for a period of 15 days was held in a Madras case[1602] to be invalid, and the sale in accordance therewith afforded grounds for damages.

Section 69(2)

Even where the notice under section 69(2) is given to only one of the mortgagors, what passes under the sale held in pursuance of the section is the interest of all the mortgagors, provided the power of sale is otherwise validly exercised.[1603]

A mortgagee who has wrongly exercised his power of sale has no right to personal recovery, or the balance of the mortgage money.[1604] Notice must be served on the mortgagor or if there are several mortgagors, notice on one is sufficient. This is also the case in section 20(1) of the Conveyancing Act, 1881, and section 103(i) of the Law of Property Act, 1925. In *Hoole v Smith,*[1605] J Fry, held in a case where the mortgage deed provided that the power of sale could not be exercised unless notice had been given to the mortgagee or his executors, administrators or assigns, that notice must be given to the assignee of the equity of redemption. This case was followed by the Bombay High Court in *Mancherji Furdoonji v Noor Mahomedbhoy.*[1606] In *Santhankumar v Indian Bank,*[1607] the Supreme Court, having considered these cases, has held that in the absence of an express stipulation to that effect in the mortgage-deed, notice need not be given to the assignee of a portion of the mortgaged property. Section 69(2) requires notice to be given to one of several mortgagors, the mortgagor receiving notice being constituted agent for the others and in the absence of fraud, a sale would be valid even if one mortgagor has received no notice.

A long delay in selling after the expiry of the period of the notice does not make a fresh notice necessary.[1608] No form of notice is prescribed. It is sufficient that the notice gives the mortgagor the prescribed period of warning.[1609] Service of notice would be in accordance with section 102.

Installments

If the mortgage money is payable by installments, the power of sale is exercisable when an installment of the mortgage money has become due.[1610]

(9) Mortgagee's Duty

The mortgagee's power is for his own benefit, and enables him to realise his debt.[1611] The mortgagee on his own convenience can exercise the power.[1612] The court will not inquire in

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1599. *Doolabhdas v Chhabildas,* (1899) 1 Bom LR 273.
1600. *Jerup Teja & Co v Peerbhoy,* (1921) 23 Bom LR 1241 : 64 IC 634 : AIR 1921 Bom 421.
1601. *Miller v Cook,* (1870) LR 10 Eq 641.
1602. *Madras Deposit & Benefit Society v Passanha,* (1888) ILR 11 Mad 201.
1603. *Yuvarajan v The Mylapore Hindu Permanent Fund Ltd,* (1975) 2 Mad LJ 414.
1604. *Purasawalkam v Kuddas* 94 IC 860 : AIR 1926 Mad 841.
1605. *Hoole v Smith,* (1881) 17 Ch D 434.
1606. *Mancherji Furdoonji v Noor Mahomedbhoy,* (1893) ILR 17 Bom 711.
1607. *Santhankumar v Indian Bank,* [1967] 2 SCR 613 : AIR 1967 SC 1296 : [1967] 2 SCJ 336 : [1967] 2 SCA 131.
1608. *Mancherji v Noor Mahomedbhoy,* (1893) ILR 17 Bom 711.
1609. *Metters v Brown,* (1863) 33 LJ Ch 97.
1610. *Payne v Cardiff Rural Council,* (1932) 1 KB 241 : [1931] All ER Rep 479.
1611. See *Palmer v Barclays Bank Ltd,* (1971) 23 P & Cr 30; *Forsyth v Blundell,* (1973) 129 CLR 477, pp 83, 494.
1612. *Reliance Permanent Building Society & Harwood Stamper,* (1944) Ch 362, p 372; Re *Potters Oils Ltd (No 2)* [1986] 1 All ER 890.

his motives for exercising the power of sale.[1613] A mortgagee when exercising his power of sale, owes a duty to the mortgagor to take reasonable care to obtain a proper price. Therefore, when selling tenanted property, which would realise a much higher price with vacant possession, the mortgagee should in appropriate cases, attempt to obtain vacant possession.[1614] Generally, a mortgagee can safely accept the highest bid at an appropriately publicised auction sale.[1615] The property should be properly described in the auction advertisement which should be widely published for the appropriate market. The auction must be held in reasonable conditions.[1616] The fact that the property is re-sold shortly after the sale by the mortgagee for a substantially higher price would be viewed with suspicion.[1617]

(10) Restraint on Exercise of the Power

An injunction will not restrain the mortgagee from exercising his power of sale because the amount is in dispute.[1618] The law in England is that the mortgagee cannot be restrained from exercising his power of sale by the mortgagor filing a suit for redemption.[1619] But he will be restrained if the mortgagor pays the amount claimed into court,[1620] or if the mortgagee denies the title of a puisne encumbrancer who has offered to redeem.[1621] The same rule was adopted by the Bombay High Court in *Jagijivan v Shridhar,*[1622] where the court said that "the owner of the equity of redemption can only stay the sale *pendente lite* by paying the amount due into court, or by giving prima facie evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage." The mortgagor must offer to redeem before he can bring the mortgagee before the court. This general rule was expressed to be an application of the maxim "he who seeks equity must do equity".[1623] An injunction was refused in *Mancherji Furdoonji v Noor Mahomedbhoy,*[1624] where the mortgagor had filed a suit for redemption and the mortgage deed contained the clause usually found in English mortgages that the mortgagor's remedy for any impropriety or irregularity should be in damages, and the court cited *Prichard v Wilson.*[1625] These cases were not decided under the TP Act. A Madras case,[1626] decided under the TP Act, holds that a power of sale is not subject to the rule of *lis pendens* enacted in section 52. The court said that the mortgagor who has given an express power of sale cannot by starting a suit for redemption derogate from that which he has in express terms conferred upon the mortgagee by the instrument, namely, a power of sale, and to hold otherwise would be simply to tear up

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1613. See *Belton v Bass Ratcliffe and Gretton Ltd*, (1922) 2 Ch 449, p 465.
1614. See *Holohan v Friends Provident and Century Life Office*, (1966) IR 1.
1615. *Cuckmere Brick Co Ltd v Mutual Finance Ltd*, (1971) Ch 949, p 965 : [1971] 2 All ER 633, p 643 (CA).
1616. See *Standard Chartered Bank Ltd v Walker*, [1982] 3 All ER 938.
1617. *Predeth v Castle Phillips Finance Co Ltd*, (1986) 279 Estates Gazetter 1355, (CA); noted at (1986) Com 442 (Thomson); *Bank of Cyprus (London) Ltd v Gill*, (1980) 2 Lloyds Rep 508 (CA).
1618. *Gill v Newton*, (1866) 14 WR CA (Eng) 490. Although where the mortgagor is a company, the presentation of a winding up petition is not a general ground for stopping the sale, an interim injunction may be granted where the mortgagee had himself presented the petition; see *Cambrian Mining Co Ltd ex p Fell*, (1881) 50 LJ Ch 836.
1619. *Adams v Scott*, (1859) 7 WR (Eng) 213; *Prichard v Wilson*, (1864) 10 Jur (NS) 330; *Babamiya v Jehangir*, AIR 1941 Bom 339.
1620. *Hill v Kirwood*, (1880) 28 WR (Eng) 358 (CA); *Hickson v Darlow*, (1883) 23 Ch D 690 (CA); *Macleod v Jones*, (1883) 24 Ch D 289 (CA); See also *Duke v Robinson*, [1973] 1 All ER 481; *Inglis v Commonwealth Trading Bank of Australia*, (1972) 126 CLR 161 (HC); *Mulraj v Nanumal*, (1942) ILR Bom 83 : 43 Bom LR 890 : 198 IC 646 : AIR 1942 Bom 46.
1621. *Rhodes v Buckland*, (1852) 16 Beav 212.
1622. *Jagijivan v Shridhar*, (1878) ILR 2 Bom 252, p 285.
1623. *Clarke v Japan Machines (Australia) Pty Ltd (No 2)*, (1984) 1 QDR 421.
1624. *Mancherji Furdoonji v Noor Mahomedbhoy*, (1893) ILR 17 Bom 711.
1625. *Prichard v Wilson*, (1864) 10 Jur (NS) 330.
1626. *Ramakrishna v Official Assignee*, (1922) ILR 45 Mad 774 : 69 IC 407 : AIR 1922 Mad 390.

the instrument which contains the contract agreed upon by the parties; nor can the mortgagor defeat the power of sale by setting up a prior mortgage which he has paid off as a shield against the puisne mortgagee exercising the power.[1627] A mortgagor, however, may obtain an injunction to restrain a sale if the mortgagee is acting in a fraudulent and improper manner, contrary to the terms of the mortgage deed.[1628] In the absence of some substantive legislative provision, the right conferred on a mortgagee to bring the property to sale out of court cannot be held to have been taken away.[1629] Where the security consists of several items, the mortgagee while selling it must not deliberately destroy the value of the whole or the set. Thus, he could not sell seven of a set of eight antique chairs.[1630]

It has been held in England[1631] that where, after default, the mortgagee has by conduct waived his right to exercise the power of sale, he may be estopped, but this is a fact to be established by the mortgagor.

(11) Who may Purchase

The mortgagee may not buy the property either himself, or with other or by an agent—for a man cannot sell to himself.[1632] A sale by a person to a corporation of which he is a member will not be a sale by a person to himself.[1633] Such a sale can, however, be objected to on the ground that the mortgagee had not acted bona fide or taken reasonable precaution to obtain the best possible price.[1634]

(12) Section 69(3)

The mortgagee cannot effect a valid sale in favour of himself; the position would not be different if the auction purchaser is really only a nominee of the mortgagee. The sale in such a case would be void ab initio.[1635] So a sale by a mortgagee to a society secretary of a building,[1636] or other officer concerned in the conduct of the sale,[1637] is void. Such a transaction is not a valid exercise of the power of sale and does not prevent the mortgagor from redemption,[1638] unless he has assented to the purchase.[1639] However a sale by a mortgagee to a company of which he is a shareholder is not necessarily invalid.[1640] And a puisne mortgagee may purchase, for he is in the same position as a stranger.[1641]

1627. *Manjappa v Krishnayya*, (1905) ILR 29 Mad 113.
1628. *Jerup Teja & Co v Peerbhoy*, (1921) 23 Bom LR 124 : 64 IC 634 : AIR 1921 Bom 421; cf *Jenkins v Jones* (1860) 2 Giff 99 (refusing to accept mortgage money); *Whitworth v Rhodes*, (1850) 20 LJ Ch 1105 (making an unauthorised demand); *Babamiya v Jehangir*, AIR 1941 Bom 339.
1629. *Govindram Bros v Official Assignee*, AIR 1950 Bom 49.
1630. *Champagne Perrier-Jonet SA v H H Finch Ltd*, [1982] 3 All ER 713, p 725.
1631. *Braithwaite v Winwood*, [1960] 3 All ER 642 : (1960) 1 WLR 1257.
1632. *National Bank of Australia v United Hand in Hand Co*, (1879) 4 App Cas 391; *Henderson v Astwood* (1894) AC 150 (PC); *Vallabhdas v Pranshankar*, (1928) 30 Bom LR 1519 : 113 IC 313 : AIR 1929 Bom 24; Re *loyes Trust* (1849) 1 Mac & G 488, p 494; *Society v Abarupammal*, AIR 1943 Mad 30 : (1943) 1 Mad LJ 92.
1633. *Farrar v Farrars Ltd*, (1988) 40 Ch D 395, p 409; *Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd*, (1978) 139 CLR 195.
1634. *Tse Kwong Lam v Wong Chit Sen*, [1983] 3 All ER 54 (PC).
1635. *VP Padmavathi Ammal v PS Swaminatha Iyer*, AIR 1975 Mad 343 : (1975) 2 Mad LJ 27 Cf *Sree Yallamma Cotton etc Mills Ltd*, AIR 1969 Mys 280.
1636. *Martinson v Clowes*, (1882) 21 Ch D 857, p 860.
1637. *Hodson v Deans*, (1903) 2 Ch 647.
1638. Ibid.
1639. *Purmanandas Jivandas v Jamnabai*, (1886) ILR 10 Bom 49.
1640. *Farrar v Farrars*, (1888) 40 Ch D 395 (CA).
1641. *Shaw v Bunny*, (1865) 2 De GJ & Sm 468 (CA); *Kirkwood v Thompson*, (1865) 2 De GJ & Sm 613, p 618; *Parkinson v Hanbury*, (1860) 1 Drew & Sm 143 : (1865) 2 De GJ & Sm 450 : LR 2 HLL.

(13) Effect of Sale

The Privy Council in *Rajah Kishendatt Ram v Rajah Mumtaz All Khan*[1642] said:

> The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power of trustee of the surplus (sale) proceeds, after satisfying his own charge, first for the subsequent encumbrancers, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free of all the encumbrances.

A contract for the sale of immovable property cannot extinguish the equity of redemption; it is only on the execution of the conveyance and registration of transfer of the mortgagor's interest by a registered instrument that the mortgagor's right of redemption will be extinguished. Until the sale is completed by registration, the mortgagor does not lose the right of redemption. The mortgagee, when exercising the power of sale under section 69, does not act as the agent of the mortgagor, but acts against him. Merely putting the property to auction does not extinguish the right of redemption.[1643] The purchaser does not derive title under or through the mortgagee, but acquires a larger estate free from encumbrances.[1644] If the mortgagor continues in possession without the permission of the purchaser, such possession is adverse.[1645] After the sale, the mortgagee satisfies his own charge and then holds the surplus sale proceeds as trustee.

(14) Protection of Purchaser

The third sub-section protecting the title of purchasers is taken almost verbatim from section 21(2) of the Conveyancing Act, 1881, now section 104(2) of the Law of Property Act, 1925. No irregularity or impropriety in the exercise of the power of sale affects the title of an innocent purchaser, and it has been held that the purchaser gets a good title even though the mortgage had been paid off at the time of the sale.[1646] This case seems covered by the words "professed exercise of such a power" which include not only a power irregularly exercised, but a want of power; and the Madras High Court has said that nothing could be clearer than the terms of the proviso which express an interest to protect the purchaser, and to confine the remedy of the mortgagor to a suit for damages.[1647] However, the expression "professed exercise of a power" does not include a case where there is no express power of sale without the intervention of the court in the mortgage.[1648] The purchaser is under no duty to make inquiries, but if he has notice of any irregularity or impropriety in the exercise of the power of sale he is not protected, for he then becomes a party to the transaction impeached.[1649] So the purchaser is not protected if he knows that notice had not or could not have been given;[1650] but he is protected if he is not aware of the irregularity in the notice;[1651] or if want of notice had been waived by the mortgagor.[1652]

1642. *Rajah Kishendatt Ram v Rajah Mumtaz All Khan*, 6 IA 145, p 160; *Purnanandas Jiwandas v Jamnabai*, (1886) ILR 10 Bom 49.
1643. *Narandas Karsondas v SA Kamtam*, AIR 1977 SC 774; [1977] 2 SCR 341; (1977) 3 SCC 247; overruling (1976) ILR 3 Mad 161.
1644. *Purnanandas Jiwandas v Jamnabai*, (1886) ILR 10 Bom 49; *Chabildas Lalloobhai v Mowji Dayal*, (1902) ILR 26 Bom 82, on app (1907) ILR 31 Bom 566 : 34 IA 179 (PC).
1645. *Chabildas Lallubhai v Mowji Dayal*, (1902) ILR 26 Bom 82.
1646. *Dicker v Augerstein*, (1876) 3 Ch D 600.
1647. *Madras Deposit & Benefit Society v Passanha*, (1888) ILR 11 Mad 201.
1648. *Mataprasad Upadhya v Kunnon Devi*, (1928) ILR 6 Rang 134 : 110 IC 698 : AIR 1928 Rang 128.
1649. *Jenkins v Jones*, (1860) 2 Giff 99; See also *Chabildas Lalloobhai v Mowji Dayal*, (1907) ILR 31 Bom 566 : 34 IA 179; *Bailey v Barnes*, (1894) 1 Ch 25 (CA).
1650. *Selwyn v Graft*, (1888) 38 Ch D 273 (CA); *Parkinson v Hanbury*, (1860) 1 Drew & Sm 143, affd (1865) 2 De G J & Sm 450 : LR 2 HL 1.
1651. *Madras Deposit & Benefit Society v Passanha*, (1888) ILR 11 Mad 201.
1652. Re *Thompson v Holt*, (1890) 44 Ch D 472.

(15) Remedy of the Mortgagor

Whatever irregularity may have been committed in the exercise of the power of sale the mortgagor's only remedy, in the absence of fraud, is in damages against the mortgagee.[1653] So when the mortgagee sold not only for money due under an English mortgage, but also for money due under a subsequent equitable mortgage, the sale was valid and the mortgagor's only remedy was in damages against the mortgagee;[1654] but a sale will be set aside on the ground of fraud, though not for mere inadequacy of price.[1655]

The mortgagor may also obtain an injunction to stay the sale, by giving prima facie evidence that it is being conducted in a fraudulent or improper manner, or otherwise by paying the whole amount due into court.[1656]

(16) Application of Sale Proceeds

The fourth sub-section dealing with the application of sale proceeds is identical with section 21(3) of the Conveyancing Act, 1881, now section 105 of the Law of Property Act, 1925, but for the addition of the words "in the absence of a contract to the contrary." When the equity of redemption is extinguished by the sale, the mortgagee exercising the power of sale becomes a trustee of the surplus sale proceeds after discharging previous encumbrances, if any, to which the sale is subject. Such encumbrances may be discharged as indicated in section 57, and the balance is to be applied in payment of the costs and expenses of the sale, then in discharge of the mortgage money and the residue, if any, in payment to the persons entitled to the mortgaged property, i.e., subsequent encumbrancers, and finally to the mortgagor. As to such residue, the mortgagee is a trustee for the mortgagor.[1657] The mortgagee is charged interest on this residue from the date of sale to date of payment to the persons interested.[1658] If there are subsequent encumbrancers they must be paid before the mortgagor, and the mortgagee, if he has notice of these subsequent encumbrances, is liable to them if he pays the mortgagor.[1659]

[1660]**69A. Appointment of receiver.**—(1) A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee

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1653. *Govind Swami Naickar v Pukhraj,* AIR 1940 Mad 903.
1654. *Ramakrishna v Official Assignee,* (1922) ILR 45 Mad 774 : 69 IC 407 : AIR 1922 Mad 390.
1655. *Warner v Jacob,* (1882) 20 Ch D 220, p 224; *Haddington Island Quarry Co v Huson,* (1911) AC 722; *Clara Mookerjea v Surendra,* AIR 1963 Mad 208.
1656. *Hill v Kirwood,* (1880) 28 WR (Eng) 358; *Hickson v Darlow,* (1883) 23 Ch D 690; *Macleod v Jones,* (1883) 24 Ch D 289; *Jagjivan v Shridhar,* (1878) ILR 2 Bom 252.
1657. *Rajah Kishendatt v Rajah Mumtaz Ali,* (1880) ILR 5 Cal 198 : 6 IA 145; *Pichu Vadhiyar v Secretary of State,* (1917) ILR 40 Mad 767 : 38 IC 986.
1658. *Haji Abdul Rahman v Haji Noor Mahomed,* (1892) ILR 16 Bom 141.
1659. *West London Commercial Bank v Reliance Permanent Building Society,* (1885) 29 Ch D 954.
1660. Ins. by Act 20 of 1929, sec. 35.

shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose off, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent, on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent on that gross amount, or at such other rate as the court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:—

(i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;

(ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;

(iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, property payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;

(iv) in payment of the interest falling due under the mortgage;

(v) in or towards discharge of the principal money, if so directed in writing by the mortgagee,

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The costs of every application under this sub-section shall be in the discretion of the Court.

(11) In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.

Synopsis

(1) New Section 668
(2) Receiver 668
(3) Exercise of the power 668
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(12) Receiver After Suit Filed 670

(1) New Section

This section was inserted by the amending Act 20 of 1929.

The provisions of the section cover a case in which it is alleged by the mortgagor that there is no debt outstanding or that the mortgage has become time-barred and thereupon, there should be no receiver.[1661]

(2) Receiver

A mortgagee in possession is responsible for prudent management, and is liable to be called upon to account on the footing of willful default.[1662] To avoid this liability and at the same time to preserve the advantages of possession, the practice grew in England at first to provide for the appointment of a receiver by the mortgagor, and then for the deed to provide for the appointment of a receiver by the mortgagee on behalf of the mortgagor, so that the receiver was the agent of the mortgagor.[1663]

(3) Exercise of the power

The mortgagee cannot appoint a receiver until the power of sale is exercisable under section 69(2). In case of default of payment of principal, the mortgagee would, therefore, have to wait until expiry of three months after service of notice. The power conferred by this section may be exercised even after the mortgagee has gone into possession.[1664] A receiver is not generally appointed by the court under such a clause in the mortgage decree after the final decree has been made.[1665]

The power conferred under this section is independent of the power of sale recognised under section 69; and the latter may be exercised even though a receiver has been appointed under this section.[1666] A receiver appointed under this section may be removed for due cause. The fact that by reason of the Madras Agriculturists' Relief Act, there is no outstanding debt is, of course, due cause within the meaning of the sub-section.[1667]

(4) Who may be Appointed

Under sub-section (2) the person, if any, named in the mortgage deed must be appointed, and failing that, the appointment must be made by the consent of the mortgagor and the mortgagee. In either case, the appointment must be made in writing signed by the mortgagee. However, if the parties do not agree, the mortgagee has liberty to apply to the court in a summary proceeding to make the appointment. A receiver can be removed from office by the consent of the mortgagor and mortgagee expressed in writing and signed by both, or failing such consent, by the court on application by either party. The provision for an application to the court either for the appointment, or the removal of the receiver is novel.

(5) Position of Receiver

The receiver is not accountable to the mortgagor, but to the mortgagee.[1668] Similarly, it has been held that it is only a fiction that the receiver is deemed to be an agent of the

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1661. *Venkatanarayan v Champalal,* (1954) ILR Mad 1231 : AIR 1954 Mad 896 : (1954) 2 Mad LJ 47.
1662. *Mayor v Murray,* (1878) 8 Ch D 424; see Transfer of Property Act, 1882, section 76(b).
1663. *Gaskell v Gosling,* (1896) 1 QB 669, p 672 : [1895-99] All ER Rep 300 (CA).
1664. *Refuge Assurance Co v Pearlberg,* (1938) Ch 687 : [1938] 3 All ER 231.
1665. Re *Renula Bose,* AIR 1938 Cal 93 : (1938) 42 Cal WN 266 : 175 IC 908.
1666. *Saraswathi Bai v Varadarajulu Naicker,* (1955) ILR Mad 1310 : (1956) 1 Mad LJ 223 : AIR 1956 Mad 385; *Krishnammal v N Krishna,* (1956) ILR Mad 1174 : (1956) 2 Mad LJ 30 : AIR 1956 Mad 424.
1667. *Venkatanarayana Rao v* C *Savansukha,* (1954) ILR Mad 1231 : (1954) 2 Mad LJ 47 : AIR 1954 Mad 896.
1668. *Cohen v Bindyanath,* (1938) 40 Cal WN 1270 : 177 IC 327 : AIR 1938 Cal 507.

mortgagor; the fiction cannot, therefore, be extended so as to make a contract entered into by the mortgagor binding upon the receiver.[1669] The agency may be modified by the terms of the deed.[1670] Under the TP Act, the mortgagee has no liability for the receiver, and this is the advantage the mortgagee gains by appointing a receiver instead of taking possession.[1671] Payment by the receiver of part of the debt saves the bar of limitation.[1672]

(6) Power as to Income

The receiver is appointed out of the income of the mortgaged property, and under sub-section (4), he has full powers of recovery in the name of either the mortgagor, or the mortgagee and to give effectual receipts. Under sub-section (5), a person paying money to him is not concerned with inquiring into the validity of his appointment. A receiver appointed by debenture holders is entitled to possession as against the liquidator.[1673] The official liquidator may dispose off the assets as he deems fit in order to realise them. In case there is a mortgage created on immovable property in favour of secured creditor, he may sell the immovable property to realise the loan extended to the company.[1674]

It has been held by the Bombay High Court that there is no power conferred by this section on the receiver to let out the mortgaged property on "leave and licence" basis.[1675]

(7) Remuneration

The rate of remuneration is fixed in sub-section (6). Unless a lower rate is specified in the deed, it is 5 per cent on the gross collections. However, the court may allow a higher rate.

(8) Powers as to Application of Income

Under sub-sections (7) and (8), the receiver has power to insure the property against fire, and to execute necessary and proper repairs, but only when authorised in writing by mortgagee. Repairs done without written authority by a receiver cannot be included in the mortgagee's account.[1676] Any insurance money that the receiver may receive, he must apply in accordance with section 76(f) either in reinstating the property, or in reduction of the mortgage debt. Other moneys received he must apply as directed in sub-section (8).

(9) Contract to the Contrary

Under sub-section (9), the power to appoint a receiver and the exercise of powers by the receiver are subject to the terms of the deed of mortgage. The deed may either restrict, or extend these powers and the powers so restricted, or extended operate as statutory powers under the TP Act.

(10) Right to Apply

The provisions of sub-section (10) give the parties the same right to apply for directions on present questions of management or administration as a trustee has under section 34 of the Indian Trusts Act, 1882. The receiver has no doubt a right to apply under this section.

1669 *Radhakrishna v Thiruvenkatiah,* (1963) ILR Mad 681 : (1963) 1 Mad LJ 160 : AIR 1963 Mad 449.
1670. *Richards v Kidderminster Corporation,* (1896) 2 Ch 212, p 220.
1671. *Mason v Westoby,* (1886) 32 Ch D 206.
1672. Re *Hale, Lilley v Foad,* (1899) 2 Ch 107 : (1895-99) All ER Rep 902 (CA).
1673. Re *Henry Pound, Son and Hutchins,* (1889) 42 Ch D 402 (CA); Re *Joshua Stubbs Ltd, Barney v Joshua Stubbs,* (1891) 1 Ch 475 (CA).
1674. *Jitendra Nath Singh v Official Liquidator,* (2013) 1 SCC 462 : LNIND 2012 SC 601 : AIR 2012 SC (Supp) 956 : JT 2012 (9) SC 221, 2012 (9) SCALE 186.
1675. *Sakamari Steel and Alloys Ltd v State Industrial and Investment Corporation,* AIR 1979 Bom 66.
1676. *White v Metcalf,* (1903) 2 Ch 567.

(11) The Court

In cases governed by the Code of Civil Procedure, the court having jurisdiction in a suit to enforce the mortgage, is the court within whose limits the mortgaged property or any portion of the mortgaged property is situated—section 17, Code of Civil Procedure 1908. As to the High Courts of Calcutta, Madras and Bombay, clause 12 of the Letters Patent of those courts is applicable.

(12) Receiver After Suit Filed

Under O 40, rule 1 of the Code of Civil Procedure, the court may appoint a receiver if it appears just and convenient. The court has power under that rule to appoint a receiver in the case of an English mortgage if the property is in jeopardy,[1677] or insufficient to pay the encumbrances,[1678] of if the interest is in arrears.[1679] The same has been held as to a mortgage by deposit of title deeds.[1680] A simple mortgagee is entitled to obtain the appointment of a receiver if the circumstances of the case justify it, and is not disentitled merely because the personal remedy does not subsist.[1681] But a simple mortgagee has no charge on the rents and profits in the hands of the receiver so as to have preference over the Crown debts.[1682] A receiver appointed in a mortgagee's suit is entitled to apply to the court for direction as to the management of the mortgaged property, e.g. as to its insurance. However, the court will not give directions on any collateral matter such as an agreement by the insurance company to pay the mortgagor a commission.[1683] A receiver, appointed under O 40, rule 1 is an officer of the court, and holds the property for the benefit of all parties, and is not the agent of the mortgagor. His appointment is prima facie for the benefit of the mortgagee, and if the mortgagor becomes insolvent, the Official Assignee cannot claim the profits in the hands of the receiver in preference to the mortgagee;[1684] nor can the receiver be removed by the Insolvency Court.[1685] Again, if after the appointment of a receiver, the mortgagor's interest is attached and sold in execution of a money decree, the purchaser is not entitled to the income of the property realized by the receiver before the sale.[1686] If a mortgagee's receiver of the income appointed under this section before suit is also appointed receiver of the property by the court, he becomes

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1677. *Ghanashyam v Gobinda,* (1902) 7 Cal WN 452; *Weatherall v Eastern Mortgage Agency Co,* (1911) 13 Cal LJ 495 : 9 IC 985.
1678. *Rameshwar Singh v Chunni Lal,* (1902) ILR 47 Cal 418 : 56 IC 839; *Khubsurat Kuer v Saroda,* (1911) 16 Cal WN 126 : 12 IC 165.
1679. *Khubsurat Kuer v Saroda,* 12 IC 165.
1680. *Ram Kumar v Chartered Bank,* (1925) 41 Cal LJ 203 : 87 IC 375 : AIR 1925 Cal 664.
1681. *Paramasivan v Ramasami,* (1933) ILR 56 Mad 915 : 65 Mad LJ 222 : 145 IC 449 : AIR 1933 Mad 570; reversing on app 143 IC 650 : AIR 1933 Mad 447 and dissenting from *Nrisingha Charon v Rajniti Prasad,* (1932) 13 Pat LJ 525 : 142 IC 300 : AIR 1932 Pat 360; *Rameshwar Singh v Chuni Lal,* (1920) ILR 47 Cal 418 : 56 IC 839; *Ma Hum Yick v KARK Firm,* 183 IC 728 : AIR 1939 Rang 321; *Damodar v Radhabai,* AIR 1939 Bom 54 : (1939) ILR Bom 82 : 40 Bom LR 1266 : 179 IC 821; *State Bank of India v The Podar Mills Ltd,* AIR 1989 Bom 21, p 24.
1682. *Sambasiva Chettiar v Secretary of State,* (1940) 1 Mad LJ 429 : 51 Mad LW 749 : AIR 1940 Mad 703; *Collector, Tiruchirappali v Trinity Bank Ltd,* (1961) ILR Mad 1158 : (1961) 2 Mad LJ 398 : AIR 1962 Mad 59.
1683. *JC Galstaun v Prudential Insurance Co,* (1932) 54 Cal LJ 566 : 137 IC 523 : AIR 1932 Cal 366.
1684. *Rameshwar Singh v Chuni Lal,* (1920) ILR 47 Cal 418 : 56 IC 839; *Maharaja of Pithapuram v Gokuldoss,* (1931) ILR 54 Mad 565 : 133 IC 504 : AIR 1931 Mad 626; *Official Assignee v Punjab National Bank,* (1932) 26 SLR 61 : 137 IC 338 : AIR 1932 Sau 82; Re *Imperial Bank of India,* (1940) ILR 1 Cal 197 : 191 IC 557 : AIR 1940 Cal 429.
1685. *Nrishinha Kumar Sinha v Deb Prosanna Mukherji,* (1935) ILR 62 Cal 483 : (1935) 39 Cal WN 384 : 157 IC 140 : AIR 1935 Cal 460.
1686. *Ponnu Chettiar v Sambasiva Ayyar,* (1933) ILR 56 Mad 546 : 64 Mad LJ 682 : AIR 1933 Mad 293.

an officer of the court and ceases to be the agent of the mortgagor.[1687] An executing court has jurisdiction to appoint a receiver at the instance of a mortgagee.[1688]

70. Accession to mortgaged property.—If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

ILLUSTRATIONS

(a) *A* mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, *B* is entitled to the increase.

(b) *A* mortgages a certain plot of building land to *B* and afterwards erects a house on the plot. For the purposes of his security, *B* is entitled to the house as well as the plot.

Synopsis

(1) Accessions 671
(2) For the Purpose of Security 673
(3) Accession After Extinction of the Mortgage 673
(4) Contract to the Contrary 673

(1) Accessions

Section 70 refers to the mortgagee's right to accessions to the mortgaged property and is, therefore, the converse of section 63 which deals with the mortgagor's rights to accessions. As regards natural accessions, it is the corollary to section 63, for such accessions are incorporated in the mortgaged property, from part of the mortgagee's security, and revert to the mortgagor upon redemption.[1689] As regards acquired accessions, the mortgagor is not always bound to incur the expense of redeeming them if they have been acquired by the mortgagee. But no such distinction is necessary in regard to the mortgagee's rights, for the mortgagee is entitled to treat acquired accessions as part of his security and to enforce his lien upon them, if they have been acquired by the mortgagor, and *a fortiori* if they have been acquired by himself. Thus, if the mortgagor builds on the property mortgaged, the buildings form part of the mortgagee's security.[1690] So also, land formed by alluvion or dilluvion.[1691] Machinery fixed by bolts and nuts to the concrete floor of a building is an accession to which the mortgagee is entitled.[1692] So also, an electric installation set up by the mortgagor in a mortgaged factory.[1693] But this would be a question of fact in each case.[1694] In *Nannu Mal v Ram Chandra,*[1695] the auction purchasers at a prior mortgagee's sale removed a shed, and built a small house on the land mortgaged. A puisne mortgagee who had not been made a party sued to enforce his mortgage, and was entitled to have the house sold as an accession to

1687. *Hand v Blow,* (1901) 2 Ch 721, p 732 (CA).
1688. *Amamath v Abhoy,* (1948) ILR 27 Pat 534 : AIR 1949 Pat 24.
1689. *Ganapatji v Saadat Ali,* (1880) ILR 2 All 787.
1690. *Krishna Gopal v Miller,* (1902) ILR 29 Cal 803; *Macleod v Kissan,* (1906) ILR 30 Bom 250, p 262, citing *Southport and West Lancashire Banking Co v Thompson,* (1887) 37 Ch D 64; *Amar Singh v Bhagwan Das,* (1933) ILR 14 Lah 749 : AIR 1933 Lah 771 : 149 IC 104; *Atmukur v Chetty v Thimpurasundar,* AIR 1965 Mad 185.
1691. *Saila Bala v Swerna Moyee,* AIR 1939 Cal 275.
1692. *PMPM Chettyar Firm v Siemens Ltd,* (1933) ILR 11 Rang 322 : 147 IC 283 : AIR 1933 Rang; *Reynolds v Ashby & Sons,* (1904) AC 466 : [1904-7] All ER Rep 401.
1693. *Punjab and Sind Bank v Kishen Singh,* (1935) ILR 16 Lah 881 : 156 IC 795 : AIR 1935 Lah 350.
1694. *Satyanarayan Murthy v Ganagayya,* AIR 1939 Mad 684 : (1939) 1 Mad LJ 692 : 49 Mad LW 578 : (1939) Mad WN 383.
1695. *Nannu Mal v Ram Chandra,* (1931) ILR 53 All 334 : 132 IC 401 : AIR 1931 All 277.

the property mortgaged. So also, if the mortgagee buys government trees standing on the mortgaged land, they form part of his security.[1696] If, after the mortgage, the mortgagor sells a plot of the land mortgaged to the mortgagee and then buys it back, the plot is again subject to the mortgage.[1697] Where only the building is mortgaged (and not the site), the site cannot be deemed to be an "accession" to the mortgaged property.[1698]

The section is not limited to physical accretions or additions, for an increase of interest or enlargement of the estate is also an accession.[1699] Therefore, when the mortgagor had only the leasehold rights in the mortgaged property and he acquires freehold rights, the same would be an accession to which the mortgagee would be benefitted.[1700] Similarly, when the mortgagor subsequently acquires certain *sir* lands by reason of the extinction of an ex-proprietary tenancy, that would also form part of the tenancy.[1701] Similarly, when the mortgagor of a *chuck* acquires the shikmi interest in the *chuck,* that interest is an accession to the security, and passes with it to the purchaser at a sale in execution of the mortgage decree.[1702] If a puisne mortgagee acquires an occupancy right by surrender from the mortgagor, such right is an accession to the mortgaged property, and ensures for the benefit of the mortgagee.[1703] If land which is *khudkast* when mortgaged is settled as *sir* land, the accrual of *sir* rights is an accession to which the mortgagee is entitled; but after foreclosure the mortgagor is entitled, under section 49 of the Central Provinces Tenancy Act, 1920, to remain in possession as an occupancy tenant.[1704] And if the mortgagor discharges a prior encumbrance existing at the date of the mortgage, the increase in value of the estate is for the benefit of the mortgagee.[1705]

Again, when a mortgagee who has mortgaged his rights to a sub-mortgagee acquires the equity of redemption, such acquisition ensures for the benefit of the sub-mortgagee.[1706] In a Madras case,[1707] the mortgage decree was against a Mahomedan lady and her eldest son. Subsequently, their shares were increased by the death of another son who was not a party to the suit and against whom no decree had been made. Yet the increased shares were held liable to be sold under the decree. In a Calcutta case,[1708] three coparceners mortgaged family property in which an aunt had a share. After the suit was instituted, the aunt died, and CJ Rankin, held that the increased share was liable to the mortgage not only under section 43, but on the principle of section 70 that any enlargement of the mortgagor's interest generally ensures for the benefit of the mortgagee.

It is immaterial whether the mortgagor or the mortgagee is in possession. However, if the mortgagee in possession encroaches upon the other land of the mortgagor, that other land is not an accession.[1709] A clearance of adjoining waste land by the mortgagor is not an accession within the meaning of this section.[1710] A fresh grant of adjoining land to the mortgagor is not necessarily an accession.[1711]

1696. *Bakshiram v Darku,* (1873) 10 Bom HCR 369.
1697. *Deolie Chand v Nirban Singh,* (1879) ILR 5 Cal 253.
1698. *Baljit Singh v J I Cunnington,* AIR 1984 All 209.
1699. *Sidheshwar Prasad v Ram Saroop,* AIR 1963 Pat 412.
1700. *M K Rakesh Kumar v Assistant Reconstruction Company (India) Ltd,* AIR 2008 AP 45 : (2008) III BC 258.
1701. *Pratab Chand v Ram Narayan,* [1961] 3 SCR 913.
1702. *Surja v Nanda Lal,* (1906) ILR 33 Cal 1212.
1703. *Bhagwantrao v Subkaran,* 127 IC 349 : AIR 1929 Nag 225.
1704. *Rajeshwar v Rukhna,* 142 IC 603 : AIR 1933 Nag 104.
1705. *Shyama Churn v Ananda Chandra,* (1898) 3 Cal WN 323.
1706. *Ajudhia Prasad v Man Singh,* (1903) ILR 25 All 46.
1707. *Ajijuddin v Sheikh Budan,* (1895) ILR 18 Mad 492.
1708. *Behary Lal v Indra Narayan,* (1927) 31 Cal WN 985 : 104 IC 206 : AIR 1927 Cal 665.
1709. *Mala Singh v Budh Singh,* 25 IC 616.
1710. *Tay Gyi v Maung Yan,* 146 IC 674 : AIR 1933 Rang 81.
1711. *Kodi v Moidin,* (1918) 35 Mad LJ 120 : 49 IC 147.

(2) For the Purpose of Security

Under this section, a mortgagee is entitled to the benefit of accession for the purpose of security only. The section has no application to the case of a mortgagee who purchases a share of the equity of redemption, and sues to enforce the mortgage[1712]

(3) Accession After Extinction of the Mortgage

An accession made after the extinction of the mortgage is not within the section. An accession made by the mortgagor after the property has been sold in execution of the mortgagee's decree does not pass to the mortgagee or to the purchaser at the court sale.[1713] In a Patna case,[1714] the mortgagee obtained a decree for sale against a mortgagor who had a *mokarrari* right. Before sale, the mortgagor acquired the *brahmottar* right. The court held that this could not be sold under the decree. It is submitted that the mortgage had not been extinguished by the decree, and the interest was liable to be sold as an accession.[1715] An accession acquired after the decree was sold, as in a Madras case already cited.[1716]

(4) Contract to the Contrary

The rule in this section is rule of equity.[1717] It is not applicable if the terms of the mortgage exclude the accretion. A Bombay case,[1718] is an illustration of an implied contract to the contrary. A *deshgat watandar* mortgaged his *watan* lands which were inalienable beyond his lifetime. The estate was subsequently enlarged to absolute ownership by the abolition of the *deshgat watans*. The court held that the heir of the mortgagor was not bound by the mortgage. The section was not referred to, but it would seem that the right to the accretion was subject to an implied contract to the contrary as the mortgagee well understood that his security was only a life estate. A converse instance was that of an older Bombay case,[1719] where the *inam* was resumed but the mortgage lien on the proprietary interest continued, as the effect of the redemption was only to make the land again liable to assessment.

71. Renewal of mortgaged lease.—When the mortgaged property is a lease [1720][***] and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Synopsis

(1) Amendment ..... 673 (2) Renewal of Lease 674

(1) Amendment

The original section referred to a lease for a term of years. The words "for a term of years" have been omitted by the amending Act 20 of 1929 as superfluous.

1712. *Arunagiri v Radha Krishna,* (1942) 2 Mad LJ 520 : 201 IC 351 : AIR 1942 Mad 44.
1713. *Sivananjiah v Sitha v Goudar,* (1921) 41 Mad LJ 490 : 70 IC 367 : AIR 1921 Mad 627.
1714. *Haradhan v Hargobind,* (1921) 6 Pat LJ 347 : 63 IC 552 : AIR 1921 Pat 188.
1715. *Sripad v Kashibai,* AIR 1945 Bom 248; *Kastoori Devi v Guru Granth Saheb,* (1964) All LJ 88 : AIR 1965 All 193.
1716. *Ajijuddin v Sheik Budun,* (1895) ILR 18 Mad 492.
1717. *Bhupendra v Mst Vajihunnissa,* (1917) 2 Pat LJ 293, p 305 : 39 IC 564.
1718. *Gansabai v Baswani,* (1910) ILR 34 Bom 175 : 5 IC 866.
1719. *Vishnu v Tatia,* (1863) 1 Bom HC 22.
1720. The words "for a term of years" omitted by Act 20 of 1929, sec. 36.

(2) Renewal of Lease

Section 71 is the corollary to section 64, for just as the mortgagor has on redemption a right to a renewed lease obtained by the mortgagee, so the mortgagee is entitled to a renewed lease obtained by the mortgagor, as it is an increment to his security. This is on the principle that the new lease is treated as engrafted on the stock of the old lease, and forming part of the mortgage security. This principle is not based on the doctrine of quasi-trusts; but there is a similar provision in illustration (a) to section 90 of the Indian Trusts Act, 1882 that when a tenant for life of leasehold property renews the lease in his own name or for his own benefit, he holds the renewed lease for the benefit of all those interested in the old lease. So if a tenant mortgagor allows his landlord to obtain a collusive decree for rent and to purchase the holding, the property in the hands of the landlord is subject to the mortgage.[1721] The deposit of a deed of lease of which the term has expired, operates as a mortgage by deposit of title deeds when the term is renewed.[1722]

72. Rights of mortgagee in possession— [1723][A mortgagee] may spend such money as is necessary—

[1724][(a) ***]

(b) for [1725][the preservation of the mortgaged property] from destruction, forfeiture or sale;

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease,

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent per annum:

[1726][*Provided* that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.]

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and the premiums paid for any such insurance shall be [1727][added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent per annum]. But the amount of

1721. *Ram Saran Das v Ram Pergash Das,* (1905) ILR 32 Cal 283.
1722. *Villa v Petley,* 148 IC 721 : AIR 1934 Rang 51.
1723. Subs. by Act 20 of 1929, sec. 37, for "When, during the continuance of the mortgage, themortgagee takes possession of the mortgaged property, he".
1724. Cl. (a) omitted by Act 20 of 1929, s 37.
1725. Subs. by Act 20 of 1929, sec. 37, for "its preservation".
1726. Ins. by Act 20 of 1929, sec. 37.
1727. Subs. by Act 20 of 1929, sec. 37, for certain words.

such insurance shall not exceed the amount specified in this behalf in the mortgage- deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

Synopsis

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(1) Amendments

This section was amended by the amending Act 20 of 1929.

(2) Rights of Mortgagee

The scope of this section has been considerably enlarged. It was formerly limited to the rights of the mortgagee in possession. This was an unnecessary limitation, for the rights under all the clauses, except old clauses (a) which was only appropriate to a mortgagee in possession, apply to all mortgages. It also led to the erroneous impression that these rights were not possessed by mortgagees who were not in possession. A striking illustration of this is the Madras case of *Perianna v Marudainayagam.*[1728] The mortgagee under a usufructuary mortgage had not been given possession. The mortgaged property was subject to a prior lien by a decree of court. The decree holder brought the property to sale, and the mortgagee paid the amount into court, and saved the property. The Madras High Court held in the first place, that as he had not been given possession he was not a usufructuary mortgagee. This is no longer so under the amended definition of a usufructuary mortgagee in section 58. The court then held that as he was not a usufructuary mortgagee, he had no charge on the property, for the amount he paid, either under section 68, or section 72. In other cases, however, it was held that, in spite of its imperfect wording, the old section did not exclude mortgagees who were not in possession.[1729]

The section represents to a large extent the English rule that the mortgagee is entitled to be indemnified against all expenses, so long as he acts reasonably as a mortgagee, and is allowed all proper "costs, charges and expenses" incurred by him in relation to the mortgage security.

1728. *Perianna v Marudainayagam,* (1889) ILR 22 Mad 332.
1729. *Upendra Chandra v Tara Prosanna,* (1903) ILR 30 Cal 794, p 800; following in *Rakhohari v Bipra Das,* (1904) ILR 31 Cal 975 and *Nadershaw v Shirinbai* (1923) 26 Bom LR 839, p 843 : 87 IC 129 : AIR 1924 Bom 264.

The costs must be costs which the mortgagee has incurred as mortgagee. Such costs form part of the entire decretal amount,[1730] and are the costs, charges and expenses referred to in O 34, rule 2(1)(a)(iii) of the Code of Civil Procedure. Costs incurred by the mortgagee after a proper tender of the mortgage money have been disallowed.[1731] Under the English law, the costs of negotiating the loan and preparing the mortgage are costs leading up to the mortgage, and not costs incurred *qua* mortgagee. Hence, though the mortgagor may be personally liable for these costs, they cannot be added to the security and recovered as costs, charges and expenses.[1732] This would also be the law under section 72 which refers to money spent by a mortgagee as a mortgagee. But when an equitable mortgage contained an agreement by the mortgagors to give a legal mortgage when required, it was held in an English case that the costs of the legal mortgage can be recovered as costs, charges and expenses, being costs of perfecting the security of the mortgagee,[1733] Such costs would also be added to the mortgage under section 72(d). Again, liability under this section cannot be enforced after the mortgage has been surrendered. If the mortgagee accepts money paid into court by the mortgagor under section 83 and gives up possession, he cannot bring the property to sale in order to recover expenses.[1734] However, the mortgagee continues to be a mortgagee after the suit and until a final decree for foreclosure is passed, or a sale under a decree for sale is confirmed, and it is submitted that a mortgagee can incur necessary expenses under this section after suit, and until final decree for foreclosure or confirmation of sale.

The English rule, however, includes costs incurred by the mortgagee in regard to the mortgage debt. Thus, the costs of recovering the debt from a surety who had only given a promissory note[1735] were allowed in England. This would not be allowed under section 72 which is limited to costs in relation to the mortgage security. Again, the English rule negatives the remedy by personal suit against the mortgagor to enforce the mortgagee's claim for expenses, for it does not rest on an implied contract by the mortgagor and can only be enforced as a condition of redemption.[1736] Section 72 gives the mortgagee the right to add the amount spent to the mortgage money; However, it seems that this does not exclude the mortgagee's remedy under section 69 of the Indian Contract Act, 1872.[1737]

ILLUSTRATION

A mortgaged his interest in a patni taluk to *B*. *A* then sold his interest to *C* who got his name registered in the zamindar's books in place of *A*. The zamindar threatened to sell the taluk for arrears of rent and *B* paid the rent to save his interest in the taluk. It was held that *B* was entitled to recover the amount paid from *C* under section 69 of the Contract Act.[1738]

1730. *Maharaj Bahadur Singh v Basiruddin,* (1925) 41 Cal LJ 607 : 93 IC 364 : AIR 1925 Cal 1135.
1731. *Dhondo v Balkrishna,* (1884) ILR 8 Bom 190.
1732. *Wales v Carr,* (1902) 1 Ch 860; see also Re *Smith's Mortgage, Harrison v Edwards,* (1931) 2 Ch 168 : [1931] All ER Rep 698.
1733. *National Provincial Bank v Games,* (1886) 31 Ch D 582.
1734. *Anandi Ram v Dur Najaf Ali,* (1891) ILR 13 All 195.
1735. *National Provincial Bank v Games,* (1886) 31 Ch D 582.
1736. Re *Sneyd, Exparte Fewings,* (1883) 25 Ch D 338, p 352 (CA); *Nadershaw v Shrinibai,* (1923) 25 Bom LR 839 : 87 IC 129 : AIR 1924 Bom 264.
1737. *Umesh Chandra v Khulna Loan Co,* (1907) ILR 34 Cal 92; *Venkitaswami v Muthuswamy,* (1918) 34 Mad LJ 177 : 45 IC 949 : AIR 1919 Mad 1102, diss from *Bavanna v Balagurivi,* (1899) 9 Mad LJ 177; *Parsotam v Jaijit,* (1890) All WN 90; *Bhuneshwari Devi v Sheogovind,* AIR 1963 Pat 185; Cf *Nikka v Gardner,* (1879) ILR 2 All 193; *A Murray v MSM Firm,* 161 IC 626 : AIR 1936 Rang 47.
1738. *Umesh Chandra v Khulna Loan & Co,* (1907) ILR 34 Cal 92.

(3) Such Money as is Necessary

The question what expenditure is necessary is one of fact, to be decided with regard to the circumstances of each case.[1739] The proviso to the section enacts that no expenditure under clauses (b) and (c) is necessary, unless the mortgagor has been called upon, but has failed to take steps.[1740]

(4) Clause (b): Preservation from Destruction, Forfeiture or Sale

The words "destruction, forfeiture or sale" also occur in section 63. The word "destruction" in a physical sense seems appropriate only when the mortgagee is in possession; and expenditure on necessary repairs is covered by section 76(d), and on improvements by section 63A. Under section 76(d), the mortgagee in possession is bound to make such necessary repairs as he can pay for out of the rent and profits. But as he is entitled to preserve his security, this section as well as section 63 gives him the right on the mortgagor's default to incur such expenditure out of his own pocket, and to add the amount so spent to the mortgage money. In the undernoted cases,[1741] the issue was whether the expenditure was necessarily incurred for the preservation of the property; and in an Allahabad case,[1742] the cost of constructing a new upper story when rebuilding a portion of a house that had fallen down, was disallowed.

There is also a destruction of the security in the abstract sense when the mortgaged property is forfeited or sold; and while section 76(c) makes it incumbent on the mortgagee in possession to pay out of the income of the property, public charges and arrears of rent, default of payment of which would involve forfeiture or sale, under this section he has the right to make such payment himself if the mortgagor makes default, and to add the amount to the mortgage money.[1743] It has, therefore, been said that the permission granted by section 72(b) is subject to the obligation imposed by section 76(c), in other words, the mortgagee may add the amount to the mortgage money when it cannot be paid out of the income and he has to pay it out of his pocket.[1744] The word "sale" is ejusdem generis with destruction or forfeiture. It must, therefore, be a sale which threatens to extinguish the security. A sale of an equity of redemption would not be within the section and the mortgagee could not recover the amount paid to stay a sale, subsequent to the mortgage, in execution of a money decree,[1745] or a sale for recovery of cesses for which the mortgage right could not be sold.[1746] A mortgagee who pays up a prior charge decree in order to avert an immediate sale in execution

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1739. *Kadar Moideen v Nepean,* (1899) ILR 26 Cal 1 : 25 IA 241; *Jagannath v Jagjiwan,* (1925) 28 OC 221 : 87 IC 829 : AIR 1925 Oudh 429.
1740. *Hamappa v Ramangouda,* AIR 1956 Bom 575.
1741. *Arunachella v Sithayi,* (1896) ILR 19 Mad 327; *Surajmal v Chunderbhan,* AIR 1939 Lah 129 : 41 Punj LR 80; *Hamappa v Ramangouda,* AIR 1956 Bom 575.
1742. *Rupan v Champa,* (1915) ILR 37 All 81 : 26 IC 521.
1743. *Girdhari Lal v Bhola Nath,* (1888) ILR 10 All 611; *Anandi Ram v Dur Najaf Ali,* (1891) ILR 13 All 195; *Lachman Singh v Salig Ram,* (1886) ILR 8 All 384; *Kamaya v Devapa,* (1898) ILR 22 Bom 440; *Nilawa v Krishnappa,* (1906) 8 Bom LR 350; *Rajkumar Lal v Jaikaran Das,* (1920) 5 Pat LJ 248 : 57 IC 653; *Upendra Chandra v Tara Prosanna,* (1903) ILR 30 Cal 794; *Rakhohari v Bipra Das,* (1904) ILR 31 Cal 975; *Ma Pwa Kin v KPSARP Firm,* 43 IC 190; *Ambica Charan v Ramgati,* 14 IC 718; *Manohar Das v Hazarimul,* (1931) 35 Cal WN 1040 : 58 IA 341 : 134 IC 645 : AIR 1931 PC 226; *Hardwar Bhagat v Sita Ram,* (1934) All LJ 637 : 150 IC 879 : AIR 1934 All 888; *Venkata Satteya v Mulibai,* AIR 1955 AP 274.
1744. *Farzand Ali v Mirza Saddiq,* (1919) 22 OC 270 : 54 IC 264.
1745. *Ram Prasad v Salikram,* (1882) All WN 210; *Sheo Dulare v Batasha,* (1913) 16 OC 48 : 19 IC 744.
1746. *Syed Ibrahim v Arumugathayee,* (1915) ILR 38 Mad 18 : 16 IC 877; *Upendra Chandra v Tara Prosanna,* (1903) ILR 30 Cal 794; *Rajendra Prasad v Bahuria,* (1916) 1 Pat LJ 589 : 38 IC 232; *Hardeo Bakhsh v Deputy Commissioner,* (1926) ILR 1 Luck 367 : 98 IC 542 : AIR 1926 Oudh 281; *Gya Prasad v Gur Dayal,* (1919) 22 OC 32 : 51 IC 549; but see *George v South Indian Bank,* AIR 1959 Ker 294.

of the decree, in the absence of proof that the mortgagor has been called upon, but failed to take timely steps, cannot be allowed to add to the amount so paid to the principal money of the mortgagee.[1747] However, in a case where a prior mortgagee deposited money under O 21, rule 89 to set aside a sale made at the instance of a puisne mortgagee, he was allowed to add the amount to the mortgage money as the sale proclamation purported to sell not merely the equity of redemption, but the whole property.[1748]

ILLUSTRATION

A sued to set aside a sale of property which his mother had sold as his guardian. A decree was made that *A* should pay a part of the price to the purchaser within six months and recover possession of the property, in default the suit to be dismissed. Before the decree *A* had mortgaged the property to *B*. As *A* failed to make the payment, *B* four days before the expiry of the time limited, paid the requisite sum into court. This he was entitled to do for the protection of his security.[1749]

There is, however, no necessity for the mortgagee, who is out of possession, to make the payment of land revenue without calling upon the mortgagor to pay the same, but he can claim to recover the amount paid only by virtue of section 69 of the Indian Contract Act, 1872.[1750]

Several local revenue and municipal Acts give the mortgagee, whether in possession or not, a right to save his security by payment of arrears of assessment, and to add the amount so paid to the mortgage money.

A *darpatnidar* in Bengal is entitled to consolidate the subsequent payments of rents to the original deposit made by him as a mortgagee in possession under the section.[1751]

(5) Clause (c): Supporting the Mortgagor's Title

The mortgagee is entitled to costs of litigation incurred in defending the mortgagor's title to the property.[1752] A similar duty is imposed upon the mortgagor under section 65(b). The mortgagee's right, therefore, arises when the mortgagor neglects to take proper and timely steps on his behalf. The mortgagee is entitled to add to his security the costs of proceedings in which he is properly made a party, in respect of his encumbrance.[1753] In a Bombay case,[1754] the mortgagee was allowed costs incurred by him in a suit filed by a person who alleged he was a prior encumbrancer, and had joined him as a party. When the mortgagee's title was attacked by tenants setting up the title of a stranger and carrying of the crops, the mortgagee was entitled to recover the costs of civil and criminal proceedings taken against them.[1755]

(6) Clause (d): Defending Mortgagee's Title Against the Mortgagor

The mortgagee is entitled to costs of a suit to enforce the mortgage.[1756] If a suit is brought by a mortgagee against the mortgagor and a puisne mortgagee, the costs of the suit will be added to the mortgage debt, and will form part of the sum for which the final decree for sale is passed. The puisne mortgagee is impleaded because in a mortgage suit it is incumbent to make parties,

1747. *Vasudevayya v Bhagirathibai,* (1950) 1 Mad LJ 9 : AIR 1950 Mad 333.
1748. *Jagannath v Jagjiwan,* (1925) 28 OC 221 : 87 IC 829 : AIR 1925 Oudh 429.
1749. *Mahomed Rahimtulla v Esmail Allarakhia,* (1924) ILR 48 Bom 404 : 51 IA 236 : 80 IC 411 : AIR 1924 PC 133.
1750. *Dalsing v Sunder Kunwar,* AIR 1944 Oudh 208.
1751. *Midnapore Zamindary Co Ltd v Saradindu Mukhopadhaya,* (1948) ILR 2 Cal 342 : AIR 1948 Cal 250.
1752. *Godfrey v Watson* (1747) 3 Atk 517, p 518; *Sandon v Hooper,* (1843) 6 Beav 246; *Damodar v Vamanrav,* (1885) ILR 9 Bom 435, p 437; *Pokree Saheb v Pokree Beary* (1898) 21 Mad 32.
1753. Ash Burner on Mortgagees, Indian edn, p 383.
1754. *Nadershaw v Shirinbai,* (1923) 25 Bom LR 839 : 87 IC 129 : AIR 1924 Bom 264.
1755. *Venkitaswami v Muthuswamy,* (1918) 34 Mad LJ 177 : 45 IC 949; but see *Benjamin v Devadoss,* (1955) ILR Mad 570 : (1954) 1 Mad LJ 537 : AIR 1955 Mad 245.
1756. *Dattaram v Vinayak,* (1904) ILR 28 Bom 181.

all persons who are entitled to redeem, and so normally, the puisne mortgagee is not ordered to pay the costs of the suit.[1757] He is also entitled to costs of defending an unsuccessful action for redemption by the mortgagor,[1758] or of prosecuting a suit against the mortgagor for establishing his title as a mortgagee,[1759] or of a suit for possession or, in case or a usufructuary mortgagee, or a suit against tenants for the arrears of rent.[1760] The general rule that a mortgagee is entitled to add the costs, charges and expenses of defending his title to his security applies notwithstanding that the mortgagor has obtained leave to sue as a poor person.[1761] Such costs are added to the security, and the mortgagor is not made personally liable, unless his conduct has led to such costs being incurred.[1762] If the decree is ambiguous, it will not be construed as imposing a personal liability on the mortgagor.[1763] However, the mortgagee is not entitled to costs of defending his title against a stranger. A creditor taking possession of the property does not forfeit his right to claim interest as this section specifically provides that mortgagee in possession is entitled to levy interest. A financial corporation would be entitled to collect interest during period when creditor takes possession of security before sale.[1764]

(7) Clause (e): Renewal of Leases

The mortgagor is under no liability to renew leases. However, the mortgagee may do so in order to maintain his security, and if he pays a fine for the renewal, he can add the amount to the mortgage money. Similarly, if a lease is terminated by forfeiture, the mortgagee may apply for relief, and the new lease so granted is part of the original security.[1765] The rights of a mortgagee in possession to create lease is not covered under section 72.[1766]

(8) Contract to the Contrary

The rights of a mortgagee under this section are subject to a contract to the contrary. So when the mortgagee has undertaken to incur all the expenses necessary for the recovery of the property, he is not entitled to the costs of litigation in which he is obliged to contest the claim of a rival *jenmi*.[1767]

(9) Add Such Money to the Principal

As already stated, these words do not exclude the personal right of suit under section 69 of the Indian Contract Act, 1872;[1768] though if a personal decree has been obtained,

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1757. *RMARM Chettyar Firm v VSPRM Chettyar Firm,* (1932) ILR 10 Rang 308 : 139 IC 185 : AIR 1932 Rang 153.
1758. *Ramsden v Langley,* (1706) 2 Vern 536; *Samuel v Jones,* (1862) 7 LT 760; Re *Wallis, Ex parte Lickorish* (1890) 25 QBD 176 (CA); *Varadarajulu v Dhanalakshmi,* (1914) 16 Mad LT 365 : 26 IC 184.
1759. *Minakshi Ayyar v Janaki,* AIR 1942 Mad 592.
1760. *Raja Sir Mahmud v Hakim Saiyadali,* AIR 1941Oudh 498.
1761. Re *Leighton's Conveyance,* (1937) 1 Ch 149 : [1936] 3 All ER 1033.
1762. *Liverpool Marine Credit Co v Wilson,* (1872) 7 Ch App 507, p 512; *Guardian Assurance Co v Avonmore (Lord),* (1873) 7 IR Eq 496; *Sheo Darshan v Beni Chaudhri,* (1926) ILR 48 All 425 : 94 IC 872 : AIR 1926 All 424; Ghose, Law of Mortgages, vol 1, p 619.
1763. *Maqbul Fatima v Lalta Prasad* (1898) ILR 20 All 523; *Mohanya v Ram Bahadur* (1912) 16 Cal WN 731 : 15 IC 23; *Dambar Singh v Kalyan Singh* (1917) ILR 40 All 109 : 43 IC 557; *Amina Bibi v Ram Shankar,* (1919) ILR 41 All 473 : 50 IC 730; *Sheo Darshan Singh v Beni Chaudhri,* (1926) ILR 48 All 425 : 94 IC 872 : AIR 1926 All 424.
1764. *Sanjiv K Goel v Punjab Financial Corporation,* AIR 2011 (NOC) 11 (P&H).
1765. *Chelsea Investment Co Ltd v Marche,* (1955) Ch 328 : [1955] 1 All ER 195.
1766. *Thakar Singh v Mula Singh,* (2015) 5 SCC 209 : LNIND 2014 SC 888 : 2014 AIR SCW 6059 : 2014 (12) SCALE 36 : AIR 2015 SC 1.
1767. *Thekkamannengath v Kakkasseri,* (1915) 28 Mad LJ 184, p 194 : 27 IC 989.
1768. *Umesh Chandra v Khulna Loan Co,* (1907) ILR 34 Cal 92; *Venkitaswami v Muthuswamy,* (1918) 34 Mad LJ 177 : 45 IC 949 : AIR 1919 Mad 1102; *Parsotam v Jaijit,* (1890) All WN 90; cf *Nikka v Gardner,* (1879) ILR 2 All 1934; *Murray v MSM Firm,* 161 IC 626 : AIR 1936 Rang 47.

the amount cannot be tacked to the mortgage.[1769] A usufructuary mortgagee tacking sums expended under this section to the mortgage retains possession until the whole amount is discharged out of the usufruct.[1770] In a Patna case,[1771] a usufructuary mortgagee set up an adverse title under a fraudulent conveyance, and made payments of rents due by the mortgagor as owner after his invalid purchase, but when the alleged sale to him was set aside, he was not deprived of his statutory right as regards rents under this section.

(10) Interest

Interest is allowed on expenditure under this section. It should be simple, not compound.[1772] In a Bombay case before the TP Act, interest at 6 per cent was allowed.[1773] Under this section, interest is at the rate specified in the mortgage,[1774] or, if no such rate is fixed, interest is at the rate of 9 per cent.

(11) Proviso

The mortgagor is the owner of the property, and it is primarily his duty to preserve it and to protect his title. It is only on his default to take proper and timely steps in this behalf that the mortgagee is entitled to spend money under clauses (b) and (c).[1775]

(12) Insurance

If the mortgagor has not insured against fire, the mortgagee is authorised to insure, and to add the premium to the mortgaged debt. If the mortgagee is in possession he must, under section 76(f), apply the money, if the mortgagor so directs in reinstating the property or in reduction of the mortgage debt. If the mortgagor has insured, the insurance money belongs to the mortgagor, and the mortgagee may under section 49 require him to apply the money in reinstating the property. And he can do so even against a creditor of the mortgagor who has attached the insurance money.[1776]

The mortgagee's authority to insure is, however, subject to a contract to the contrary. There may be a stipulation in the mortgage that insurance is not necessary; or the mortgagor may covenant that in case of fire, the mortgagee should rebuild the house at his own expense.[1777] Where by a mortgage deed of March 1936, the mortgagors covenanted to keep the premises insured against loss or damage by missiles or projectiles fired at aircrafts and it was further provided that, should they fail to do so, the mortgagees might insure the premises at the expense of the mortgagors and that the power of sale of the mortgagees would immediately become exercisable if the mortgagors broke any covenant. Both parties were unaware that the policy of insurance obtained in respect of the premises and sent to the mortgagee's solicitors did not comply with the covenant though it would then have been possible to obtain a policy in accordance with the covenant. From October 1936, however, such a policy was unobtainable. In January 1939, the mortgagees became aware of the defect in the insurance and gave notice that unless the mortgage-money was paid off, they would exercise their power of sale. It was held that there had been a breach of the

1769. *Imdad Hasan v Badri Prasad,* (1898) ILR 20 All 401.
1770. *Abdul Qayyum v Sadruddin,* (1905) ILR 27 All 403; *Mohamed v Sheodarshan,* (1907) 4 All LJ 176.
1771. *Foodeni Sah v Azhar Hussain,* (1931) ILR 10 Pat 210 : 131 IC 814 : AIR 1931 Pat 325.
1772. *Kishori Mohun v Gunga Bahu,* (1896) ILR 23 Cal 228 : 22 IA 183, p 192.
1773. *Karnaya v Devapa,* (1898) ILR 22 Bom 440, p 446.
1774. *Mst Kami Fizza v Datadin,* 90 IC 184 : AIR 1925 Oudh 678.
1775. *Hamappa v Ramangouda,* AIR 1956 Bom 575; and see *Asarfi v Ram Swaroop,* AIR 1972 Pat 183.
1776. *Sinnot v Bowden,* (1912) 2 Ch 414 : [1911-13] All ER Rep 752.
1777. *Sakharamshet v Amtha,* (1890) ILR 14 Bom 28.

covenant, since there was no implied term in the contract that if it became impossible to obtain a policy in accordance with it, neither party should be entitled to rely on a failure to comply with it. It was further held that the mortgagees were not estopped from setting up their claim.[1778]

[1779][**73. Right to proceeds of revenue sale or compensation on acquisition.**— (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears or revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale-proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894 (1 of 1894), or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrances, and may be enforced notwithstanding that the principal money on the mortgage has not become due.]

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(1) Substituted Security

This section is an instance of the application of the doctrine of substituted security, viz that the mortgagee is, for the purpose of his security, entitled not only to the mortgaged property, but also to anything that is substituted for it. The old section reproduced almost verbatim the decision of the High Court of Calcutta in the case of *Heera Lal Chowdhry v Janokeenath.*[1780] The doctrine applies not only to the cases referred to in the section, but also to judicial sales, and to the conversion of an undivided share into a share held in severalty by partition. In *Byjnath Lall v Ramoodeen Chowdry,*[1781] where the mortgagee lost the undivided share of his mortgagor by reason of a partition, the Judicial Committee said: "He would take

1778. *Moorgate Estates Ltd v Trower,* (1940) Ch 206 : [1940] 1 All ER 195.
1779. Subs. by Act 20 of 1929, sec. 38, for section 73.
1780. *Heera Lal Chowdhry v Janokeenath,* (1871) 16 WR 222, followed in *Kristo Dass v Ramkant,* (1881) ILR 6 Cal 142.
1781. *Byjnath Lall v Ramoodeen Chowdry,* (1875) 21 WR 233 : 1 IA 106, p 120.

the subject of the pledge in the new form which it had assumed." This case was followed in *Mohammad Afral Khan v Abdul Rahman*[1782] where the Privy Council said:

> Their Lordships are of opinion that where one of two or more co-sharers mortgages their undivided shares in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby, to convert what was an undivided share of the whole into a defined portion held in severally. If the mortgage therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share.

If the mortgage contains a personal covenant, the substitution of the security does not affect the mortgagee's remedy on that covenant.[1783]

In an Andhra Pradesh case, there was a mortgage of a specific item of joint property by one co-sharer. The item so mortgaged was later allotted to another co-sharer. It was held that the mortgagee could proceed against the substituted item in the hands of the co-sharer who had created the mortgage.[1784]

If, by a process of law or by a compelling situation sanctioned by law, the security given to a creditor is changed into something other than the property which constituted the original security, the mortgagee gets rights over the substituted security.[1785]

Bhumidari rights, acquired by the mortgagor under section 18 of the Uttar Pradesh Consolidation of Holdings Act, are new rights created under the said Act after the land in which such rights have been acquired had vested in the state free from all encumbrances. This land, notwithstanding that it was the subject matter of mortgage prior to the date of vesting, would not be treated as "substituted security" within the meaning of section 73, and a mortgage decree, if any, cannot be executed against that land.[1786]

(2) Revenue and Rent Sales

The sale referred to in this section must be a sale free of encumbrances, ie, a sale which has the effect of nullifying the mortgage.[1787] This must be so, for if the sale does not extinguish the mortgage, the mortgagee can enforce his lien against the property in the hands of the auction purchaser.[1788] Even if the mortgage is executed after default in payment of revenue, the mortgage has a right to payment out of surplus sale proceeds.[1789] When property is sold under section 167 of the Bengal Tenancy Act, 1885, the purchaser has power to annul encumbrances, and it has been held that if he has not exercised that power, the mortgagee may abandon his precarious security, and claim payment out of the surplus sale proceeds.[1790]

1782. *Mohammad Afzal v Abdul Rahman,* 59 IA 405 : (1932) 36 Cal WN 1129 : 139 IC 85 : AIR 1932 PC 235; *Koru Issaku v Gottumukkala,* (1948) ILR Mad 454 : AIR 1948 Mad 1; *Shyam Sunder v Nilakantha Das,* AIR 1956 Ori 165.
1783. *Benarasi Prasad v Mohiuddin,* (1924) ILR 3 Pat 581 : 78 IC 723 : AIR 1924 Pat 586.
1784. *P Narasimham v P Venkata Narasimham,* AIR 1973 AP 162.
1785. *Amer Mohammed Ismail v SAS Allagappa Chettiar,* [1977] 1 Mad LJ 76.
1786. *Pratap Singh alias Babu Ram v Deputy Director of Condolidation, Mainpuri,* (2000) 4 SCC 614.
1787. *Prem Chand Pal v Purnima Dasi,* (1888) ILR 15 Cal 546; *Beni Prasad v Rewat Lall,* (1897) ILR 24 Cal 746; *Umartara Gupta v Umacharan Sen,* (1906) 3 Cal LJ 52; *Narotam Das v Thakur Sukhraj Singh,* (1928) ILR 3 Luck 719 : 116 IC 49 : AIR 1928 Oudh 442; *Krishna Chandra v Bipin Behari,* (1936) ILR 16 Pat 299, 174 IC 834, AIR 1938 Pat 179.
1788. *Prem Chand Pal v Purnima Dasi,* (1888) ILR 15 Cal 546; *Rasik Chandra v Jagabandhu,* 113 IC 904 : AIR 1929 Cal 392.
1789. *Umartara Gupta v Umacharan Sen,* (1906) 3 Cal LJ 52.
1790. *Nim Chand Baboo v Ashutosh Dutt,* (1904) 9 Cal WN 117.

A sale under which the purchaser has power to annul encumbrances is thus treated as a sale free of encumbrances. In some cases,[1791] it was held that the mortgagee could exercise this right irrespective of the question whether the sale would annul the security, but this is open to question. This seems too literal a construction of the section, for the sale could hardly have the effect of enlarging the security. If the sale is set aside, the interest of the mortgagor is revested in him, and the mortgagee falls back upon his original security.[1792]

(3) Sale of Part of the Property Mortgaged

The section as amended includes the case where the sale is of only part of the property mortgaged. It is submitted that if the effect of the sale is to extinguish the mortgage of the part sold, the mortgagee can claim a ratable proportion of the mortgage money from the surplus sale proceeds, and the mortgage of the unsold residue subsists. Under section 54 of the Bengal Land Revenue Sales Act, 1859, a revenue sale of part of an estate does not annul encumbrances.

It is submitted that section 73 does not apply to such a sale. The Patna High Court, however, reading the two sections together, has held that if part of the property mortgaged is sold at a revenue sale, the mortgagee can follow the mortgaged property in the hands of the purchaser, as well as claim payment out of the surplus sale proceeds.[1793]

(4) Compensation under Land Acquisition Act

Once the property mortgaged is compulsorily acquired by the state, the mortgagee can proceed in a manner provided in section 73, namely follow the compensation money, and there is no other way possible for him.[1794] The same rule applies in cases where the mortgaged property is acquired under the Land Acquisition Act, 1894; the mortgagee is entitled to claim payment out of the sum awarded as compensation.[1795] The Allahabad High Court in one case held that the mortgagee would lose his claim if he did not claim apportionment under the Land Acquisition Act.[1796] Assuming that the decision was correct, it will not be so under the present section. If the mortgagee does not exercise his right to claim compensation money before it is withdrawn by the mortgagor, it would not deprive him of his original rights as a mortgagee to enforce his security as against the compensation money.[1797] However, when another land is substituted in lieu of compensation for acquisition, the auction purchaser in exercise of the mortgage decree is entitled to enforce his claim against the substituted property.[1798] However, this section merely gives a right to the mortgagee to satisfy his claim from the compensation amount; he cannot have such a right sold under the mortgage decree.[1799] So also, a contract of sale does not create any interest in the property

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1791. *Gobind Sahai v Sibdut,* (1906) ILR 33 Cal 878; *Mukhram Maiwadi v Baleshwar Mahton,* 169 IC 805 : AIR 1937 Pat 307.
1792. *Rash Behari v Kasum Kumari,* 86 IC 882 : AIR 1925 Cal 1145.
1793. *Kapari Sahu v Mathura Das,* 148 IC 972 : AIR 1934 Pat 209.
1794. *Rama Sheo Ambar Singh v Allahabad Bank Ltd,* AIR 1961 SC 1790 : [1962] 2 SCR 441 (with respect to section 6(h) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951).
1795. *Viraragava v Krishnasami,* (1883) ILR 6 Md 344; *Topandas v Jesaram,* (1907) PR 17; *Jotoni Chowdhurani v Amor Krishna,* (1908) 13 Cal WN 350 : 1 IC 164; *Debendra Nath v Mirza Abdul,* (1909) 10 Cal LJ 150 : 1 IC 264; *Ladu Prasad v Nizam-ud-din,* 54 IC 535; *Ashutosh v Babu Lal,* (1921) 5 Pat LJ 650 : 59 IC 513 : AIR 1971 Pat 372; *Prag Din v Nankau Singh,* (1930) ILR 5 Luck 702; 123 IC 56 : AIR 1930 Oudh 292; *Sudhir Kumar Bose v Chandra Kanta,* (1955) 52 Cal WN 446 : AIR 1955 Cal 560 (the mortgagee need not file a suit to enforce payment).
1796. *Basa Mal v Tajammal,* (1894) ILR 16 All 78.
1797. *Girdhar Lal v Alaya Hasan,* (1938) ILR All 513 : (1938) All LJ 313 : AIR 1938 All 221.
1798. *Nallamuthu Pillai v Aravamudhu,* AIR 1952 Mad 263 : (1951) 2 Mad LJ 205.
1799. *Abdul Khaleque v Medaswar,* AIR 1967 Cal 56.

agreed to be sold. The prospective purchaser is not entitled to the compensation which may be awarded for the compulsory acquisition of property before the sale could be completed.[1800]

(5) Judicial Sales

Surplus sale proceeds left after a prior mortgagee's sale represent the puisne mortgagee's security in a new form, and he has a right to follow them[1801] even after the creditors of the mortgagor have withdrawn them.[1802] In *Barhamdeo Prasad v Tara Chand,*[1803] the first mortgagees under a mortgage of May 1887 also had a third mortgage of 1890 which they sued on without making the second mortgagees on a mortgage of September 1887 a party, and in execution, withdrew the surplus sale proceeds of the sale of the first mortgage. The second mortgagees were held entitled to recover the money from them as part of the security. Their Lordships said:

> The surplus moneys of that sale represented the security which the plaintiffs had under their mortgage of 19 September 1887, and did not cease to represent that security owing to the fact that Ram Berhamdeo Prasad and Ram Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the court in which they had been deposited.

The principle of this section has also been applied to sale by the Official Liquidator after a court has ordered the winding-up of a mortgagor company.[1804]

(6) Partition

This is a case not dealt within the section, but to which the same doctrine applies. If the subject of the mortgage is an undivided share and the joint sharers effect a partition, the mortgagee must pursue his remedy against the share allotted in severally to his mortgagor;[1805] and in the absence of fraud or collusion, the co-sharers of the mortgagor would hold their shares free of the mortgage. However, if as a part of the partition agreement, the coparcener to whose share the subject matter of the mortgage is allotted undertakes to pay the mortgage debt, then the true position is that the said coparcener has in effect obtained the equity of redemption only, and is liable to the mortgagee who may sue him.[1806] In the leading case of *Byjnath Lall v Ramoodeen Chowdry,*[1807] the Judicial Committee observed that the mortgagee would take the subject of the pledge in the new form which it had assumed. In this case the

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1800. *Mahomed Abdul v Lalmiya,* AIR 1947 Mad 254.
1801. *Barhamdeo Prasad v Tara Chand,* (1906) ILR 33 Cal 92 : on app (1914) ILR 41 Cal 654, p 660 : 21 IC 961 (PC); *Bakhlawar v Barumal,* (1907) 4 All LJ 492.
1802. *Gusto Behari v Shib Nath,* (1893) ILR 20 Cal 241.
1803. *Barhamdeo Prasad v Tara Chand,* (1906) ILR 33 Cal 92.
1804. *UOI v Official Liquidator,* AIR 1960 AP 555.
1805. *Mahammad Afzal Khan v Abdul Rahman,* 59 IA 405 : (1932) 36 Cal WN 1129 : 56 Cal LJ 324 : (1932) All LJ 909 : 35 Bom LR 1 : 139 IC 85 : AIR 1932 PC 235; *Byjnath Lall v Ramoodeen Ghowdry,* (1874–1875) 21 WR 233 : 1 IA 106; *Hem Chunder Ghose v Thako Moni,* (1893) ILR 20 Cal 533; *Lakshman v Gopal,* (1899) ILR 23 Bom 385; *Joy Senkari v Bharat Chandra,* (1899) ILR 26 Cal 434; *Amolak Ram v Chandan,* (1902) ILR 24 All 483; *Pullamma v Pradoshan,* (1895) ILR 18 Mad 316; *Muthia Raja v Appala Raja,* (1911) 20 Mad LJ 393 : 6 IC 991; *Hakim Lal v Ram Lal,* (1907) 6 Cal LJ 46; *Shahebzada v Hills,* (1908) ILR 35 Cal 388; *Bhup Singh v Chedda Singh,* (1920) ILR 42 All 596 : 58 IC 171; *Umar v Sakharam,* (1934) ILR 58 Bom 49 : 35 Bom LR 1154 : 147 IC 230 : AIR 1933 Bom 485; *Amar Smgh v Bhagwan Das,* (1933) ILR 14 Lah 749 : 149 IC 104 : AIR 1933 Lah 771; *Nirmal Kunwar v Sant Lal,* (1937) ILR 16 Pat 662 : 171 IC 715 : AIR 1937 Pat 563; *Ganga Prasad Sao v Dalan Saran Singh,* 170 IC 134 : AIR 1937 Pat 345; *Balakrishna Prasad v Apurbo Krishna,* 175 IC 194 : AIR 1938 Pat 99; *Deokinandan v Aghorenath,* AIR 1945 Pat 400; *Rup Chand v Madan Mohan,* AIR 1960 Cal 351; And see *Padmanabha Pillai v P Abraham,* AIR 1971 Ker 154.
1806. *Atmaram Sao v Bhupendranath,* AIR 1940 Nag 149.
1807. *Byjnath Lall v Ramoodeen Chowdry,* (1875) 21 WR 233 : 1 IA 106.

partition was by the collector, but the rule applies to all partitions. If after partition, the mortgagor makes another mortgage of the share allotted to him, this mortgage will be a puisne mortgage subject to the mortgage effected before partition. It matters not that the post-partition mortgagee had no notice of the pre-partition mortgage, for he cannot take a larger estate than the mortgagor had.[1808] For the purpose of the application of the principle underlying this section, it is immaterial whether there is a transfer of an undivided share or a transfer of a specific item of a joint property.[1809]

(7) Mortgagor's Title Altered

When the mortgagor's title is altered, the land held under the new title is still subject to the mortgage. When a *zamindari* was mortgaged and the mortgagor lost the *zamindari* right and became an ex-proprietary tenant of the *sir,* the mortgage was effectual against the ex-proprietary right.[1810]

(8) Default of the Mortgagee

If the mortgagee is in possession, it is his duty under section 76(c) to pay the revenue, rent, and public charges out of the income. If the income is not sufficient to pay the assessment, the sale is not due to his default and he is entitled to claim payment of his mortgage money out of the surplus sale proceeds; and if he purchases at the sale, he is not liable to be redeemed in cases where the revenue sale involves a forfeiture or extinction of the equity of redemption.[1811]

But if the income is sufficient to pay the assessment and if the sale is occasioned by his default, he is not entitled to payment out of the surplus sale proceeds; and if he purchases the property himself, he is a trustee for the mortgagor under section 90 of the Indian Trusts Act, 1882, and is liable to be redeemed.[1812] Generally speaking, a sale for arrears of revenue caused by the mortgagee's default does not affect the right of redemption.[1813] Conversely, if the sale is for default of the mortgagor to pay the revenue, and the mortgagor purchases, either himself or *benami*, he takes it subject to the mortgage;[1814] and if the mortgagee has obtained payment of the surplus sale proceeds in ignorance of the *benami* character of the purchase on behalf of the mortgagor, and there is a deficit, he may enforce payment against the property in the hands of the auction purchaser.[1815]

(9) Priority

The section as now amended makes provision for priority. The right of the mortgagee to the surplus sale proceeds is subject to the general rule of priority enacted in section 48. If

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1808. *Mohan Lal v Wadhawa Singh,* 149 IC 1195 : AIR 1934 Lah 660.
1809. *Liladhar Uttamchand v Shiwaji Ganesh,* (1936) ILR Nag 22 : 165 IC 550 : AIR 1936 Nag 125.
1810. *Sham Das v Batul Bibi,* (1902) ILR 24 All 538; *Jotindra Mohan v Godadhur,* (1897) 2 Cal WN 29 (a *dartaluk* changed into a *putni*).
1811. *Abdul Rahman v Vinayak,* (1927) 29 Bom LR 1056 : 104 IC 653 : AIR 1927 Bom 540; *Ooppath Naramparembath v Koyakutti,* 29 IC 344; *Fekna Mahto v Bahilal Sahu,* (1938) ILR 18 Pat 133 : 183 IC 374 : AIR 1939 Pat 362.
1812. *Lakshmaya v Appadu,* (1884) ILR 7 Mad 111; and see *Thulasi Bai Ammal v Punapakkam Ramakrishnappa,* AIR 1957 AP 430.
1813. *Kalappa v Shivaya,* (1896) ILR 20 Bom 492; *Sambu v Babaji,* (1891) PJ 160; *Nawab Sidhee v Rajah Ojhoodhyaram,* (1866) 10 MIA 540; *Babaji v Magniram,* (1897) ILR 21 Bom 396; *Jaikaran Singh v Sheo Kumar Singh,* (1928) ILR 50 All 36 : 103 IC 370 : AIR 1927 All 747 : 29 All LJ 698; see note "Mortgagee purchasing at court sale" under section 60.
1814. *Sangapally Lakshmayya v Intoory,* (1903) ILR 26 Mad 385.
1815. *Ganga Sahai v Tulsi Ram,* (1903) ILR 25 All 371.

there are two successive mortgagees, the right of the first mortgagee will take precedence and he will be paid first.

ILLUSTRATION

A leased property to *B* by a lease which gave a charge for arrears of rent. *B* mortgaged the leasehold to *C*. *A* in enforcement of his charge brought the property to sale. The decree for rent was satisfied out of the sale proceeds. The surplus sale proceeds were then applied, first in payment of *A*'s charge for rent from date of suit to date of sale, and then in payment of *C*'s mortgage.[1816]

In the case of a partition where the share allotted to the mortgagor was subject to a charge for owelty, that charge took precedence over the mortgage.[1817] If there is a subsequent encumbrance and the sale is subject to the encumbrance, the mortgagee, if the sale proceeds are not sufficient to satisfy his mortgage, may pursue his remedy for the balance against that encumbrance. Thus, in a Calcutta case,[1818] the mortgagor after the execution of the mortgage, had granted a *putni* lease, and the property was sold subject to that *putni*, and the surplus sale proceeds did not suffice to satisfy the mortgage. The mortgagee was, therefore, allowed to proceed against the *putni* interest for the deficit, and it was said that the section was not designed to restrict the rights of the mortgagee. If unsecured creditors of the mortgagor have withdrawn the sale proceeds, the mortgagee can enforce his claim against them. In another case,[1819] a *putni taluq* had been sold for arrears of land revenue, and unsecured creditors of the mortgagor *putni* withdrew part of the surplus sale proceeds. They were pleased that there was a sufficient balance left to satisfy the mortgagees, but the court held that the surplus sale proceeds represented the security, and as the mortgagees could not be compelled to split their security, they could enforce their claim against the unsecured creditors. Similarly, in the case of a judicial sale, the right of the puisne mortgagee to the sale proceeds takes priority over that of a money decree holder, or an unsecured debtor of the mortgagor.[1820] A puisne mortgagee not made a party to the prior mortgagee's suit can prove both against the surplus proceeds and against the property in the hands of the auction purchaser, for as he has not been made a party the sale cannot affect his rights.[1821]

ILLUSTRATION

A mortgaged property first to *B* and then to *C*. *B* sued on his mortgage without making *C* a party and brought the property to sale. The auction purchaser was *D* and the sale proceeds satisfied *B*'s mortgage and left a surplus. The surplus sale proceeds were attached and taken by an unsecured creditor, *E*. *C* was entitled to enforce his mortgage against the property purchased by *D*, subject to the prior mortgage, and to require *E* to repay the surplus sale proceeds.[1822]

In *Karan Singh v Ishtiaq Husain*,[1823] the surplus sale proceeds on the prior mortgagee's sale were paid to the mortgagor. The puisne mortgagee obtained a decree on his mortgage and proceeded to bring the property to sale. The auction purchaser paid the puisne mortgagee to avert a sale, and was then allowed to recover the amount from the mortgagor.

1816. *Central Bank of India v S Sachindra Mohan Ghosh*, 144 IC 760 : AIR 1933 Pat 257.
1817. *Shahebzada v Hills*, (1908) ILR 35 Cal 388.
1818. *Susilabala v Dinabandhu*, (1909) 14 Cal WN 186 : 5 IC 70.
1819. *Gusto Behary v Shib Nath*, (1893) ILR 20 Cal 241.
1820. *Padmanabh Bombshenvi v Khemu Komar*, (1894) ILR 18 Bom 684.
1821. *Gobind Lal Roy v Ramajanam Misser*, (1894) ILR 21 Cal 70 : 20 IA 165; *Krishnaswami v Thirumalai*, 90 IC 410 : AIR 1926 Mad 101.
1822. *Krishnaswami v Thirumalai*, 90 IC 410 : AIR 1926 Mad 101.
1823. *Karan Singh v Ishtiaq Husain*, (1921) ILR 43 All 268 : 61 IC 376 : AIR 1921 All 312.

(10) Limitation

The surplus sale proceeds in the mortgaged property is a new form, and as the mortgagee has the same right to it as he had to the land, his claim is subject to 12 years' limitation under Article 62 of the Act of 1963, which corresponds to Article 132 of the Act of 1908.[1824]

74. Right of subsequent mortgagee to pay off prior mortgagee.—[Rep. by Transfer of Property (Amendment) Act, 1929 (20 of 1929), sec. 39].

75. Rights of *mesne* mortgagee against prior and subsequent mortgagees.—[Rep. by Transfer of Property (Amendment) Act, 1929 (20 of 1929), sec. 39].

76. Liabilities of mortgageee in possession.—When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own;

(b) he must use his best endeavours to collect the rents and profits thereof;

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature [1825][and all rent] accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;

(e) he must not commit any act which is destructive or permanently injurious to the property;

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;

1824. *Barhamdeo Prasad v Tara Chand,* (1906) ILR 33 Cal 92 : on app (1914) ILR 41 Cal 654 : 21 IC 961 (PC); *Kamala Kant v Abul Barkat,* (1900) ILR 27 Cal 180; *Gopikrishna v Ram,* (1910) 14 Cal WN 484 : 5 IC 524; *Upendra Chandra v Mohri Lal,* (1904) ILR 31 Cal 745; *Ram Rup Singh v Bahadur Singh,* (1951) ILR 30 Pat 391 : AIR 1951 Pat 566.

1825. Ins. by Act 20 of 1929, sec. 40.

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the con- tinuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses [1826][properly incurred for the management of the property and the collection of rents and profits and the other expenses] mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest [1827][***] and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor;

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his [1828][***] receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of court, as the case may be and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.

Loss Occasioned by his Default.—If the mortgagee fails to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

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1826 Ins. by Act 20 of 1929, sec. 40.
1827. The words "on the mortgage-money" omitted by Act 20 of 1929, sec. 40.
1828. The word "gross" omitted by Act 20 of 1929, sec. 40.

(1) Possession

The section enacts the statutory duties of a usufructuary mortgagee, or of a mortgagee in possession.[1829] The view taken in an Allahabad case[1830] that the section does not apply where the mortgage is in its inception usufructuary, is, it is submitted, erroneous. It deals mainly with the debit side of the mortgagee's account, while section 72 deals with the credit side.[1831]

Section 76 is not applicable unless the mortgagee is in possession qua mortgagee. Even if a mortgage deed entitles a mortgagee to take possession, collect rents and profits, his liability to account for such rents and profits will not arise, unless and until he has taken such possession.[1832] A mortgagee is not in possession *qua* mortgagee if he enters the property as lessee.[1833] In some cases, the mortgagee is both a lessee and a mortgagee, and then it is a matter of construction whether the transactions of mortgage and lease are separable. If they are separable, the mortgagee is in possession as lessee and is not liable to account under this section. Where part of the rent is set off against the interest, it has been held that the mortgagee is in possession in his own right in order that the debt should be paid off, and that this section applies.[1834] A mortgagor in a *zuripeshgi* lease may claim credit in the account for arrears of rent due by the mortgagee,[1835] and conversely, a usufructuary mortgagee may set off arrears of rent due by the mortgagor in respect of any tenancy held by the mortgagor within the mortgaged premises.[1836] In an usufructuary mortgage, there was a distinct covenant to pay interest and the mortgagee was to appropriate the usufruct towards interest. The mortgagee gave a lease to the mortgagor on annual rent, which was equal to the annual interest. In such a case if the mortgagor did not pay rent, that did not affect the right of the mortgagee to recover the whole of the mortgage money including the interest.[1837]

A mortgagee generally enters into possession *qua* mortgagee in the case of a usufructuary mortgage or an English mortgage. However, a mortgagee may take possession *qua* mortgagee even when the deed is silent as to possession.[1838] This may arise where a mortgagee is in possession under a foreclosure decree;[1839] or under the provisions of a debenture trust-deed when the trustees take over the management of a company;[1840] or in any other case when the possession is relatable to the mortgage.[1841] However, the section has no application where the possession is unrelated to the mortgage.[1842] Mere receipt of rents and profits does not amount to taking possession, unless the mortgagee receives them in such a way as to displace the

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1829. *Kamalapat v Union Sugar Mills,* (1929) 50 Cal LJ 561 : 119 IC 631 : AIR 1929 PC 256; *Mahadev Tambali v Mahammad Saddiq,* AIR 1949 All 189 : (1949) ILR All 362 : AIR 1949 All 189; *Canara Bank v Bhawani Oil Corporation,* AIR 2004 Ker 273 : (2004) 1 KLJ 473 : (2004) 1 KLT 273.
1830. *Kallu v Ganesh,* 116 IC 747 : AIR 1929 All 348.
1831. *Subba Rao v Sarvarayudu,* (1924) ILR 47 Mad 7 : 72 IC 292 : AIR 1923 Mad 533.
1832. *Sivraj Lal v HPF Ltd,* (1943) ILR Mad 430 : (1943) 1 Mad LJ 472 : 55 Mad LW 678 : (1942) Mad WN 625 : 207 IC 535 : AIR 1943 Mad 62.
1833. *Page v Linwood,* (1837) 4 Cl & Fin 399, p 434; *Stanley v Grundy,* (1883) 22 Ch D 478; *Gulab Chand v Ram Kumar,* 193 IC 573 : AIR 1941 Pat 296.
1834. *Kishundayal v Mahabir Bhagat,* (1920) 5 Pat LJ 492 : 58 IC 291; *Vengubai Ammal v Ramaswami,* (1927) Mad WN 749 : 105 IC 419 : AIR 1927 Mad 964.
1835. *Nursingh Narain v Baboo Lukputty,* (1880) ILR 5 Cal 333.
1836. *Sheo Saran Singh v Mahabir Pershad,* (1905) ILR 32 Cal 657.
1837. *Chaitan Prakash v Mumtaz Ahmad,* AIR 1937 All 762; *Ghulam Mohammad v Rajeshwar,* AIR 1940 Lah 333 : 1940 Lah 658 : 192 IC 505.
1838. *Madari v Baldeo Prasad,* (1905) ILR 27 All 351.
1839. *Venkataraju v Venkata Raghavayya,* (1957) ILR AP 477 : AIR 1958 AP 593; *Suratsingh v Nomanbhai,* (1960) ILR Bom 709 : 62 Bom LR 414 : AIR 1961 Bom 43.
1840. *L V Apte v R G N Price,* AIR 1962 AP 274.
1841. *Upendra Nath v Tara Nath,* AIR 1962 Assam 52.
1842. *Venugppala Rao v Hanumantha Rao,* AIR 1958 AP 541. See note under clause (b) below.

mortgagor from management of the estate.[1843] A mortgagee is not in possession because the mortgage deed requires the mortgagor to appoint a manager in whom the mortgagee has confidence.[1844] The possession of a statutory receiver appointed by the mortgage under section 69A is that of the mortgagor, unless the agency has been modified by the terms of the deed.[1845] A mortgagee is not in possession *qua* mortgagee after he purchases in execution of a decree for sale on his mortgage.[1846]

(2) Dekkan Agriculturists Relief Act

It has been said that the section does not apply when the mortgagor is an agriculturist, and the account is taken under sections 13 and 13A of the Dekkan Agriculturists Relief Act, 1879.[1847]

(3) Clause (a): Management

Clause (a) imposes the same obligation as section 15 of the Indian Trusts Act, 1882 for though a mortgagee in possession is not a trustee for the mortgagor, his duties are akin to those of a trustee.[1848] He is, therefore, bound to act as a prudent owner in the management of the property. The mortgagee in possession of agricultural land is bound to cultivate the ordinary crops that the land is capable of yielding,[1849] but he is not an assurer of the continuance of the same rate of profit as his mortgagor was able to raise, for the very change of management may cause a falling off of receipts.[1850] A mortgagee in possession is liable for loss occasioned by his failure to make necessary repairs,[1851] but he will not be liable for damage caused while the mortgagors were in occupation as tenants.[1852] The mortgagee who takes possession of the mortgaged property must manage it as a person of ordinary prudence.

The question whether a mortgagee in possession can by reason of clause (a) grant a lease of the mortgaged property, has been considered in several decisions of the Supreme Court. In *Mahabir Gope v Harbans Narain,*[1853] the Supreme Court observed that the right conferred under clause (a) was an exception to the general rule that a person cannot confer a better title on another than he possesses himself. The court pointed out that it followed that though a mortgagee may, if it is prudent, grant leases, these would determine on redemption. The court recognised, however, that in some cases the granting of a lease in the course of prudent management might result in the tenant acquiring rights under other laws so that he could not be evicted by the mortgagor, but this was an exception, and could not apply where the mortgage deed prohibits such a lease either expressly, or by necessary implication. These observations do not appear to have been followed in *Harihar Prasad Singh v Deonarayan Prasad,*[1854] where the Supreme Court held that even a lease created by a mortgagee in

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1843. *Noyes v Pollock,* (1886) 32 Ch D 53.
1844. *Mati Lal v Eastern Mortgage and Agency Co,* (1920) 25 Cal WN 265 : 61 IC 468 : AIR 1921 PC 118.
1845. *Richards v Kidderminster,* (1896) 2 Ch 212.
1846. *Rangayya Chettiar v Parthasarathi,* (1887) ILR 20 Mad 120; *Kundanlal v Rupabai,* (1936) ILR Nag 19 : AIR 1936 Nag 293.
1847. *Sakharam v Dhaktojirao,* (1934) ILR 58 Bom 472 : 36 Bom LR 633 : 152 IC 434 : AIR 1934 Bom 321.
1848. *Jagannath v Sripathibabu,* (1945) 1 Mad LJ 478 : AIR 1945 Mad 297.
1849. *Girjoji v Keshavrav,* (1864) 2 Bom HCR 211.
1850. *Shah Mukhun Lal v Baboo Sree Kishen Singh,* (1868) 12 MIA 157, p 193 : 11 WLR 19.
1851. *Shiva v Jaru,* (1892) ILR 15 Mad 290.
1852. *Bagar Ali v Nisar Husain,* (1885) All WN 262.
1853. *Mahabir Gope v Harbans Narain,* [1952] SCR 775 : [1952] SCJ 292 : [1952] SCA 436 : AIR 1952 SC 205.
1854. *Harihar Prasad Singh v Deonarain Prasad,* [1956] SCR 1 : [1956] SCJ 279 : [1956] SCA 316 : AIR 1956 SC 305.

possession in the course of prudent management though binding on the mortgagors after redemption, could not create the rights of a *raiyat* on the tenants. The question was next considered in *Asa Ram v Ram Kali,*[1855] where the Supreme Court held that the creation of a lease which would create occupancy rights in favour of the tenants could not be regarded as a prudent transaction. In *Prabhu v Ramdev,*[1856] however, the Supreme Court without referring to *Asa Ram's* case held that a tenant of a mortgagee can invoke the benefit of subsequent tenancy legislation, which provided that such a tenant could not be evicted except in the circumstances set out in that legislation. The court explained *Mahabir Gope's* case as being a decision given with reference to the normal relationship of landlord and tenant, and stressed that the Supreme Court in that case had contemplated an extraordinary situation arising from a tenant acquiring rights under other laws. The court explained *Harihar Prasad Singh's* case as having been decided on the peculiar facts of the case, viz in that case the tenants were not entitled under the local law to invoke the protection of that law. In *Film Corporation Ltd v Gyan Nath,*[1857] the Supreme Court again considered the question. The court did not refer to either *Harihar Prasad Singh's* case,[1858] or *Prabhu v Ramdev,*[1859] and observed the principle laid down in *Mahabir Gope's case*[1860] that a bona fide and prudent lease would bind the mortgagor. "Ordinary" applies only to agricultural lands and has "seldom" been extended to urban property. This observation is strictly speaking, obiter, as the court found that the lease in question was neither bona fide, nor prudent in view of the long term and the low rent. It is respectfully submitted that there is no warrant for limiting section 76(a) to agricultural land. Whether a particular lease is bona fide or prudent is a question of fact; obviously a lease of urban land which would confer on the lessee the protection of special statutes such as the Rent Acts would prima facie be imprudent. In *Sachalmal Parasram v Ratanbai,*[1861] however, the Supreme Court has repeated the obiter observation in the *Film Corporation case*[1862] that except in the case of agricultural land, acts of a mortgagee would not bind the mortgagor.

The position could be more satisfactorily stated with reference to the language of clause (a). The right conferred by that clause is to manage the property during the subsistence of the mortgage. It is unlikely that a prudent manager would create a lease for a period longer than the mortgage, or in circumstances which would give the lessee rights after the redemption of the mortgage. Such leases would prima facie be imprudent, and not binding on the mortgagor as beyond the powers conferred by clause (a). If, however, it can be shown in any given case that such a lease was prudent, it would bind that mortgagor, even after redemption, and even though the lessee acquires thereunder rights of a permanent or quasi- permanent nature. No question of imprudence can arise where, as in *Prabhu v Ramdev* the rights of the tenant were enlarged by tenancy legislation enac after the tenant was put in possession by the mortgage.[1863] It is submitted that this statement of the law is consistent with all the Supreme Court decisions quoted above. Where the mortgage-deed requires the mortgagee to cultivate the land himself, a lease by him is not a prudent act of management, but rather a destruction of the rights of the mortgagor, and the lessee is not entitled to statutory ownership conferred by

1855. *Asa Ram v Ram Kali,* [1958] SCR 986 : [1958] SCJ 575 : AIR 1958 SC 183; *Ram Kailash Singh v Baliram Singh,* AIR 1963 Pat 26.
1856. *Prabhu v Ramdev,* [1966] 3 SCR 676 : AIR 1966 SC 1721 : [1967] 1 SCJ 60.
1857. *Film Corporation Ltd v Gyan Nath,* [1970] 2 SCR 581 : (1969) 3 SCC 79.
1858. AIR 1956 SC 305.
1859. *Prabhu v Ramdev,* AIR 1966 SC 1721.
1860. AIR 1952 SC 205.
1861. *Sachalmal Parasram v Ratanbai,* AIR 1972 SC 637.
1862. (1969) 3 SCC 79.
1863. *Prabhu v Ramdev,* [1966] 3 SCR 676.

tenancy legislation.[1864] A tenant of a mortgagee in possession cannot resist eviction by the mortgagor by relying on the Rent Acts,[1865] as the alleged "lessees" inducted by the mortgagee (without the authority of law) were not really lessees at all.[1866] In a case before the Supreme Court, as per the mortgage deed, the mortgagee was not entitled to induct tenants who would continue beyond the term of existence of mortgage, or who would be given rights even after expiry of mortgage yet without any concurrence or approval of the mortgagor the tenants were not only inducted but continued in possession. The apex court held that no landlord and tenant relationship between the tenant and mortgagor existed; the tenant was not entitled to protection of the Rent Act and could be evicted in a suit for the recovery of possession.[1867] It is a settled principle of law that when the mortgage is redeemed, the tenant inducted by the mortgagee cannot continue in possession.[1868]

In *Sachalmal v Ratanbai,*[1869] the issue was whether the mortgagee in possession had the right of letting out the mortgaged premises, either under the agreement, or under section 76. The Supreme Court confirmed its earlier decisions[1870] and pointed out that generally the relationship of lessor and lessee created by the mortgagee cannot subsist beyond the duration of the mortgage. In the present case, there was a finding by the district judge that the lease was not an act of prudent management. From section 76(a), it can be inferred that acts done bona fide and prudently in the ordinary course of management may be binding even after the termination of the title of the mortgagee in possession. The principle applies ordinarily to the management of agricultural lands, and has seldom been extended to the urban property so as to tie it up in the hands of lessees, or to confer on them rights under special statues. Decisions of High Courts (even after this pronouncement) are not consistent. According to an Allahabad case, section 76(a) applies to urban immovable property also. If during the subsistence of the mortgage, the mortgagee, acting as an ordinary prudent man, lets out the mortgaged premises bona fide, the rights of the lessee survive even after the redemption of the mortgage. The section is based on the hypothesis that if the mortgagor had been in possession, he also would have similarly let out the premises.[1871] According to the Bombay view, a tenant inducted by the mortgagee ceases to be a tenant on redemption, whether it be urban or agricultural property, unless a law dehors the TP Act, confers protection. Merely because a lease has been created by a mortgagee in possession in exercise of "prudent" management under section 76(a), does not mean that the lease can inure beyond the period of the mortgage.[1872] A Full Bench of the Rajasthan High Court has held that mortgagee in possession of agricultural land can induct tenant in respect of such land beyond the period of

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1864. *Naravansa Dharamchandra v Laxman Moti Ram,* AIR 1976 Bom 61 : (1975) Mah LT 503.
1865. *Kamlakar Co v Gulumshafi,* (1962) 64 Bom LR 554 : AIR 1963 Bom 42; approving *Bhansali Khushalchand v Sha Shamji,* (1957) 59 Bom LR 682.
1866. *G Panniah Thevar v Nellayam Perumal Pillai,* AIR 1977 SC 244 : [1977] 2 SCR 446 : (1977) 1 SCC 500.
1867. *Carona Shoe Co Ltd v K C Bhaskaran Nair,* AIR 1989 SC 1110 : (1989) 2 SCC 395; followed in *Gopal Sharan v Radha Devi,* AIR 2004 Raj 129, p 131 : (2004) 2 WLC 179.
1868. *Hanumant v Mohan,* AIR 1988 SC 299, p 302 : (1988) 1 SCC 377.
1869. *Sachalmal Parasram v Ratanbai,* AIR 1972 SC 637; See also All *India Film Corpn v Raja Gyan Nath,* (1969) 3 SCC 792; *Pomal Kanji Govindji v Vrajlal Karsunda Purohit,* AIR 1989 SC 436, p 451; *Om Prakash Garg v Ganga Sahai,* AIR 1988 SC 108, p 109; *Mainu Devi v Thakur Mansinh,* AIR 1986 Raj 44, p 48.
1870. (1969) 3 SCC 79 : [1970] 2 SCR 581.
1871. *Tajammul Hussain v Mir Khan,* AIR 1974 All 234 : (1974) ILR 1 All 519; (1974) All LJ 274; dissented from in *Devkinandan v Roshanlal,* AIR 1985 Raj 11, p 18; Cf *S Harinath Rao v H Gurushanthamma,* AIR 1974 Kant 2 relying on *Sachalmal v Ratanbai,* AIR 1972 SC 637; dissented from in *Devkinandan v Roshanlal,* AIR 1985 Raj 11, p 18; *State of Madhya Pradesh v Meena Sharma,* AIR 1992 MP 30, pp 32, 33.
1872. *Mahadeo Maruti Bhagwat v Kantilal Khemchand Gujar,* AIR 1980 Bom 19.

redemption of the mortgage, if he has acted prudently and bona fide, and in cases where the mortgagor agreed with the mortgagee for creation of such tenancy, and there is no prohibition in the deed itself against action of such tenancy.[1873] The legal position emerging from the decisions of the Supreme Court is thus summarised:

(1) The general proposition of law is that no person can confer on another a better title than he himself has. Hence, a mortgagee in possession cannot create, in the tenant inducted by him, a right to continue in possession beyond the period of redemption. But by virtue of section 111(c), expiry of the duration of the mortgagee's interest determines his position as the "lessor" also.

(2) To this proposition, an exception is carved out by section 76(a). This exception has been applied ordinarily to the management of agricultural lands, and has seldom been extended to urban property so as to tie it up in the hands of lessees, or to confer on them rights under special statutes.

(3) In a lease of agricultural lands, a lessee, by the very process of cultivation, brings inputs and improves the fertility of the soil. Constant and continuous cultivation by proper manuring etc would improve the fertility of the soil and, on the determination of the lease, that fertility would still remain in the land. But, in the case of non-agricultural lands, normally nothing is done by the tenant which is likely to improve the inherent quality of the property by his own efforts put in during the terms of the tenancy. There is, therefore, no question of a "prudent" owner of urban immovable property granting a long-term lease merely with a view to improving the inherent quality of the land.

(4) When the mortgagor has, either in the deed of mortgage or elsewhere, stated that the mortgagee with possession may lease the property, such authorisation does not amount to any intention to allow expressly the creation of a tenancy beyond the term of the mortgage.

(5) Once it is held that the tenant inducted by the mortgagee with possession did not continue to be a tenant on the termination of the mortgagee's interest, it must necessarily follow that there is no scope for the relationship of landlord and tenant to arise either under the general law, or under the special definition set out in the Rent Act, and the protection afforded by the Rent Act is not available to such a tenant.

(6) Accordingly, section 76(a) of the TP Act cannot apply to a case of urban immovable property, and a lease created by the mortgagee in possession of an urban immovable property would not be binding on the mortgagor after redemption of the mortgage. This is so even if it were to be assumed that the lease is such, as a prudent owner of property would have granted in the usual course of management.

(7) It is only where the words of the mortgage-deed clearly and indubitably express an intention to allow expressly the creation of a tenancy beyond the term of the mortgage, that a lease created in exercise of the power expressly conferred by the mortgage-deed would be binding on the mortgagor.

(8) According to the Supreme Court's decision in *Asa Ram's* case, where there is no prohibition under the mortgage-deed expressly prohibiting the mortgagee with possession from granting a lease, the parties will be thrown back on the right under the TP Act, and the lessee must still establish that the lease is binding on the mortgagors under section 76(a) of the TP Act.[1874]

1873. *Devkinandan v Roshan Lal,* AIR 1985 Raj 11, p 19.

1874. *Lalji Purshottam v Thacker Madhavji Meghaji,* AIR 1976 Guj 161 : (1976) 17 Guj LR 497 : (1976) RCJ 349; approved in *Pomal Kanji Govindji v Vrajlal Karsandas Purohit,* AIR 1989 SC 436, p 453; see also *Om Prakash Garg v Ganga Sahai,* AIR 1988 SC 108; (1987) 3 SCC 553; *Jadavji Purshottam v Dhami Navnitbhai Amratlal,* (1987) 4 SCC 223 : AIR 1987 SC 2146.

The same view was taken later by the Gujarat High Court and it was held that section 76(a) cannot be applied to a lease of urban immovable property.[1875]

According to the Kerala view, where the mortgagee inducts tenants in the mortgaged building, the tenancy terminates with redemption of the mortgagee, and it cannot be said that the mortgagee has rented out the building as a prudent and reasonable man would do.[1876]

According to the Madras view, an express protection conferred by statute on "tenants" [eg by the Tamil Nadu (Buildings, Lease and Rent Control) Act, 1960] cannot be claimed against the mortgagor by a tenant inducted by the mortgagee, because the protection is not available against one who is not the tenant of the "landlord". It is not available to erstwhile tenants. Further, with reference to section 76(a), a lease of urban property cannot be placed on the same footing as a lease of agricultural land. If a tenant of urban property inducted by a mortgagee wishes to rely on section 76(a), he must strictly prove the facts establishing the binding nature of the tenancy created by the mortgagee on the mortgagor.[1877] The Mysore High Court has held that the act of the mortgagee in exchanging certain items of the mortgaged properties and, in respect of other items, creating a lease of permanent nature even beyond the duration of mortgage, are not acts of prudent men within section 76(a) and, as such, not binding on the mortgagor. The interest of the lessees terminated on redemption of the mortgage.[1878]

Thus, a tenant inducted by the mortgagee during the continuance of the mortgage can be evicted in a redemption decree passed against the mortgagee. The protection given by the Rent Control Act is not available to such a tenant, and a tenancy created by the mortgagee in possession does not survive the termination of the interest of the mortgagee.[1879]

Ordinarily, on the termination of the title of the mortgagee, a derivative title from him also comes to an end. But this principle ordinarily applies only to the management of agricultural lands. It has seldom been extended to urban properties. To this again, there is an exception that the lease created by the mortgagee while in possession would continue to bind the mortgagor, provided it is established that the mortgagor had concurred in the grant of the lease. Where the properties mortgaged were shop rooms, situated in an urban area, the tenants of the mortgagee would not be entitled to the benefit of section 76(a) on termination of title of the mortgagee.[1880] The mortgagor mortgaged a house property, and delivered possession to mortgagee. The ground floor of the house was, however, already in the occupation of a tenant. Hence, the mortgagors endorsed the rent deed executed by the tenant to the mortgagee, for the remaining period of the lease. The mortgage deed provided that the mortgage could be redeemed whenever the mortgagors paid the mortgage amount and, on redemption, the mortgagee should return the title deeds, and deliver possession of the mortgaged property to the mortgagors. Notwithstanding mortgage purporting to be a

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1875. *Dhami Navnitbhai Amratlal v Bhagwanlal Chhaganlal,* (1978) 19 Guj LR 420.
1876. *C K Kuttappan v Karhiyayam,* AIR 1981 Ker 107.
1877. *S V Venkatarama Reddiar v Abdul Ghani Rowther,* (1980) 2 Mad LJ 179; *K C Bhaskaran Nair v Carona Shoe Co Ltd,* AIR 1987 Ker 132, p 134.
1878. *Laxminarayan v Padmanabhai,* AIR 1972 Mys 81.
1879. *Champalal v Gulabi,* AIR 1981 Raj 130; *C K Kuttappan v Karthiyayani,* AIR 1981 Ker 107; *Devi Sahai v Sardar Govindrao Mahadik,* AIR 1992 MP 13, p 21 : (1992) 37 MPLJ 109; *Hariram Lehrumal Sindhi v Anandrao Narayanrao Mukai,* AIR 1992 MP 15; *Pomal Kanji Govindji v Vrajlal Karsandas Purohit,* AIR 1989 SC 436, p 455 : (1989) 1 SCC 458; *Puran Chand & Co v Ganeshi Lal Tara Chand,* AIR 1988 Del 1 : 1987 RLR 626; *Gauri Shankar v Kapoor Chand* AIR 1983 Raj 77; *Hanumant Kumar Talesara v* Mohan Lal, AIR 1988 SC 299.
1880. *Ayyappan v Karthiyayani Amma,* AIR 1987 Ker 130.

possessory mortgage, the mortgage deed provided for payment of interest and gave a right to the mortgagee to demand repayment of the mortgage amount at any time the mortgagee deemed fit, and if the demand was not met, to file a suit and to bring the mortgaged property for sale, and also to proceed against the mortgagor for recovery of the balance amount. It was held that in view of the fact that the mortgagors had not empowered the mortgagee to create a lease which would be binding on the mortgagor after the redemption of the mortgage, the tenant's rights, as a tenant, did not become enlarged by means of any tenancy legislation which came to be enacted after the lease was granted. The execution application taken against the mortgagee would be binding on the tenant. Having no independent rights on his own, the tenant could not contend that the decree and the execution application were not binding on him as he was not made a party to the proceedings.[1881]

A permanent lease is, of course, not a prudent transaction.[1882] The burden of proving such a lease to be a prudent transaction would be upon he who asserts it, eg the lessee.[1883] The general position of a tenant in such cases has been considered by a Full Bench of the Punjab and Haryana High Court in *Jagan Nath v Mitter Sain.*[1884] The court held that a tenant in possession before the mortgage becomes a tenant of the mortgagee on the mortgagee taking possession, and reverts on redemption to his position as a tenant of the mortgagor. The tenancy of a new tenant inducted by the mortgagee comes to an end on redemption, except where the tenancy was a prudent transaction, and certain rights are conferred on the tenant by law. Prior to these decisions, it had been held that it is the duty of the mortgagee not to let vacant lands remain untenanted, but to let them to solvent tenants.[1885] A mortgagee in possession may enter into any arrangement which might facilitate the recovery of a reasonable return for his money,[1886] and this would include the granting of leases. Such leases may be given even after a suit for redemption is filed,[1887] but would determine at redemption,[1888] as would an occupancy tenancy.[1889] A mortgagee with *zamindari* rights may settle tenants on the land,[1890] unless the mortgage deed negatives this right.[1891]

(4) Clause (b): Collection of Rents and Profits

The mortgagee in possession must use his best endeavours to collect the rents and profits. It is immaterial in such a case that the mortgaged property was leased before the usufructuary mortgage was executed.[1892] If the mortgagee has leased the property mortgaged to the mortgagor and has obtained a decree for rent which has become time-barred, he is not entitled to credit for the amount in a redemption suit.[1893] However, when the mortgage- deed stipulated for payment of interest, and the mortgaged property had been leased to the

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1881. *Jadavji Purshottam v Dhami Navnitbhai Amratlal,* AIR 1987 SC 2146.
1882. *Laxminarayana v Padmanabha,* AIR 1972 Mys 81.
1883. *Dalip Singh v Financial Commissioner,* (1964) 66 Punj LR 427 : AIR 1964 Punj 369; *Mathra Puri v Hukam Chand,* (1965) 67 Punj LR 64 : AIR 1965 Punj 231; and see *Asa Ram v Ram Kali,* AIR 1958 SC 183.
1884. *Jagan Nath v Mitter Sain,* (1969) ILR 2 Punj 116 : AIR 1970 P & H 104; *Dhani Ram v Deep Chand,* AIR 1970 P & H 109; *Kishori Lal v Nohria Mal,* AIR 1970 P & H 198.
1885. *Sheo Barat Singh v Padarath,* 52 IC 473.
1886. *Karamat Ali Khan v Ganeshi Lal,* (1927) ILR 49 All 658 : 101 IC 516 : AIR 1977 All 552.
1887. *Pramatha Nath v Sashi Bhushan,* AIR 1937 Cal 763.
1888. *Ramchand v Rajhans,* (1906) ILR 3 All 517; *Jhagru Mian v Raghunath,* 119 IC 551 : AIR 1929 Pat 630.
1889. *Gauri v Mangla,* 94 IC 442 : AIR 1926 All 463.
1890. *Mahadeo Lal v Sir Gobind,* 78 IC 943.
1891. *Mahabir Gope v Harbans Narain,* AIR 1952 SC 205.
1892. *Ram Kishen Das v Badri Bishal,* AIR 1937 All 337.
1893. *Naraina v Shivu Rao,* (1918) ILR 41 Mad 1043 : 49 IC 123; *Said Ahmed v Raja Barkhandi Mahesh,* (1932) ILR 8 Luck 40 : 139 IC 64 : AIR 1932 Oudh 255; *C N Chandra v Dwarka Das,* AIR 1936 Lah 42.

mortgagor himself and the latter made a default, the mortgagee could not be held liable for failure to recover the rent or to have lost the right of claiming interest.[1894] Even when the mortgage deed contained a stipulation that the mortgagor would pay from year to year the amount by which the profits fell short of interest, the mortgagor was not liable when the deficit was due to the default of the mortgagee.[1895] This is on the principle that the mortgagee must be diligent in realising his security.[1896] It represents the English rule that the mortgagee in possession is always directed to account on the footing of willful default, ie, not merely for rents and profits which he actually receives, but also for rents and profits which but for his mismanagement or neglect he would have received.[1897] A mortgagee in possession is not bound to account for its rent when the mortgagor himself is a tenant.[1898] This is the usual form of account in actions on mortgages where the mortgagee is in possession,[1899] and the plaintiff does not have to make out a special case as in a suit against a trustee.[1900] The court must find that the mortgagee was in possession, and if so from which date, and the decree must contain an express provision that accounts are to be taken on this basis.[1901] The mortgagee will be liable to account on this basis only in respect of the portion of the mortgaged premises taken possession of by him.[1902] In *Banarsi Prashad v Ram Narain,*[1903] the Judicial Committee, on a construction of the deed in suit, held that the mortgagee was not in all circumstances responsible for the gross rental as shown in the *jummabundi* or rent roll, and that he was liable only for such sums as were actually received by him, or on his behalf, and such sums, if any, as might have been received by him, but for his own neglect or fault. Some of the old cases[1904] make the rent roll the basis of the account and hold the mortgagee responsible for that amount, less 10 per cent for collection charges, but this is not correct, for *Shah Mukkun Lall's* case[1905] shows that the mortgagee is not an assurer of the rate of profits.

This rule of wilful default applies only when the mortgagee is in possession in his character of mortgagee so that he knows he is in possession and chargeable accordingly. In *Parkinson v Hanbury,*[1906] Lord Cranworth said:

> I think that it is perfectly clear law, that when a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default.

When a mortgagee by conditional sale went into possession before the decision in *Ramji v Chinto*[1907] believing that he was absolute owner, he was allowed to charge for improvements,[1908] and was not made accountable for rents and profits.[1909] But the last case

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1894. *Ghulam Mahomed v Rajeshwar,* AIR 1940 Lah 333 : (1940) ILR Lah 658 : 192 IC 505.
1895. *Ratan Dei v Sher Singh,* (1929) 27 All LJ 217 : 114 IC 876 : AIR 1929 All 260.
1896. *Kensington (Lord) v Bouverie,* (1855) De GM & G 134, p 157 (CA).
1897. *Chaplin v Young* (No 1), (1864) 33 Beav 330, p 337; *Parkinson v Hanbury,* 1867 LR 2 HL 1, p 14.
1898. *Nana Sakharam v Dadaji,* (1951) ILR Bom 209 : 52 Bom LR 892 : AIR 1952 Bom 19.
1899. *Mayer v Murray,* (1878) 8 Ch D 424.
1900. Re *Wrightson,* (1908) 1 Ch 789.
1901. *Anandji v Ahmedbhoy,* (1940) ILR Bom 645 : 40 Bom LR 580 : 170 IC 280 : AIR 1940 Bom 287; *Karson Champsi v Meghji Asana,* AIR 1941 Bom 28.
1902. *Chunilal v Abdul Karim,* (1937) 39 Bom LR 795 : 172 IC 584 : AIR 1937 Bom 483.
1903. *Banarsi Prashad v Ram Narain,* (1903) ILR 25 All 287 : 30 IA 66; *Gauri Nath v Fateh Singh,* 38 IC 537.
1904. *Hurnuns v Petam,* (1854) SDN WP 371.
1905. (1868) 12 MIA 157 : 2 BLR 44 : 11 WR 19.
1906. *Parkinson v Hanbury,* (1867) LR 2 HL 1, pp 13–14.
1907. *Ramji v Chinto,* (1864) 1 Bom HC 199.
1908. *Anandrao v Ravji Dashrath,* (1864) 2 Bom HC 214.
1909. *Ramshet Bachashet v Pandharinath,* (1871) 8 Bom HC 236.

carried the rule too far. For the condition about crediting the rents and profits are to be always implied.[1910] If not aware of his character of mortgagee, he is not liable for default of collection, yet he must be liable in the ordinary way for rents and profits that he has received. In a Calcutta case,[1911] when a mortgagee by conditional sale went into possession at due date with the consent of the mortgagor, J Mookerjee held that he was not an usufructuary mortgagee, but that he was, nevertheless, liable to account for rents and profits as they were incidents *de jure* to the ownership of the equity of redemption. When a mortgagee purchased the equity of redemption at a sale held in contravention of section 99 and which was at that time considered to be void, he was held accountable for the rents and profits.[1912] So also, when a mortgagee went into possession under an agreement of sale which was invalid.[1913] When a simple mortgagee went into possession under an invalid decree for possession, he was held accountable for rents and profits.[1914] An assignee of an auction purchaser at a prior mortgagee's sale when redeemed by a puisne mortgagee is also accountable.[1915]

A mortgagee in possession may determine the tenancy of an annual tenant without the consent of the mortgagor.[1916] Similarly, a commutation of *bhavli* (crop share) rent by the mortgagor into *nagdi* (cash) is not binding on the mortgagor.[1917]

(5) Clause (c): Public Charges and Rent

The mortgagor when in possession is liable to pay public charges, and rent under section 65(c). The mortgagee is under the same liability when he is in possession, although no money may be left with him.[1918] But when he is not in possession, it is the duty of the mortgagor to pay the land revenue.[1919]

The section, however, deals only with the relative rights and duties of the mortgagor and the mortgagee, and does not confer any right on a third party. Thus, in the case of a usufructuary mortgage of a leasehold property, the lessor cannot recover the arrears of rent from the mortgagee.[1920] The mortgagee is, however, bound to pay out of the income of the property, and is not entitled to charge such payment against the mortgagor in the accounts.[1921] His liability to pay charges of a public nature is conditioned by two circumstances, one is that it should have been possible for him to pay those charges out of the income, and the other is that the liability to pay should have arisen after he entered into possession as a mortgagee.[1922] But if the mortgagor has covenanted to pay the rent and makes default, the mortgagee may pay the rent, and debit the mortgagor with the payment in the mortgage account.[1923] If the mortgagee cannot pay out of the income, and pays out of his own pocket, in order to save the security, he is entitled, under section 72(b), to add the

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1910. *Wasu Ram v Mahomed Ramzan,* AIR 1940 Lah 199 : 188 IC 570.
1911. *Afsar Shaik v Saurava,* (1917) 25 Cal LJ 560 : 40 IC 371.
1912. *Shib Dass v Kali Kumar,* (1903) ILR 30 Cal 463.
1913. *Bama Charan v Nimai,* (1922) 35 Cal LJ 58 : 64 IC 903 : AIR 1922 Cal 114.
1914. *Papamma Rao v Pratapa Korkonda,* (1896) ILR 19 Mad 249 : 23 IA 32.
1915. *Muthammal v Razu Pillai,* (1918) ILR 41 Mad 513 : 44 IC 753.
1916. *Barjorji v Shripatprasadji,* (1927) 29 Bom LR 215 : 100 IC 1033 : AIR 1927 Bom 145.
1917. *Jhalki Prasad v Bachu Lal,* (1950) ILR 29 Pat 180 : AIR 1950 Pat 246.
1918. *Narain Mishra v Mahanth Mishra,* AIR 1952 Pat 421.
1919. *Munnabi v Mohanlal,* (1952) ILR Nag 366 : AIR 1953 Nag 259.
1920. *Govindarajulu v Gopal Swami,* AIR 1941 Mad 401 : (1941) 1 Mad LJ 225 : 53 Mad LW 150 : (1941) Mad WN 185 following *Sachindra Mohan v Commrs for the Port of Calcutta,* (1938) ILR 1 Cal 21 : (1937) 41 Cal WN 1141 : 66 Cal LJ 910.
1921. *Abid Husain v Kaniz Fattima,* (1924) ILR 46 All 269 : 51 IA 157 : 80 IC 1019 : AIR 1924 PC 102.
1922. *Jhalliram v Daulat Singh,* (1950) ILR Nag 862 : AIR 1951 Nag 255.
1923. *Hardwar Bhagat v Sita Ram,* (1934) All LJ 637 : 150 IC 879 : AIR 1934 All 888.

amount to the mortgage money.[1924] If the mortgagee cannot pay out of the income and does not pay out of his own pocket, and the property is sold, he will have a charge on the surplus sale proceeds under section 73. If the mortgagee does not pay and the mortgagor pays in order to avert a sale, he is entitled to credit for the amount in the mortgage account,[1925] and to charge interest.[1926] He is also entitled to recover such payment by a separate suit by way of damages.[1927] However, the default of the mortgagee does not entitle the mortgagor to such credit, unless the mortgagor has actually paid.[1928] If the land is sold for the mortgagee's default of payment and is purchased by the mortgagee, it is still open to redemption by the mortgagor.[1929] If after the execution of the mortgage the government assessment is raised, then, in the absence of a contract to the contrary, the mortgagee is liable to pay the enhanced assessment,[1930] though there is a case to the contrary.[1931] But the point is settled by the case of *Abid Husain Khan v Kaniz Fatima,*[1932] where, in the case of a mortgage before the TP Act, the Privy Council said that in the absence of a provision to the contrary, the mortgagee must pay out of the income of the property in his possession, the government revenue that might be assessed upon it, this being part of his duty of prudent management. When the government revenue is a consolidated demand on the land mortgaged and other lands as well, the mortgagee is bound to pay the whole revenue accruing due on all the lands.[1933]

The obligation does not, of course, extend to other lands, and the mortgagee is not responsible if the property mortgaged is sold to realise arrears of rents of other lands.[1934]

The liability to pay assessment, whether enhanced or not, is subject to a contract to the contrary and is, therefore, controlled by any special stipulation in the deed of mortgage.[1935] If a usufructuary mortgagee agrees to take rents and profits in lieu of interest, or part of the interest, he is liable under the contract to pay enhanced assessment.[1936] Public charges have been held to include *tagavi* advances,[1937] and local rates.[1938] The provision as to arrears of rent in default of

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1924. *Farzand Ali v Mirza Sadiq,* (1919) 22 OC 270 : 54 IC 264.
1925. *Jaijit Rai v Gobind Tiwari,* (1884) ILR 6 All 303.
1926. *Krishnan v Kamath Ambu Kurup,* (1927) 51 Mad LJ 633 : 98 IC 802 : AIR 1927 Mad 59.
1927. *Duraiswami Pillai v Venkata Reddy,* AIR 1940 Mad 233 : 50 Mad LW 889; but see *Raj Mohan v Sarada Charan,* AIR 1936 Cal 200 as to maintainability of a separate suit.
1928. *Prasanna Kumar Haldar v Girish Chandra,* (1934) 37 Cal WN 1162 : 58 Cal LJ 80 : 149 IC 667 : AIR 1934 Cal 149.
1929. *Kshetranath v Dargapada,* 52 IC 902; *Lakshmaya v Appadu,* (1884) ILR 7 Mad 111; *Kalappa v Shivaya,* (1896) ILR 20 Bom 492; *Jaikaran Singh v Sheo Kumar Singh,* (1927) ILR 50 All 36 : 25 All LJ 658 : 103 IC 370 : AIR 1927 All 747; *Karthiyayani v Panicker,* AIR 1959 Ker 178.
1930. *Sadanand v Ratanji,* (1886) PJ 68; *Veyather v Lakshiammal,* (1909) 5 Mad LJ 284; *Valia Achan v Ravunni,* (1911) 22 Mad LJ 151 : 12 IC 140; *Kolli Valappil v Valiya,* 14 IC 590; *Nanu Nair v Ashta,* (1915) 29 Mad LJ 772 : 29 IC 386; *Vasteva Holla v Mahabala Rao,* 91 IC 943 : AIR 1926 Mad 405; *Farzand Ali v Mirza Sadiq,* (1919) 22 OC 270 : 54 IC 264; *Chempthoor Roman v Nagalasari,* 24 IC 870; *Tuppan Nambudri v Chinna Pari,* (1908) 18 Mad LJ 31; *Sankunni Varriar v Neelakandhan,* AIR 1943 Mad 620 : (1943) 2 Mad LJ 127 : 56 Mad LW 398.
1931. *Krishnier v Arrappuli,* (1904) 14 Mad LJ 488.
1932. *Abid Husain Khan v Kaniz Fatima,* (1924) ILR 46 All 269 : 51 IA 157 : 80 IC 1019 : AIR 1924 PC 102; followed in *Vasteva Halla v* Mahabala Rao, AIR 1926 Mad 405.
1933. *Gunnam Dorayya v Vadapalli,* (1914) 27 Mad LJ 295 : 25 IC 797.
1934. *Jadubans Sahai v Bahuna Phulpati,* AIR 1957 Pat 452.
1935. *Ooppath Naremparembath v Koyakutti,* 29 IC 344; *Panigatan v Roman,* (1907) 17 Mad LJ 517; *Maharaj Singh v Lalta Prasad,* (1919) 17 All LJ 93 : 57 IC 774.
1936. *Thippa Ramaswami v Krishnaswami,* (1911) 9 Mad LT 206 : 8 IC 845; *Pannambatta v Kalathinpadkil,* (1914) 16 Mad LT 317 : 25 IC 641; *Hari v Shridhar,* (1914) 10 Nag LR 9 : 23 IC 131.
1937. *Chhita Bhula v Bai Jamni,* (1916) ILR 40 Bom 483 : 37 IC 295; *Jhalliram v Daulat Singh,* (1950) ILR Nag 562 : AIR 1951 Nag 225.
1938. *Abid Husain v Kaniz Fatima,* AIR 1924 PC 102; *Kesho Ram v Ram Lal Saha,* 163 IC 55 : AIR 1936 AP 312; *Ramakrishna Natale v Chandrashekara Rao,* (1951) ILR Mys 503 : AIR 1953 Mys 114.

payment of which the property may be summarily sold, has reference to *putni* tenures and saleable under tenures. The word "summarily" implies that the proceedings for realization of rent by sale of the property are of a summary nature; for instance, as in the case of a certificate under the Public Demands Recovery Act.[1939] It has been held that the mortgagee is liable to pay such arrears even if they are due for a period before his entry into possession.[1940]

The usufructuary mortgagor does not lose his title to the property or right to redemption by lapse of time. By operation of the last para of section 76, the mortgagor is entitled to the accounting of the loss occasioned to it. At best the auction-purchaser on redemption would look to the mortgagee who had committed default in terms of the mortgage, and the court would give suitable directions in that behalf. The possession of the purchaser must be on behalf of the mortgagee, and becomes liable to accounting etc.[1941]

(6) Clause (d): Repairs

The duty of the mortgagee to make necessary repairs out of the rents and profits was recognized before the TP Act.[1942] The cost of repairs to a well has been allowed,[1943] but not the cost of laying out water pipes in a house.[1944] However, the mortgagee in possession is not bound to spend money on necessary repairs, unless there is a surplus left after deducting interest and money paid for public charges. Hence, the use for the words "rents and profits" in this clause which are less extensive than the word "income" in clause (c). If the parties dispense with an account, the mortgagee cannot charge for repairs.[1945] The mortgagor is entitled to credit in the account for loss caused by the mortgagee's failure to repair.[1946]

The object of section 76(d) is not to lay down priorities, but to make it obligatory on the mortgagee, unless there is a contract to the contrary, to carry out necessary repairs to the property; the amount he can expend is, however, limited to the difference between the income of the property and the amounts expended on rates charges, etc mentioned in section 76(c), and the interest due to him.[1947]

(7) Clause (e): Waste

The mortgagee in possession must not commit waste, and the prohibition is enacted in the same words as in the case of a mortgagor in possession under section 66, and in the case of a lessee under section 108 (o). This prohibition is a corollary to the direction given in clause (a) to the mortgagee to manage the property as a person of ordinary prudence would if it were his own. A mortgagee in possession commits waste if he fells trees or even immature bamboo clumps standing on the date of the mortgage,[1948] but not if he fells trees he has himself planted.[1949] A *kanomdar* in Madras has power to remove trees planted by his

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1939. *Jagat Narain v Sheonarain Marwadi,* 174 IC 1001 : AIR 1938 Pat 196; *Jay Prosad v Jasoda,* AIR 1958 Pat 649.
1940. *Kshetra Nath v Durgapada,* 52 IC 902; and see *Priyanath Sasmal v Mrutunjoy Pani,* (1955) ILR Cut 697 : AIR 1956 Ori 61.
1941. *Panchanam Sharma v Basudeo Prasad Jaganani,* AIR 1995 SC 1743.
1942. *Jogendronath v Raj Narain,* (1868) 9 WR 488; *Ragho Bagaji v Anaji,* (1868) 5 Bom HC 116; *Jamal v Mahomed,* (1874) PJ 7; *Balaji v Nana,* (1881) PJ 195.
1943. *Durga Singh v Naurang,* (1896) ILR 17 All 282.
1944. *Kuttuva Narayanasami v Soranammal,* (1914) 15 Mad LJ 374 : 22 IC 635.
1945. *Lakshman v Hari Dinkar,* (1880) ILR 4 Bom 584, p 589.
1946. *Shiva v Jaru,* (1892) ILR 15 Mad 290; *Raghu v Ashraf,* (1879) ILR 2 All 252.
1947. *Anandram v Premraj,* [1968] 1 SCR 424 : AIR 1968 SC 250 : [1968] 1 SCJ 529.
1948. *Ghasi Ram v Bhola Nath,* (1924) ILR 46 All 115 : 79 IC 314 : AIR 1924 All 153; *Raghu v Ashraf,* (1879) ILR 2 All 252; *Mahabir v Sheo Shankar,* 112 IC 434 : AIR 1929 Oudh 124.
1949. *Ramchandra v Shripati,* (1926) ILR 50 Bom 692 : 99 IC 400 : AIR 1926 Bom 595; *Krishna Patter v Srinivasa,* (1897) ILR 20 Mad 124, p 127.

own self.[1950] Cutting timber and clearing the ground for the purpose of improvement would not be a waste. The mortgagor would, however, be entitled to the value of the timber cut.[1951] Failing to inform the mortgagor that trees had fallen so that he could remove the timber renders the mortgagee liable for the value of the timber.[1952] Where the mortgagee in possession depreciated the value of the estate by granting occupancy rights in exchange for *nazarana*, he was held accountable to the mortgagor for the *nazarana*.[1953] A somewhat forced construction was put upon this clause in an Allahabad case where it was said that a violation of the right of privacy, by keeping a door on the mortgaged premises open, would constitute waste.[1954] In a case from Kerala,[1955] which was decided before the TP Act was made applicable to the state, it was held that the mortgagee in possession was not liable for permissive waste, as when paddy lands became silted and unfit for cultivation because of the negligence of the mortgagee.

(8) Clause (f): Insurance

Section 72 gives the mortgagee the right to insure the mortgaged property if there is no contract to the contrary, and if the mortgagor has not already done so. When the mortgagee has so insured, he is entitled under that section to tack the premiums to the mortgage money. This clause provides for the application of the insurance money. The mortgagee must apply it in re-instating the property or, if the mortgagor so directs, in reduction or discharge of the mortgage debt. In a case in which the insurance was effected neither by the mortgagor, nor by the mortgagee, but by the Receiver of the court, the application of the insurance money was held to be in the discretion of the court.[1956] If the mortgagor has insured, the mortgagee has no claim to the insurance money as against the insurance company.[1957]

(9) Clause (g): Accounts

The mortgagee in possession must keep clear, full and accurate accounts supported by vouchers. The section applies to the case of a usufructuary mortgage. The mortgagee is under statutory liability to maintain accounts of the income.[1958] This is another duty of the mortgagee which is akin to that of a trustee under section 19, Indian Trusts Act, 1882.

The same obligation was imposed by the Regulations;[1959] and it did not matter whether the mortgagee was in possession with or without the consent of the mortgagor.[1960] With reference to the Bengal Regulation, J Phear said in *Goluck Chunder v Mohan Lall*[1961] that the mortgagee's account should show what the mortgagee has realised, from what portions of the mortgaged property, in what terms of periods, with what loss or gain on the several assets, and with what necessary reductions, and the net profits available as actual realisations towards liquidating the mortgage amounts. And again in *Mokund Lall v Goluck Chunder*,[1962]

1950. *Vasudevan v Valia*, (1901) ILR 24 Mad 47; *Krishna Patter v Srinivasa*, (1897) ILR 20 Mad 124.
1951. *Chandi Avira v Varkey*, AIR 1951 Tr & Coch 109.
1952. *Nani Kunjukrishnan v P Pillai*, (1958) ILR Ker 838 : AIR 1959 Ker 38.
1953. *Ghasi Ram v Bhola Nath*, AIR 1924 All 153.
1954. *Lachmi Narain v Jethu Mal*, (1894) ILR 16 All 396.
1955. *V Narayanan v K Sankaran*, AIR 1960 Ker 298.
1956. *Dooly Chand v Ramashwar*, 40 IC 623.
1957. *P V Chetty Firm v Motor Union Insurance Co*, 67 IC 777 : AIR 1923 Rang 6.
1958. *Mahadev Tambali v Mohammed Siddiq*, (1949) ILR All 362 : AIR 1949 All 189.
1959. Bengal Reg 15 of (1793) and 1 of 1798; Madras Reg 24 of 1802; see also *Shah Mukhun Lal v Sree Kishen Singh*, (1869) 12 MIA 157 : 2 BLR 44 : 11 WR 19.
1960. *Nilkant Sein v Sheikh Jaenoddeen*, (1876) 7 WR 30.
1961. *Goluck Chunder v Mohan Lall*, (1866) 5 WR 271.
1962. *Mokund Lall v Goluck Chunder*, (1888) 9 WR 572.

he said that the mortgagees were bound to exhibit detailed items of all receipts and disbursements upto the time of accounting verified by themselves, and accompanied by all vouchers. This clause has been based on these cases. In a case under the TP Act, the necessity for detailed accounts has been stressed by the Bombay High Court.[1963] If the mortgagee employs an agent, it is not sufficient to show lump sums received from the agent, and the mortgagee should show what the agent received from the tenants.[1964] It has been held[1965] that the accounts to be kept by a mortgagee are independent of any which may be kept by a *patwari*, and this has been followed by the chief court of Oudh.[1966] In the undernoted case, the Privy Council applied the maxim *qui facit per alium facit per se,* and held that the accounts of the property managed by the agent, though prepared by the agent, are the principal's accounts.[1967]

A mortgagee was not permitted to appropriate receipts of usufruct in lieu of interest, but on the contrary, he had to render accounts on redemption. It was held that section 77 was not attracted, and, under sections 76(g) and (h), accounts must be maintained by the mortgagee as required by law.[1968] If there are two mortgages, the mortgagee must file a separate account of each, for the court will take separate accounts.[1969] In a case where the mortgage decree directed two accounts, the Privy Council held that the mortgagee is not bound to credit receipts to the debt which bore compound interest, and was more burdensome to the mortgagor.[1970] It has been held that the obligation to keep accounts is a rule of justice, equity and good conscience, and applies to mortgages executed prior to the coming into force of the TP Act,[1971] and in areas where the TP Act is not in force.[1972]

Failure to account

If the mortgagee fails to keep accounts, there will be a general presumption against him *in odium spoliatoris.*[1973] But the presumption must have reasonable limits, and not be mere conjectures based on inexact data.[1974] Thus, when the accounts of all the years have not been kept, the court may proceed on the basis of an average annual income,[1975] or may assume that all the tenants have paid their rents, and may order the accounts to be prepared on the basis of gross annual rentals.[1976] However, the presumption should not be carried beyond reasonable limits and if the mortgagee is debited with gross rentals, he should be allowed

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1963. *Kundanmal v Kashibai,* (1902) ILR 26 Bom 363.
1964. *Noyes v Pollock,* (1885) 30 Ch D 336 : (1886) 32 Ch D 53.
1965. *Ram Kissen Singh v Shah Kundun Lal,* (1864) WR 177.
1966. *Kudai Lal v Aisha Jehan,* (1927) ILR 2 Luck 564 : 102 IC 263 : AIR 1927 Oudh 199; citing *Lal Bahadur v Murli Dhar,* 74 IC 95 : AIR 1924 Oudh 92; *Lachmi Narain v Mohamadi Begam,* (1932) ILR 7 Luck 454 : 137 IC 102 : AIR 1932 Oudh 123; *Said Ahmed v Raja Barkhandi Mahesh,* (1932) ILR 8 Luck 40 : 139 IC 64 : AIR 1932 Oudh 255.
1967. *Shah Mukhun Lal v Sree Kishen Singh,* (1868) 12 MIA 157 : 2 BLR 44 : 11 WR 19; on appeal from *Ram Kissen Singh v Shah Kundun Lal,* (1864) WR 177.
1968. *Krishna Gopal v Bachhulal,* AIR 1985 All 327, p 331.
1969. *Ramchandra v Janardan,* (1890) ILR 14 Bom 19.
1970. *Kader Moideen v Nepean,* (1890) ILR 26 Cal 1 (PC) : 25 IA 241.
1971. *Muhammad Ishaq Khan v Rup Narain Singh,* (1932) ILR 54 All 205 : 136 IC 363 : AIR 1931 All 562; *Mahomed Sadiq v Harakh Narain,* 166 IC 545 : AIR 1936 Pat 583.
1972. *Gaddhar Mal v Kalooram,* (1957) ILR Raj 250.
1973. *Shah Gholam Nuzuf v Emanum,* (1868) 9 WR 275; *Allah Yar v Thakar Das,* 44 IC 9; *Devaki Devi v Devi Das,* AIR 1951 Pepsu 18; *Gajadhar v Baidyanath,* (1950) ILR 29 Pat 545 : AIR 1950 Rang 374.
1974. *Shah Mukhun Lall v Sree Kishen Singh,* (1868) 12 MIA 157; *Lal Bahadur v Murli Dhar,* AIR 1924 Oudh 92.
1975. *Muhammad v Uttamchand,* 63 IC 598.
1976. *Lachmi Narain v Mohamadi Begam,* AIR 1932 Oudh 123; *Hardeo Prasad v Ganga Sahai,* (1921) 19 All LJ 155 : 61 IC 48 : AIR 1921 All 197.

collection charges.[1977] In some cases, interest has been disallowed,[1978] or if there is no definite evidence as to the amount of the rent;[1979] it has been assumed that the profits would balance the interest.[1980] This was done with the consent of the parties as being just and convenient when a puisne mortgagee was redeeming a prior mortgagee, who had realized his security and purchased and taken possession of the property.[1981] But this is not a rule of law for a prior mortgagee who has realized his security and is in possession, as purchaser is liable to account for rents and profits when sued for redemption by a puisne mortgagee who had not been made a party.[1982] The mortgagee cannot be heard to say that an item entered in his account is an illegal collection;[1983] and when a mortgagee collected a cess which was introduced by an Act subsequent to the mortgage and realizable only by the mortgagor, it was held that the amount should be credited to the mortgagor.[1984]

Wilful default

A mortgagee is not liable to account under the rule of wilful default, ie, not only for actual receipts, but also for what he might and ought to have received, unless he is in possession in the character of a mortgagee.

When a mortgagee, however, enters into possession under a deed which is silent as to possession, he takes upon himself the obligation of accounting for rents and profits.[1985]

Contract to the contrary

The sub-section is not expressed to be subject to a contract to the contrary, and a mortgagee in possession cannot contract himself out of the duty to account.[1986] Every mortgagee in possession is bound to account, unless he establishes a contract in the terms of section 77.[1987] In *Bihari Lal v Shib Lal,*[1988] the contract in the mortgage was that the mortgagee should take the rents and profits in lieu of interest and pay the mortgagor a fixed annual sum by way of *malikhana,* and that there was to be no account except as to *malikhana.* The agreement was enforced and redemption was decreed on payment of the principal sum, less the balance due on the *malikhana* account. The mortgagee under section 76(g) and (h), is bound to maintain full and accurate accounts, supported by vouchers.[1989]

1977. *Khwaja Saiyed Kazi Husain v Debi Dayal,* (1934) ILR 9 Luck 456 : 148 IC 880 : AIR 1934 Oudh 104.
1978. *Shadi Lal v Lal Bahadur,* (1933) 377 Cal WN 420 : 57 Cal LJ 152 : 64 Mad LJ 298 : 35 Bom LR 308 : (1933) All LJ 339 : 142 IC 739 : AIR 1933 PC 85; *Suratsingh v Nomanbhai,* (1960) ILR Bom 709 : 62 Bom LR 414 : AIR 1961 Bom 43.
1979. *Hardat Singh v Damodar,* 145 IC 122 : AIR 1933 Lah 141.
1980. Ibid; *Amirchand v Tirath Ram,* (1908) Punj LR 95.
1981. *Umes Chunder v Zahoor Fatima,* (1891) ILR 18 Cal 164 : 17 IA 201; but see *Mohammed Mohsin v Kausar Raza,* (1956) ILR 2 All 210 : AIR 1956 All 422.
1982. *Muthammal v Razu Pillal,* (1918) ILR 41 Mad 513 : 44 IC 753; contra; *Syed Ibrahim v Arumugathayee,* (1915) ILR 38 Mad 18 : 16 IC 877; *Sri Ram v Kesri Mal,*(1904) ILR 26 All 185; *Hari Krishna v Gajendra Nath,* AIR 1939 Cal 15; *Arunachalam Mudaliar v Jagannatha,* AIR 1948 Mad 132; *Ghulam Khoja v Pandharinath,* (1948) 50 Bom LR 271 : AIR 1948 Bom 579.
1983. *Nuwal Kishore v Sayyud Inayat Ali,* (1852) 7 Agra SD 248.
1984. *Ramavatar v Tulsi Prosad,* (1911) 14 Cal LJ 507 : 11 IC 713.
1985. *Madari v Baldeo Prosad,* (1904) ILR 27 All 351.
1986. *Muhammad Ishaq Khan v Rup Narain Singh,* (1932) ILR 54 All 205 : 136 IC 363 : AIR 1931 All 562; *Lal Bahadur v Murli Dhar,* 74 IC 95 : AIR 1924 Oudh 92; Ch *Sarfraz Ahmed v L Mannilal,* (1943) ILR 18 Luck 273 : (1942) Oudh WN 585 : 203 IC 449 : AIR 1943 Oudh 38; *Chen Sankar Lal v United Bank of India,* (1956) 60 Cal WN 664 : AIR 1955 Cal 569.
1987. *Kamla Prasad v Bamdeo,* 155 IC 22 : AIR 1935 Pat 148; *Kishun Lal v Hira Lal,* 120 IC 768 : AIR 1929 Pat 571.
1988. *Bihari Lal v Shib Lal,* (1924) ILR 46 All 633 : 82 IC 25 : AIR 1924 All 591.
1989. *Krishna Gopal v Bachhulal,* AIR 1985 All 327.

Accounts only on redemption

The mortgagor cannot claim an account, unless he has filed a suit for redemption.[1990] A suit for an account only would contravene the provisions of O 2, rules 1 and 2 of the Code of Civil Procedure, for the mortgagor cannot split his remedies. But under section 15D of the Dekkan Agriculturists Relief Act, 1879, as amended by Act 22 of 1882, an agriculturist is allowed the privilege of suing for an account without asking for redemption.[1991] Where a statute passed for the benefit of agriculturists bars redemption, the mortgagor can sue for accounts.[1992] As the prayer for an account is ancillary to the claim to redeem, no question of limitation can arise between a mortgagor and mortgagee when accounts are taken at the time of redemption.[1993]

(10) Clause (h): System of Accounting

Section 76(h) directs the mortgagee to apply the receipts from the mortgaged property in a certain manner. The order of application is:

(1) expenses properly incurred for the management of the property, and collection of rents and profits, and other expenses mentioned in section 76(c) and (d);

(2) interest thereon;

(3) the surplus is to be applied towards the interest on the principal money; and

(4) towards the principal money.[1994]

The account has to be taken with rests, so that, strictly speaking, as soon as there is a surplus of net receipts over interest, the balance should be applied in reduction of principal, and then interest runs on the reduced amount. The section says "from time to time" and evidently contemplates a rest whenever there is a surplus, but the practice of courts in India is to take annual rests,[1995] though in one reported case, half yearly rests were ordered.[1996] But if the net receipts are less than the interest, the deficit is not added to the principal, as that would lead to compound interest which is not allowed,[1997] unless there is express provision to that effect. The same clause in the old section referred to "interest on the mortgage money," but these words have been omitted, because a mortgage money means principal and interest, the phrase might imply that compound interest was to be charged even when the deed only provided for simple interest. In *Gyarsi Bai v Dhansukh Lal,*[1998] the Supreme Court has held that the obligation to render accounts continues even after a preliminary decree until the final mortgage decree.

Occupation rent is an expression which also occurs in section 62 of the Indian Trusts Act, 1882. This is charged if the mortgagee is in personal occupation, and it represents what the

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1990. *Bhau Balaji v Hari Nilkanthrav,* (1883) ILR 7 Bom 337; *Gordhanlal v Thakur Radha,* AIR 1943 All 109 : 205 IC 580.
1991. *Laluchand v Girjappa* (1896) ILR 20 Bom 469.
1992. *Muhammed K P v Maya Devi,* AIR 1971 Ker 290.
1993. *Thekkamannengath v Kakkasseri,* (1915) 28 Mad LJ 184 : 27 IC 989; *Banwari Singh v Sakhraj,* (1931) 29 All LJ 421 : 135 IC 248 : AIR 1931 All 585.
1994. *Anandram v Premraj,* [1968] 1 SCR 424 : AIR 1968 SC 250 : [1968] 1 SCJ 529.
1995. *Jaijit Rai v Gobind Tiwari,* (1884) ILR 6 All 303; *Radhabenode Misser v Kripa Moyee,* (1872) 14 MIA 443; *Muhammad v Uttamchand,* 63 IC 598; But see *Kanakaraj v Sundaraja Iyer,* (1968) ILR 3 Mad 152 : AIR 1968 Mad 394.
1996. *Doolee Chand v Omda Khanum,* (1881) ILR 6 Cal 377.
1997. *Radhabenode Misser v Kripa Moyee,* (1872) 14 Mad LA 443.
1998. *Gyarsi Bai v Dhansukh Lal,* [1965] 2 SCR 154 : AIR 1965 SC 1055 : [1965] 2 SCJ 783; see also *Satyanarayana v Suryanarayana,* (1949) 1 Mad LJ 116 : AIR 1949 Mad 613.

land would yield if let to a tenant.[1999] In a Patna case,[2000] the mortgagees were in personal occupation at the time of the mortgage and were charged an occupation rent, but when they let the premises to tenants, they were liable for the rent that they received. The court will not, however, require the mortgagee to account for any collateral advantage received from his occupation. So when the mortgaged property is a public house, and the mortgagee, a brewer, lets the house as a tied house, he is not called upon to render an account of the profits of the sale of the beer, but the rent charged is that which would be realized if the house was let without the condition as to purchase of beer from the mortgagee.[2001]

By operation of the last para of section 76, the mortgagor is entitled to the accounting of the loss occasioned to it. At best the auction-purchaser on redemption would look to the mortgagee who had committed default in terms of the mortgage and the court would give suitable directions in that behalf. The possession of the purchaser must be on behalf of the mortgagee, and becomes liable to accounting etc.[2002]

After deducting expenses

The mortgagee's receipts are his actual realisations. From these are deducted the expenses allowed by this clause, and the balance is debited in reduction first of interest, and then of principal. The expenses to be deducted are those under clauses (a) and (b), (c) and (d), ie, management, collection of rents and profits, public charges and necessary repairs. The provision allowing a deduction for expenses of management and collection of rents is new. Under the old section, these were omitted from this clause, but allowed in clause (a) under section 72— so that they were strictly speaking, not recoverable by the mortgagee until the principal money became due. It is more reasonable that the mortgagee should get credit for these at once and that they should be deducted from the receipts before these are debited against the mortgagee,[2003] and that they should be on the same footing as expenses of collection and necessary repairs. This is in accordance with the law in England where expenses of management are allowed to the mortgagee in the accounts[2004] as "just allowances," ie, items admissible though not expressly mentioned in the decree.[2005] Expenses of repairs;[2006] and costs of litigation incurred bona fide by a mortgagee to collect his rents have been allowed as "just allowances".[2007] But in another case, it was said that the mortgagor was not responsible for such costs, unless the mortgagor's title was impeached in the suit.[2008] It is submitted that the former view is correct. There is, however, nothing to prevent the mortgagor and the mortgagee making an express bargain that a fixed sum should be charged annually for expenses.[2009] The word "expenses" includes public charges, but the mortgagee is not entitled to deduct such charges paid after the date when the amount mentioned in the decree for redemption is tendered to him.[2010]

1999. *Raghoonath Roy v Baraik,* (1867) 7 WR 244.
2000. *Kishun Lal v Hira Lal,* 120 IC 768 : AIR 1929 Pat 571.
2001. *White v City of London Brewery Co,* (1889) 42 Ch D 237.
2002. *Panchanan Sharma v Basudeo Prasad Jaganani,* AIR 1995 SC 1743.
2003. *Shib Chandra v Lachmi Narain,* (1929) ILR 51 All 686 : 56 IA 339 : 119 IC 612 : AIR 1929 PC 243; *Kirat Singh v Ramsaran,* (1941) ILR All 380.
2004. *Leith v Lryine,* (1833) 1 M & K 277; *Raja Sir Mahmud v Hakim Saiyadali,* AIR 1941 Oudh 498.
2005. *Wilkes v Saunion,* (1877) 7 Ch D 188; Seton, p 1976.
2006. *Tipton Green Colliery Co v Tipton Moat Colliery Co,* (1877) 7 Ch 192.
2007. *Basant Singh v Mata Baksh,* (1914) 17 OC 47 : 23 IC 456.
2008. *Pokree Sheb v Pokree Beary,* (1898) ILR 21 Mad 32.
2009. *Chalikani Venkatarayanim v Zamindar of Tuni,* (1923) ILR 46 Mad 108 : 50 IA 41 : 71 IC 1035 : AIR 1923 PC 26.
2010. *Paliyadi Rajagopala v Karruppiah,* AIR 1946 Mad 464.

Remuneration

The mortgage is not allowed to charge remuneration for his personal services in connection with the management of the mortgaged property;[2011] but he may employ an agent at a salary, if the work is so onerous that he would do so if the property were his own.[2012] In *Kader Moideen v Nepean,*[2013] the mortgagee's son lived on the mortgaged property and managed it, but the Privy Council allowed only the cost of maintenance of the son during the father's lifetime, but nothing after the father's death when the son himself became the mortgagee. However, this strict rule has been relaxed on the principle of *Biggs v Hoddinott, Hoddinott v Biggs,*[2014] and a mortgagee may stipulate for his own remuneration, and the stipulation will be valid if it is free from oppression and limited to the duration of the mortgage. The Bombay High Court allowed a mortgagee to charge remuneration for the management of a mortgaged mill.[2015]

Surplus

If, on redemption, it is found that the mortgagee has received a surplus in excess of the principal and interest, the mortgagor is entitled to recover the surplus. The mortgagee is also liable to pay interest on the surplus, but there is conflict as to whether the interest should run from the time when the debt is satisfied,[2016] or from the time when the redemption suit was instituted.[2017] In one case,[2018] the Allahabad High Court pointed out that the English authority *Charles v Jones,*[2019] referred to a surplus left after the exercise by the mortgagee of a right of private sale, and that the mortgagee is not liable for interest on the surplus until the institution of a redemption suit.

(11) Clause (i): Effect of Tender or Deposit

A deposit of the mortgage money in court operates as a tender as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take the money. Tender when wrongfully refused, operates as a cessation of interest if there is a continued readiness to pay.[2020] However, the mortgagee is still in possession, as mortgagee is under a statutory liability to account for rents and profits received from the date of tender.[2021] After tender or deposit, the mortgagee is not entitled to collection charges,[2022] but in a Madras case[2023] this was said to be too drastic, and the mortgagee was allowed to make deductions for collection charges, government revenue and repairs. The express provision added at the end of the clause has the effect of superseding the latter decision. It is submitted that the word "receipt"

2011. Re *Wallis, ex-parte Lickorish,* (1890) 25 QBD 176; *Mahadeo v Ramchandra,* (1904) 6 Bom LR 590; *Langstaffe v Fenwick,* (1805) 10 Ves 404.
2012. *Eyre v Hughes,* (1876) 2 Ch D 148; *Leith v Irvine,* (1833) 1 M & K 277, p 295.
2013. *Kader Moideen v Nepean,* (1898) ILR 26 Cal 1 : 25 IA 241.
2014. *Biggs v Hoddinott, Hoddinott v Biggs,* (1898) ILR 2 Ch 307 : (1895-99) All ER Rep 625.
2015. *Hope Mills v Cawasji,* (1911) 13 Bom LR 162 : 10 IC 749.
2016. *Haji Abdul Rahman v Haji Noor Mahomed,* (1896) ILR 16 Bom 141; *Bhaya Lal v Mohammed Hakim,* 57 IC 294.
2017. *Janoji v Janoji,* (1883) ILR 7 Bom 185.
2018. *Ismail Hasan v Mehdi Hasan,* (1924) ILR 49 All 897 : 80 IC 63 : AIR 1924 All 881.
2019. *Charles v Jones,* (1887) 35 Ch D 544.
2020. *Jagat Tarini v Naba Gopal,* (1907) ILR 34 Cal 305; *Velayuda Naicker v Hyder Hussan,* (1910) ILR 33 Mad 100 : 3 IC 729; *Hukam Singh v Babu Lal,* (1922) ILR 44 All 198 : 64 IC 971 : AIR 1922 All 181; *Raj Mohan v Sarada Charan,* AIR 1936 Cal 200.
2021. *Rukhminibai v Venkatesh,* (1907) ILR 31 Bom 527; *Satyabadi v Harabati,* (1907) ILR 34 Cal 223; *Ma Nyo v Maung Hla Ba,* (1924) ILR 2 Rang 382 : 84 IC 395 : AIR 1925 Rang 13; *Harbans v Ramdhari,* AIR 1960 Pat 51.
2022. *Beni Prasad v Narain Das,* 5 IC 529.
2023. *Subba Rao v Sarvarayudu,* (1924) ILR 47 Mad 7; 72 IC 292 : AIR 1923 Mad 533.

is used in the same sense as in clause (h), and that after tender, the mortgagee is neither entitled to interest, nor to deductions for expenses of management, collection of rents and profits, public charges, or repairs,[2024] or expenses for cultivation.[2025] There is no warrant for limiting the word "expenses" in clause (i) to what has been spent in connection with the management and the collection of rents and profits. Where a decree directs the mesne profits to be awarded after a particular date, the mortgagee cannot charge for public charges.[2026]

Loss

If loss is occasioned by the mortgagee's default in the performance of the duties imposed upon him by this section, the amount will be determined in the same suit.[2027] If the mortgagee fails to pay the government revenue, and the mortgagor pays to avert a sale, the mortgagor is entitled to credit for the amount in the mortgage account.[2028] The remedy under this section is cumulative, and does not operate as a bar to any other remedy the mortgagor may have at law.[2029] He may bring a suit for damages at once, and need not wait to debit the mortgagee with the loss when accounts are taken at redemption.[2030] When a mortgagee is in possession, any act which he does affecting the mortgaged property, cannot be said to be an act of tort. A suit by a mortgagor for compensation for such act was not governed by Article 36, but by Article 120 of the Limitation Act, 1908.[2031] The article corresponding to Article 120 in the Act of 1963 is Article 113, the period prescribed being three years.

77. Receipts in lieu of interest.—Nothing in section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

(1) Receipts in Lieu of Interest

Section 77 enacts an exception to section 76. It omits reference to clause (c) of section 76, which makes it obligatory on the mortgagee to pay government revenue.[2032]

There is no account to be taken between the mortgagor and mortgagee when the rents and profits are taken in lieu of interest, or in lieu of interest and defined portions of the principal.[2033] In such cases, if the mortgagee does not realise the full value of the usufruct, it is the mortgagee and not the mortgagor who suffers. The section was applied in a case in which

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2024. *Rajagopala v Karruppiah,* AIR 1946 Mad 464.
2025. *Narain Prasad v Radhakant Prasad,* AIR 1967 Pat 5.
2026. *Puleyadi Rajagopala v Karuppi,* AIR 1946 Mad 464.
2027. *Shiva v Jaru,* (1892) ILR 15 Mad 290; Contra *Raghu v Ashraf,* (1879) ILR 2 All 252 (submitted to be incorrect).
2028. *Jaijit Rai v Gobind Tiwari* (1884) ILR 6 All 303; *Krishnan v Komath Ambu Karup,* (1927) 51 Mad LJ 633 : 98 IC 802 : AIR 1927 Mad 59.
2029. *Shivadchidambara v Kamatchi,* (1909) ILR 33 Mad 71 : 3 IC 433.
2030. *Mahabir v Sheo Shankar,* 112 IC 434 : AIR 1929 Oudh 124.
2031. *Genuji Ramji v Murlidhar Laxman,* (1954) 56 Bom LR 462 : AIR 1954 Bom 417.
2032. *Misri Lal v Gajadhar,* AIR 1943 Oudh 433 : (1943) Oudh WN 347 : 200 IC 324.
2033. *Bachchu Lal v Chaudri Syed Mohammad,* (1933) 37 Cal WN 457 : (1933) All LJ 350 : 144 IC 1025 : AIR 1933 PC 136; *Mahant Ramdhan Puri v Bankey Bihari Saran,* [1959] SCR 1085 : [1959] SCJ 121 : [1959] SCA 110 : AIR 1958 SC 941; *Moulvi Osman Ali v Faijian Bewa,* (1931) 53 Cal LJ 380 : 134 IC 95; *Ram Ranbijoy v Badri Upadhya,* (1946) ILR 24 Pat 545 : 226 IC 112 : AIR 1946 Pat 36.

the rents and profits were taken in lieu of portion of the interest only,[2034] but the judgment proceeds on the erroneous assumption that a usufructuary mortgagee is not liable to account, unless there is an express contract to that effect;[2035] this decision would appear to have been impliedly overruled by a subsequent Full Bench decision.[2036] The exception, therefore, is limited to the two cases specified. When the mortgage merely made an estimate of the amount of rents and profits that would be available for reduction of the debt, the mortgagees were not exonerated from their liability to account.[2037] However, when the mortgagee was to take the rents and profits in lieu of interest and receive a fixed annual sum from the mortgagor as well, he was not liable to account.[2038] If there is a contract that receipts shall be taken in lieu of interest, the fact that the rate of interest is specified in the mortgage, does not by itself show that the mortgagee is liable to account.[2039]

Whether this section excludes the operation of clauses (b), (d), (g) and (h) of section 76 depends on the construction of the document. No such exclusion takes place where the document provides that the mortgagee is entitled to a fixed sum in lieu of interest, or where the deed provides that the mortgagee would be entitled to interest if he is unable to obtain any receipts.[2040] When the mortgage stipulated that the mortgagee was to pay a fixed annual sum to the mortgagor as *malikhana,* and that the rents and profits were to be taken in lieu of interest, and that there was to be no account except as to *malikhana,* redemption was decreed on payment of the principal sum less the balance due on the *malikhana* account.[2041] But when the *malikhana* was not to be paid to the mortgagor, and the mortgagee withheld payment as he claimed himself to be the *malikhandar,* the mortgagee was not liable to account, but was required to give the mortgagor an indemnity against the claim of some other person proving to be the *malikhandar.*[2042] In a case when the rent and profits were taken in lieu of interest and the mortgagee covenanted to pay rent to the *zamindar* who held by title paramount, the fact that the mortgagee afterwards escaped payment of rent did not entitle the mortgagor to get credit for his rent[2043] A usufructuary mortgage provided that the mortgage should be discharged by the rents and profits for 55 years, but that an annual sum of ₹ 60 should be paid out of the rents and profits to the mortgagor. If these payments had been made there would have been no account, but as the payments were not made, the mortgagee was held liable to account and the term of the mortgage was proportionately reduced.[2044] A fallen tree is part of the produce of the land, and if the mortgage is one to which section 77 applies, the mortgagee may take it without accounting for its value.[2045]

2034. *Shafi-un-nissa v Fazalrab,* (1910) 7 All LJ 787.
2035. See the criticism in *Kishun Lal v Hira Lal,* 120 IC 768.
2036. *Muhammad Ishaq Khan v Rup Narain Singh,* (1932) ILR 54 All 205 : 136 IC 363 : AIR 1931 All 562; *Kanala Prashad v Bamdeo,* 155 IC 22.
2037. *Surendra Khitindra,* (1919) 29 Cal LJ 434 : 53 IC 59.
2038. *Sitla v Dhum Singh,* (1924) 28 OC 100 : 82 IC 406 : AIR 1925 Oudh 114.
2039. *Mahant Ramdhan Puri v Bankey Bihari Saran,* AIR 1958 SC 941; *Mahomad Ali v Ali Mirza,* (1935) ILR 10 Luck 70 : 148 IC 903 : AIR 1934 Oudh 220.
2040. *Manickchand v Mohamed Sait,* [1969] 2 SCR 1001 : AIR 1969 SC 751 : [1969] 2 SCJ 147 : (1969) 1 SCC 206.
2041. *Bihari Lal v Shib Lal,* (1924) ILR 46 All 633 : 82 IC 25 : AIR 1924 All 591; *Basant Rai v Kanauji Lal,* (1879) ILR 2 All 455.
2042. *Raghubar Narain v Mohit Narayan,* (1928) ILR 7 Pat 44 : 144 IC 473 : AIR 1929 Pat 37.
2043. *Fakir Mahammed v Ali Sherkhan,* 10 IC 113; *Paru Amma v Kelu Kurup,* AIR 1941 Mad 549 : (1941) 1 Mad LJ 484 : (1941) Mad WN 289 reversing *Kelu Kurup v Paru Amma,* AIR 1940 Mad 686 : (1940) 1 Mad LJ 693 : 51 Mad LW 617 : (1940) Mad WN 55.
2044. *Narasimha Rao v Seshayya,* (1925) 48 Mad LJ 363 : 90 IC 138 : AIR 1925 Mad 825; on app *Immani Seshayya v Dronamraju,* (1930) 57 Mad LJ 800 : 24 IC 282 : AIR 1930 Mad 160; *Jaijit Rai v Gobind Tiwari,* (1884) ILR 6 All 303.
2045. *Durga Shanker v Ganga Sahai,* (1932) 30 All LJ 493 : 142 IC 889 : AIR 1932 All 500.

A mortgagee permitted by the deed to appropriate the usufruct for interest on the principal is, by section 77, exempt from liability to account for the usufruct. However, local legislation—such as section 9, Orissa Money-lenders Act, 1939—which prescribes the maximum lawful rate of interest, would override section 77, and the mortgagee would then have to render accounts.[2046]

Priority

78. Postponement of prior Mortgagee.—Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Synopsis

(1) Priority 708
(2) Fraud 709
(3) Misrepresentation 709
(4) Gross Negligence 710
(5) Liability of Mortgagor Not Affected 712
(6) Liability of Purchaser Not Affected. 712
Res judicata 712

(1) Priority

The priority of successive mortgages is determined by section 48, which enacts the rule *qui prior est tempore potior est jure.* The following Oudh case[2047] is an instance of the rule: *A* mortgaged a share in a village *X* to *B* in 1917, and there was a provision in the mortgage that if *A* was dispossessed of any part of that share by other heirs, the mortgage should operate as a mortgage of a share in village *Y.* In 1918, *A* mortgaged the share in village *Y* to *C.* In 1922, *A* was dispossessed of part of his share in the village by co-heirs. The contingent mortgage of village *Y* to *B* did not vest till 1922, and, therefore, *C's* mortgage had priority over the mortgage to *B.* A question of priority arose in a curious way in the following case:[2048] A prior mortgagee sued to enforce his mortgage making the puisne mortgagee a party. The puisne mortgagee did not appear and a decree for sale was made on the prior mortgage, but as the puisne mortgagee was not before the court, the judge erroneously made an order dismissing the suit as against him. The puisne then sued to enforce his mortgage, and claimed priority as the prior mortgagee's suit against him had been dismissed. The court got over the difficulty by applying the rule that the object of impleading a puisne mortgagee is to enable the property to be sold free from his encumbrance. The effect of dismissing the suit against the puisne was that the sale was subject to the encumbrance of the puisne mortgage, but did not affect the priority of the prior mortgage. If the mortgagor admits the validity of a puisne mortgage, the prior mortgagee cannot dispute it;[2049] but the mortgagee who is first in time has priority over a subsequent mortgagee. A prior mortgage duly registered is a valid security in priority to all of a later date. Such priority will be displaced if the puisne mortgagee has redeemed the prior mortgagee.[2050] The prior mortgagee does not lose priority by releasing part of his security.[2051]

2046. *Ghana Biswal v Kamnath Mohapatra,* AIR 1974 Ori 196; Cf *Mohamed Yusuf v Sarifan Bibi,* AIR 1962 Cal 457.
2047. *Murtazai Begam v Dildar Ali,* 124 IC 417 : AIR 1930 Oudh 129.
2048. *SKARST Chettyar Firm v ALAR Chettyar Firm,* (1931) ILR 9 Rang 1 : 132 IC 281 : AIR 1931 Rang 105.
2049. *Maula Baksh v Imam Din,* 101 IC 324 : AIR 1927 Lah 81.
2050. *PSSMKT Chethiresan Chettiar v N S Nadhiappa Chettiar,* 143 IC 761 : AIR 1933 PC 191.
2051. *Punjab and Sind Bank v Amin Chund,* (1930) ILR 11 Lah 694 : 125 IC 631 : AIR 1930 Lah 731.

The section enacts an exception based on the doctrine of estoppel. A mortgagee need not go out of his way to give notice of his security when he hears that the mortgagor is dealing with the property. But if there is any fraud or artifice, direct or indirect, of the mortgagee, he is postponed to the subsequent mortgagee.[2052] In a Bombay case,[2053] the one-sixth share of a member of a joint Hindu family was purchased at an execution sale by the plaintiff's son, who sold it to the defendant without telling him that the whole property was under mortgage to his father, the plaintiff. Justice West, held that the mere fact that the son bought and sold a share of the property without disclosing the existence of the mortgage was not estopped against the mortgagee; but that if there had been any active fraud or artifice, by which the mortgagee directly or indirectly had prevented the purchaser or his son from making inquiries as to title, the case might have been different. Similarly, in a Calcutta case,[2054] the mortgagor, after the mortgage to the plaintiff, sold part of the property to *A*, and gave a second mortgage of the remainder to *B*. The mortgagee had led both *A* and *B* to believe that the property was unencumbered. His suit against *A* was barred by estoppel, and as to *B* the mortgagee's mortgage was postponed to that of *B*.

The section summarises the cases under three heads; fraud, misrepresentation, and gross negligence. These ingredients, it has been said, are disjunctive, and indicate three different kinds of conduct.[2055]

(2) Fraud

Fraud on the part of the mortgagee is the same as fraud on the part of anyone else. The word "fraud" is used in the section in the sense of the definition in section 17 of the Indian Contract Act, 1872. Under the explanation to that section, non-disclosure is not fraud unless in the circumstances of the case there is a duty to speak or unless silence is in itself equivalent to speech. Thus, there is a duty on the mortgagee to disclose his lien at a court sale. If the mortgagee brings the property to sale in execution of a money decree and the lien is not notified in the sale proclamation, he is guilty of fraud and cannot assert priority to the auction purchaser.[2056] In a Bombay case,[2057] the omission to notify was held not to be fraudulent concealment because the mortgage was registered, but this, it is submitted, is erroneous, for a person who is under a duty to disclose an encumbrance cannot take shelter behind a plea of constructive notice. The mortgagee need not give express notice at the time of the sale if his mortgage is notified in the sale proclamation.[2058] There is no duty on the mortgagee to disclose his mortgage when attesting a puisne mortgage if he is not aware of the contents of the deed—yet where that knowledge is brought home to him and there are circumstances which show that he acted dishonestly or disingenuously, and the puisne mortgagee was in consequence deceived, the prior mortgagee will be deprived of priority.[2059]

(3) Misrepresentation

Misrepresentation is defined in section 18 of the Indian Contract Act, 1872. It includes cases where there is no intent to deceive. An omission to notify a prior encumbrance in a sale

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2052. *Indian Bank v Punjab Naitonal Bank,* AIR 2010 Mad 84 : (2010) 1 MLJ 346.
2053. *Joshi v Joshi,* (1878) ILR 2 Bom 650; *Bhurrut Lal v Gopal Suran* (1869) 11 WR 286.
2054. *Sukiuddin Saha v Sonaullah,* (1918) 22 Cal WN 641 : 45 IC 986.
2055. *Nanda Lal v Abdul Aziz,* (1916) ILR 43 Cal 1052 : 34 IC 115.
2056. *Jaganatha v Gangi,* (1892) ILR 15 Mad 303; *Kasturi v Venkatachalapathi,* (1892) ILR 15 Mad 412; *Muhammad Hamiduddin v Shib Sahai,* (1899) ILR 21 All 309; *Ramchandra v Jairam,* (1896) ILR 22 Bom 686.
2057. *Dhondo v Raoji,* (1896) ILR 20 Bom 290.
2058. *Banwari Das v Muhammad,* (1887) ILR 9 All 690.
2059. *Salamat Ali v Budh Singh,* (1879) ILR 1 All 303.

proclamation, even if an innocent mistake, would amount to misrepresentation if the purchaser was thereby misled to his prejudice. If the mortgagee stands by and sees another lending money on the same estate without giving notice of his first mortgage, it is a misrepresentation, and he will lose his priority.[2060]

(4) Gross Negligence

The history of the doctrine of gross negligence has been explained in the note under the same heading under section 3. Lord Lindley in *Oliver v Hinton*[2061] said:

> To deprive a purchaser for value without notice of a prior encumbrance, of the protection of the legal estate it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior encumbrance of his priority.

This was followed by the Calcutta High Court,[2062] dissenting from a dictum of J Jenkins that gross neglect in this section means neglect that amounts to evidence of fraud.[2063] The Lahore High Court[2064] has also dissented from the view of J Jenkins.

Ghose defines gross negligence as any act or omission by the prior mortgagee, which enables the mortgagor to deal with the property as if it was not encumbered. This is a good working definition, and may be illustrated by the case of *Bridge v Jones,*[2065] where the mortgagee of leasehold property lent the lease to the mortgagor to enable him to raise money, telling him to give notice of the mortgage. The mortgagor raised money from a bank without giving notice, and the mortgagee was postponed to the bank. Lord Romilly in this case said that "a person who puts it in the power of another to deceive and to raise money, must take the consequences." This case is very similar to the Madras case[2066] where the mortgagee instead of retaining the deeds and insisting on their being inspected in his presence, returned them to the mortgagor to enable him to secure a fresh advance. Likewise, if the mortgagee gives loan merely on the strength of certified copies of title deeds, he would be guilty of gross negligence.[2067] In a Nagpur case,[2068] the mortgagee made an incorrect endorsement of satisfaction on the mortgage deed, and returned it to the mortgagor who was enabled to raise money on subsequent mortgages. The mortgagee was, therefore, postponed to the subsequent encumbrancers. However, if a mortgagee allows a mortgagor to remain in possession and the latter pays rent to the mortgagee, the former cannot be held to be negligent.[2069]

Illustration

G deposited title deeds of his property with bank *N* to secure an overdraft. *G* then asked for the return of the deeds saying that he wished to sell the property and clear the overdraft. The usual practice is for the prospective purchaser to inspect the deeds in the office of the bank's solicitor. But *G* said he would not get a good price if the purchaser knew the bank had the

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2060. Re *Thatched House,* (1667) 1 Eq Cas Abr 322; *Raman Chetty v Steel Bros,* (1911) 15 Cal WN 813 : 11 IC 503 (PC).
2061. *Oliver v Hinton,* (1899) 2 Ch 264, p 274.
2062. *Lloyds Bank Ltd v PE Guzdar & Co,* (1929) ILR 56 Cal 868 : 121 IC 625 : AIR 1930 Cal 22.
2063. *Monindra v Troylucko Nath,* (1898) 2 Cal WN 750.
2064. *Ghulam Fatuna v Gopal Devi,* AIR 1940 Lah 269 : 190 IC 599 : AIR 1943 Lah 113 : 209 IC 75.
2065. (1870) LR 10 Eq 92, p 98; *Clarke v Palmer,* (1882) 21 Ch D 124; *Perry Herrick v Attwood,* (1857) 25 Beav 205; *Cowasji Jehangir & Co v Tyabji,* 112 IC 722 : AIR 1928 Sau 179.
2066. *Madras Hindu Union Bank v Venkatarangiah,* (1889) ILR 12 Mad 424; *Damodara v Somasundara,* (1889) ILR 12 Mad 429; *Nataraja v Lakshamma,* AIR 1937 Mad 195.
2067. *Indian Bank v Punjab National Bank,* AIR 2010 Mad 84 : (2010) 1 MLJ 346.
2068. *Rangappa v Immauddin,* AIR 1934 Nag 29.
2069. *Banarsi Das v Moti Ram,* AIR 1940 Lah 269 : 190 IC 599.

deeds, and the Bank Manager returned the deeds to *G*. *G* then borrowed money from bank *L* on a deposit of the deeds falsely representing that there was no encumbrance on the property. The mortgage to bank *L* had priority over the mortgage to bank *N*.[2070]

However, there is no negligence if the mortgagee inquires for the deeds and the mortgagor gives a reasonable excuse that they are lost or that he never had any and that his title is prescriptive; and if the mortgagee honestly accepts the owner's statements he will not be postponed if it turns out afterwards that the mortgagor had deeds;[2071] but not if the owner merely says he has not got the deed and the mortgagor makes no further inquiry.[2072] Again, the mortgagee does not lose priority when he gives the deeds to a sub-mortgagee who returns them to the mortgagor,[2073] or when the non-possession of the deeds is reasonably accounted for.[2074] But when the mortgagee allowed the title deeds to remain for four years in the possession of the mortgagor and, could give no reasonable explanation, he was postponed.[2075]

When a vendor had taken a mortgage to secure the greater part of the price, and knowing that the buyer was impecunious and a bad paymaster, allowed him to retain the deeds, he was postponed to a second mortgage by deposit of title deeds.[2076] If the prior mortgagee has done nothing to induce a subsequent mortgagee to advance money, he cannot be postponed simply because there has been a delay in the registration of his mortgage.[2077] In an Allahabad case,[2078] an incorrect description of the land in the prior mortgage led to a second mortgagee advancing money in the belief that the land was not encumbered. The mistake was due to an error in the mortgagor's title deeds, and the prior mortgagee would have discovered the mistake if he had examined the revenue registers. His omission, to do so was held not to be such gross negligence as to justify his being deprived of property. The ratio decidendi seems to be that the omission was want of caution, rather than gross negligence.

The rule as to priority, it is submitted, was misapplied in a Lahore case.[2079] The first mortgage was a usufructuary mortgage for ₹ 99, but the mortgagee omitted to register the deed or to take possession or to apply for mutation of names in the revenue records, and yet he was not postponed to a second mortgage with possession. The court was under the erroneous impression that gross negligence must be fraudulent. The act or omission must be the proximate cause of the change of position.[2080] For even if the mortgagee allows the deeds to remain with the mortgagor, he will not be postponed if the second mortgagee advances the money without investigating the title or searching the register.[2081] One of the facts to be taken into consideration is the existence of a universal system of registration.[2082] Two Madras

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2070. *Lloyds Bank Ltd v RE Guzdar Co,* (1929) ILR 56 Cal 868 : 121 IC 625 : AIR 1930 Cal 22.
2071. *Dixon v Muckleston,* (1872) 8 Ch App 155; *Surendra Mohan Roy v Mohendra Nath,* (1932) ILR 59 Cal 781 : (1932) 36 Cal WN 420 : 140 IC 662 : AIR 1932 Cal 589.
2072. *Kshetranath v Harasukhdas,* (1927) 31 Cal WN 703 : 102 IC 871 : AIR 1927 Cal 538.
2073. *Mutha v Sami,* (1885) ILR 8 Mad 200.
2074. *Somasundara Tambiran v Sakkarai,* (1870) 4 Mad HC 369 (mere possession of deeds by second mortgagee insufficient to give him priority); see also *Grierson v National Provincial Bank,* (1913) 2 Ch 18.
2075. *Shan Maun Mull v Madras Building Co,* (1892) ILR 15 Mad 268.
2076. *Nanda Lal v Abdul Aziz,* (1916) ILR 43 Cal 1052 : 34 IC 115.
2077. *Surendranath Ghosh v Haridas Biswas,* (1933) ILR 60 Cal 225 : 144 IC 196 : AIR 1933 Cal 398.
2078. *Ratan Lal v Makundi Lal,* (1933) All LJ 16 : 140 IC 488 : AIR 1933 All 299.
2079. *Mahesh Dass v Daulat Ram,* (1929) 11 Lah LJ 82 : 118 IC 655 : AIR 1929 Lah 314.
2080. *Lloyds Bank Ltd v P E Guzdar & Co,* (1929) ILR 56 Cal 868 : 121 IC 625 : AIR 1930 Cal 22.
2081. *Monindra v Troylucko Nath,* (1898) 2 Cal WN 750; *Balmakundas v Moti Narayan,* (1894) ILR 18 Bom 444; *Rangasami v Annamalai,* (1908) ILR 31 Mad 7; *Chettiappa v Periasami,* (1910) 20 Mad LJ 979 : 7 IC 810; *ALRM Chettiar v LPR Chettiar,* 98 IC 19 : AIR 1926 Rang 195.
2082 *Monindra Chandra v Troylucko Nath,* (1898) 2 Cal WN 750; *Agra Bank v Barry,* (1874) LR 7 HL 135.

cases on this point are, it is submitted, incorrect.[2083] To constitute a valid equitable mortgage, it has in some cases been held that it is not necessary that all the deeds of title should be deposited. It may, therefore, happen that an equitable mortgage is created by the deposit of some deeds with a first mortgagee, and then another equitable mortgage is created over the same property by the deposit of the remaining deeds with a second mortgagee. In such cases, it is a question of fact whether the omission of the first mortgagee to require the deposit of the remaining deeds is evidence of such gross negligence as to deprive him of priority.

(5) Liability of Mortgagor Not Affected

Questions of priority only arise between successive mortgagees. They do not affect the liability of the mortgagor. This is illustrated by the case of *Padarath Halwai v Ram Nain.*[2084]

There was a first mortgage of villages *A* and *B* to *S:* second mortgage of village to *L*; third mortgage of villages *A* and *B* to *S,* for the amount due on the first mortgage and a further advance; and a fourth mortgage of village to *L. L* sued on the second and fourth mortgages for sale of villages *A,* making *S* a party. The court by mistake overlooked the priority of the first mortgage to *S* and directed the sale proceeds of village *A* to be paid first to satisfy the second mortgage, then the first and then the fourth. The second mortgage was fully satisfied, and the first mortgage partly satisfied out of the sale proceeds. The fourth mortgage was not satisfied and so, village *B* was sold under a personal decree under section 90 and purchased by *P. S* then sued on his third mortgage and the purchaser of *B* claimed that village *B* was relieved of all liabilities under the first mortgage by reason of the failure of *S* to insist upon his priority in respect of that mortgage. Their Lordships said that it was true that if *S* has appealed against the decree of the subordinate judge he could have had his interest as first mortgagee protected, and could, on the sale of *A,* have obtained payment of the amount then due under that mortgage, but the fact that he had not done so did not disentitle him from recovering the full amount of his claim in this suit. *P* as purchaser of the equity of redemption was in the position of the mortgagor, and his liability was not affected by the fact that *S* had lost priority owing to the erroneous order of the court.

(6) Liability of Purchaser Not Affected

The liability of a purchaser is not affected by section 78, for the section applies in cases of successive mortgages, and not to the case of a mortgagee and a subsequent purchaser.[2085] On the other hand, a purchaser of an equity of redemption is not affected by further advances made after his purchase, though in a Bombay case the purchaser was held to have lost priority on the very doubtful ground that he had allowed the mortgagee to believe that the mortgagor was still the owner.[2086] In a later Bombay case,[2087] the mortgagee paid only part of the mortgage money at the time of the mortgage, and the remainder after the mortgagor had sold a portion of the property mortgaged to a third person. The purchaser was only liable for the amount advanced prior to his purchase.

Res judicata

A claim to priority may also be lost by res judicata. When a puisne mortgagee sued to redeem a prior mortgagee and the latter omitted to set up an earlier mortgage to which he was subrogated, a suit subsequently brought on that mortgage against the puisne mortgagee

2083. *Madras Building Co v Rowlandson,* (1890) ILR 13 Mad 383; *Shan Maun Mull v Madras Building Co,* (1892) ILR 15 Mad 268.
2084. *Padarath Halwai v Ram Nain,* (1915) ILR 37 All 174 : 42 IA 163 : 30 IC 366 : AIR 1915 PC 21.
2085. *Pt Sita Ram v Raj Narayan,* 150 IC 145 : AIR 1934 Oudh 283.
2086. *Govindrav v Ravji,* (1887) ILR 12 Bom 33.
2087. *Subraya v Ganpa,* (1911) ILR 35 Bom 395 : 11 IC 989.

is barred by res judicata.[2088] Similarly, in *Mahomed Ibrahim Hossein Khan v Ambika Persad Singh,*[2089] a claim to priority was barred by res judicata, and by limitation. The fifth mortgagee sued for sale claiming to have paid off the first mortgagee and to be subrogated to him and to have priority over the second, third and fourth mortgagees. But the second and third mortgagees had previously sued for sale making the fifth a party, and in that suit, the fifth had not claimed to be subrogated to the first. The claim to priority was, therefore, barred as against these mortgagees by res judicata. It was also barred by limitation as against all intermediate mortgagees, as the suit was filed after the period of limitation (under Article 132)[2090] when the enforcement of the first mortgage had expired.

79. Mortgage to secure uncertain amount when maximum is expressed.—If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

ILLUSTRATION

A mortgages Sultanpur to his bankers, *B & Co,* to secure the balance of his account with them to the extent of ₹ 10,000. *A* then mortgages Sultanpur to *C,* to secure ₹ 10,000, *C* having notice of the mortgage to *B & Co,* and C gives notice to *B & Co* of the second mortgage. At the date of the second mortgage, the balance due to *B & Co* does not exceed ₹ 5,000. *B & Co* subsequently advanced to *A* sums making the balance of the account against him exceed the sum of ₹ 10,000. *B & Co* are entitled, to the extent of ₹ 10,000, to priority over *C.*

Synopsis

(1) Priority as to Subsequent Advances..... 713
(2) Express the Maximum..... 714
(3) Charge..... 715

(1) Priority as to Subsequent Advances

This section like section 78, enacts an exception to the rule of priority. In accordance with that rule, a mortgagee who makes a subsequent advance is, as regards that subsequent advance, puisne to an intermediate mortgagee. Thus:

(1) *A* mortgages to ..... *B*

(2) *A* mortgages to ..... *C*

(3) *A,* for a fresh advance, against mortgages to ..... *B*

then *B*'s mortgage (1) is prior to *C*'s mortgage (2). Even if *B* were to take a renewal of his mortgage (1) at the time of making a fresh advance on mortgage (3) the latter mortgage would be, puisne to mortgage (2), though he would not lose priority as to mortgage (1).

However, the exception made by this section is that if *B*'s mortgage (1) is to secure a present advance as well as future advances up to a fixed maximum, then any further advance

2088. *Sri Gopal v Pirthi Singh,* (1902) ILR 24 All 429 : 29 IA 118.
2089. *Mahomed Ibrahim Hossein Khan v Ambika Persad Singh,* (1912) ILR 39 Cal 527 : 39 IA 68 : 14 IC 496.
2090. Now art 62 of the Limitation Act, 1963.

made by *B* within that maximum will be treated as part of the first mortgage and take priority over *C*'s mortgage (2)—provided *C* had notice of that first mortgage. Thus, if the mortgage (1) to *B* is to secure the balance of *A*'s account up to a maximum of ₹ 1,000 and ₹ 600 is advanced at the time of the mortgage; and after the mortgage (2) to *C* who has notice of mortgage, (1), *B* advances the balance of ₹ 400, this advance is not treated as a third mortgage, but as a fulfillment of the first mortgage, and has priority over *C*'s mortgage (2).

The two elements to be considered are:

(i) whether the subsequent mortgagee took with notice of the prior mortgage; and

(ii) whether the prior mortgage expresses the maximum amount to be secured.[2091]

In a case when the prior mortgage was registered only a day before the second mortgage, it was held that the second mortgagee could not have had notice of it.[2092] The section, however, has no application when the prior mortgagee claims interest only on the sum advanced under his mortgage prior to the second mortgage. The prior mortgagee has priority for the amount of such interest.[2093]

(2) Express the Maximum

These words do not import an obligation to advance up to a maximum limit. The security is for further advances which may, or may not be made. When a mortgage was executed of a leasehold by the lessee to secure payment of rent and interest on defaulted installments for a period of nine years, and the rent per annum was stated, it was held that the maximum secured was expressed.[2094] Their Lordships said:

> Even if we assume for a moment that the amount of interest was not sufficiently specified, there can be no question that the aggregate rent payable under the lease could be determined by a simple arithmetical calculation ... We hold, therefore, that the prior mortgage expressed the maximum to be secured thereby within the meaning of section 79.[2095]

This is on the maxim *id certum est quod certum fieri potest.* If no maximum is fixed, the mortgage will not have priority as to future advances. This is illustrated by the Privy Council decision in *Imperial Bank of India v U Rai Gyaw.*[2096] In that case, the bank was equitable mortgagee by deposit of title deeds for a present, and for future advances. The mortgagor then granted a legal registered mortgage of some of the property, and subsequently took a further advance from the bank. The Judicial Committee held that the bank was not entitled to priority as to such further advances, as the equitable mortgage did not express the maximum to be advanced in future. The argument was pressed upon their Lordships that equitable mortgages were granted to finance commercial operations, and that the exigencies of business required immediate advances, and preclude the possibility of a search of the registers, but Lord Dunedin pointed out that the remedy was to fix the maximum in the first mortgage so as to secure priority. It was contended that the subsequent mortgagee must have notice of the prior mortgage which expresses the maximum, but as to this it was said that if the subsequent mortgagee advances money without asking for the title deeds such notice should be imputed to him under section 3 of TP Act.

2091. *Dalip Narayan v Chait Narayan,* (1912) 16 Cal LJ 401 : 17 IC 931; see *Durga Prasad v Mario Galstaun,* AIR 1955 Cal 194, p 394 : 17 IC 927.
2092. *Dalip Narayan v Chait Narayan,* (1912) 16 Cal LJ 394 : 17 IC 927.
2093. *Allahabad Bank Ltd v Benares Bank Ltd,* (1938) All LJ 658 : 177 IC 219 : AIR 1938 All 473.
2094. *Dalip Narayan v Chait Narayan,* (1912) 16 Cal LJ 401 : 17 IC 931; *Brijmohan Singh v Dukhan Singh,* (1930) ILR 9 Pat 816 : 130 IC 168 : AIR 1931 Pat 33.
2095. *Dalip Narayan v Chait Narayan,* (1912) 16 Cal LJ 401, p 403 : 17 IC 931.
2096. *Imperial Bank of India v U Rai Gyaw,* (1923) ILR 1 Rang 637 : 50 IA 283 : 76 IC 910 : AIR 1923 PC 211.

(3) Charge

The section was applied in the case of a charge created by a partition deed, which provided that "the common family debts should be discharged by the respective sharers to whom they fell, as per schedule of the document, and that, if any sharer failed to discharge accordingly, such sharer's properties should be liable for such debts and for the losses that might happen to the family." One sharer defaulted, and a creditor obtained a decree against all the sharers. The other sharers discharged this decree, and claimed priority against a subsequent mortgagee of the defaulter, and the claim was allowed; the obligation created by the partition deed being treated as a charge for the performance of a future engagement.[2097]

80. Tacking abolished.—[Rep. by Transfer of Property (Amendment) Act, 1929 (20 of 1929), Sec. 41].

Marshalling and Contribution

[2098][**81. Marshalling securities.**—If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.]

Synopsis

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(1) Amendment

This section has been substituted by the amending Act 20 of 1929.

(2) Movables

This section applies to the mortgage of immovable property, and not to the hypothecation of movables. Thus, where certain immovable property is mortgaged to a certain person, and under the same document some cattle are hypothecated to him, and the immovable property is again mortgaged to another person, it was held that section 81 had no application, and the subsequent mortgagee could not insist that the prior mortgagee should first liquidate the debt due to him out of the cattle hypothecated.[2099] Where a claim to marshalling has been raised as an issue in a suit and has been decided on the merits, the matter is not open to a fresh contest in execution.[2100]

2097. *Sesha Ayyar v Srinivasa,* (1921) 41 Mad LJ 282, p 283 : 70 IC 362 : AIR 1921 Mad 459.
2098. Subs. by Act 20 of 1929, sec. 42, for section 81.
2099. *K S P Subbiah Naidu v Ram Sabad,* (1936) ILR 14 Rang 198 : 163 IC 444 : AIR 1936 Rang 266.
2100. *Kathisa-Bi v Venkateswara Iyer,* (1943) 2 Mad LJ 301 : 56 Mad LW 501 : AIR 1943 Mad 705.

(3) Notice

Under the old section, the second mortgagee had no right to have the securities marshalled, unless he had no notice of the prior mortgage.[2101] The condition as to notice seems to have been taken from a statement of the rule by Lord Hardwicke in the old case of *Lanoy v Athol (Duke and Duchess)*,[2102] but later cases appear to have been decided without reference to notice.[2103] In cases to which the TP Act did not apply, a subsequent mortgagee was held to have an equity to call for marshalling of securities even though he had taken with notice of the prior mortgage.[2104] The principle that it should not depend upon the will of one creditor to disappoint another, is quite independent of the question of notice; and the rights of the prior mortgagee and of another encumbrancers are sufficiently safeguarded by the words "but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties." The condition as to notice has accordingly been omitted in this section. The right to call for marshalling is, however, subject to other conditions.

(4) Common Debtor

The first of these is that there must be a common debtor, and marshalling applies only when there are different debts realizable out of the several properties of that one common debtor; and so, the section requires that both mortgages shall be by the same owner.[2105] It does not apply to a case more than one debtor mortgaging their separate properties jointly for contracting the debt.[2106] This qualification was applied in a Madras case,[2107] where a manager of a joint and undivided Hindu family mortgaged the family property, and then made a mortgage of his own share for his personal debt. The second mortgagee had no right of marshalling, for the first mortgagor was the coparcenary, and the second mortgagor the individual coparcener. Again, when *A* and *B* mortgaged properties in which they had separate interest to *C*, and then *B* alone mortgaged his interest to *D*, it was held that *D* had no right of marshalling.[2108]

(5) No Prejudice to First Mortgagee

Marshalling being a rule of equity will not be enforced so as to work injustice to the prior creditor. The prior mortgagee cannot be compelled to proceed against a security which may be insufficient or doubtful or which may involve him in litigation.[2109] Again, marshalling has never been enforced unless the properties are separate parcels. Thus, if the puisne mortgage was of a fractional share of the prior mortgage, the puisne mortgagee could not compel the prior mortgagee to proceed against the fractional residue. A proper price would not be realized, and such a procedure would prejudice both the prior mortgagee and the mortgagor.

2101. *Inderdawan v Govind*, (1896) ILR 23 Cal 790; *Kishan Chand v Ramsukhi Das*, (1916) PR 86 : 33 IC 815; *Ramaswami Chetty v Madura Mills Co*, (1916) 1 Mad WN 265 : 34 IC 338; *Low & Co v Hazarimull*, (1926) 30 Cal WN 183 : 94 IC 786 : AIR 1926 Cal 525; *Rajkeshwar Prasad v Mohammad*, (1924) ILR 3 Pat 522 : 78 IC 796 : AIR 1924 Pat 459; *Sripat Singh v Naresh Chandra*, AIR 1926 Pat 94; *Lakshmana Iyer v Sankaramoorthi*, (1913) 25 Mad LJ 245 : 18 IC 199.
2102. *Lanoy v Athol (Duke and Duchess)*, (1742) 2 Atk 444.
2103. *Gibson v Seagrim*, (1855) 20 Beav 614; *Flint v Howard*, (1893) 2 Ch 54.
2104. *Chunilal v Fulchand*, (1894) ILR 18 Bom 160; *Dina v Nathu*, (1902) ILR 26 Bom 538, p 542.
2105. Cf *Ex parte Kendall*, (1811) 17 Ves 514.
2106. *K Kotaswara Rao v K Vrukalaramana*, AIR 1973 AP 46.
2107. *Gopala v Saminathayyan*, (1889) ILR 12 Mad 255; *Ramaswamy Chetty v Madura Mills Co*, (1916) 1 Mad WN 265 : 34 IC 338.
2108. *Venkayya v Venkataramayya*, (1929) Mad WN 629 : 125 IC 66 : AIR 1930 Mad 178; *Neelamegan v Govindan*, (1891) ILR 14 Mad 71.
2109. *Krishna Ayyar v Muthukumaraswamiya*, (1906) ILR 29 Mad 217, p 222.

In a Rangoon case,[2110] a puisne mortgagee was allowed to require a prior mortgagee to proceed first against a property which he had "released" from his mortgage. It is not, however, clear from the judgment whether the property was still a part of the prior mortgagee's security. The Madras High Court has construed the words "but not so as to prejudice the rights of the prior mortgagee" to mean that the first mortgagee's right to sell whichever property he pleases cannot be curtailed, and that the right of marshalling can only be exercised against the mortgagor.[2111] This construction would make the section a dead letter, and the omission of the words "as against the seller" which occurred in the old section 56 shows that this view is no longer tenable. In some cases the court, in exercise of its discretion under O 34, rule 5 of the Code of Civil Procedure, has adjusted the equities by requiring a prior mortgagee to proceed first against properties that are not subject to a puisne mortgage.[2112]

The question whether prejudice is being caused is purely a question of fact, and is intimately connected with the value of the property against which the first mortgagee is directed to proceed in the first instance.[2113]

(6) No Prejudice to Other Encumbrancers

For the same reason marshalling will not be enforced so as to prejudice another encumbrancer. For instance:

A mortgages *X* and *Y* to ..... *B*

A mortgages *X* to .....*C*

A mortgages *Y* to ..... *D*

then if *C* were to insist that *B* should pay himself wholly out of *Y*, there might be nothing left for *D*. The court would, therefore, apportion *B*'s mortgage rateably between *X* and *Y*, and the surplus of *X* would go to *C* and the surplus of *Y* to *D*. This rule was referred to by the Calcutta High Court in a case in which marshalling was refused as the rights of subsequent purchasers would be affected.[2114]

(7) Contract to the Contrary

The right of marshalling may be excluded by contract. Thus, if *A* mortgages *X* and *Y* to *B*, and *A* then mortgages *X* to *C*, *C* will have no right to require *B* to realize his mortgage as far as possible out of *Y* if *C*'s mortgage has been made expressly subject to and after satisfaction of *B*'s mortgage. The converse is also true, for if there is a third encumbrancer thus:—

A mortgages *X* and *Y* to ..... *B*

A mortgages *X* to .....*C*

A mortgages *X* and *Y* to ..... *D*

then if *D*'s mortgage has been made expressly subject to and after satisfaction of the two prior mortgages, *D* could not prevent *C* from marshalling against him.[2115]

2110. *Ram Sabad v Subiah,* 156 IC 318 : AIR 1935 Rang 139.
2111. *Thanmul Sowcar v Ramadoss,* (1928) ILR 51 Mad 648 : 110 IC 54 : AIR 1928 Mad 500.
2112. *Rajkeshwar Prasad v Mohammad,* (1924) ILR 3 Pat 522 : 78 IC 796 : AIR1924 Pat 459; *Kaisar Beg v Sheo Shankar,* (1931) ILR 53 All 391 : 129 IC 708 : AIR 1932 All 85; See also *Chettyar v Chettyar,* (1937) ILR Rang 13 : 171 IC 444 : AIR 1937 Rang 200; *Kuppuswami Goundar v Muthuswamy Goundan,* (1954) 2 Mad LJ 514 : AIR 1955 Mad 208.
2113. *Brahm Prakash v Manbir Singh,* [1964] 2 SCR 324 : AIR 1963 SC 1607.
2114. *Umesh Chandra v Hemangachandra,* (1933) ILR 60 Cal 87 : 143 IC 315 : AIR 1933 Cal 325.
2115. Re *Mower's Trusts,* (1869) LR 8 Eq 110; *Deratha Pullaya v Jaldu Manikyala Rao,* AIR 1962 AP 425.

(8) Funds on the Same Footing

Another condition for the application of the equity is that securities must be on the same footing. The section deals only with successive mortgages. A fund, and a right of action are not marshalled.[2116] If the double creditor has a charge on one fund, and a right of set off against another fund, he cannot be compelled by a second encumbrancer on the first fund to abandon his charge, and rely on his right of set off.[2117]

(9) Right of Purchaser

The right to claim marshalling is not confined to puisne mortgagees. The right of purchasers is recognised in section 56. A puisne mortgagee who has a right of marshalling against a prior mortgagee does not lose that right because he has purchased the equity of redemption.[2118] The auction purchaser of part of the mortgaged property in execution of the decree on a prior mortgage cannot claim the benefit of this section as regards the marshalling of securities so as to prejudice the person who has purchased the other item of the mortgaged property in execution of a money decree of a prior mortgagee. The case is governed by section 84 of the TP Act, and the former is entitled to contribution ratably from the latter.[2119]

ILLUSTRATION

A mortgages *X* and *Y* to *B*. *A* then mortgages *X* to *C*. *C* brings *X* to sale in enforcement of his mortgage and himself purchases *X*. *B* then obtains an order for sale on his mortgage. *C* is entitled to require *B* to bring *Y* to sale first and realize his security as far as possible out of *Y*.[2120]

(10) Right of Volunteers

It seems that in England, a grantee under a voluntary conveyance may also claim the right of marshalling. If a mortgage comprises of both settled and unsettled estates, it will be thrown as far as possible on the unsettled estates in England.[2121]

In India, however, the section refers to prejudice to the rights of the first mortgagee or any other person who has, for consideration, acquired an interest in either property. This would appear to exclude volunteers.

(11) Right of Surety

A surety who has given his property as security for the debt may require the creditor to resort to the other property of the debtor first.[2122]

(12) Lessee

A lessee has no right to claim marshalling. If a mortgagee of several properties is executing a decree for sale, the lessee of one of the properties has no right to require that the other properties should be sold first.[2123]

2116. *The Arab,* (1859) 5 Jur NS 417.
2117. *Webb v Smith,* (1885) 30 Ch D 192 (CA).
2118. *Rajkeshwar Prasad Narain Singh v Mohammad Khalil-ul-Rahman,* (1924) ILR 3 Pat 522 : 78 IC 796 : AIR 1924 Pat 459; *Inderdawan Pershad v Gobind Lall,* (1896) ILR 23 Cal 190; *Lakhmidas v Jamnadas,* (1898) ILR 22 Bom 304; *Madan Mohan v Nand Ram,* (1943) ILR All 444 : (1943) All LJ 62 : 206 IC 142 : AIR 1943 All 156.
2119. *Pandurang v Hari,* (1948) ILR Nag 595.
2120. *Inderdawan v Gobind,* (1896) ILR 23 Cal 790.
2121. *Hales v Cox,* (1863) 32 Beav 118; *Mallott v Wilson,* (1903) 2 Ch 494 : [1900-03] All ER Rep 326.
2122. Re *Westzinthus,* (1833) 5 B and Ad 817.
2123. *Low & Co v Hazarimull,* (1926) 30 Cal WN 183 : 94 IC 786 : AIR 1926 Cal 525.

82. Contribution to mortgage debt.—[2124][Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date].

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the [2125][subsequent] mortgagee.

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(1) Amendments

The first para of the section was substituted by the amending Act 20 of 1929.

(2) Contribution

Marshalling settles the rights of competing mortgages, while contribution settles the rights of mortgagors of several shares in one property. Marshalling requires that the creditor who has the means of satisfying his debt out of several funds shall so exercise his rights as not to take from another creditor the funds which form his only security. Contribution requires

2124. Subs. by Act 20 of 1929, sec. 43, for the original paragraph.
2125. Subs. by Act 20 of 1929, sec. 43, for "second".

that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone.[2126] It, therefore, follows that such of the mortgaged properties as have been sold for the realization of the mortgage money and have thus contributed to the mortgage debt are not liable to a claim for contribution; and that such a claim can only be advanced by the owners of those properties which have contributed more than their ratable share of the debt, and against those portions of the mortgaged property only, which have not contributed to the mortgage debt, and have benefited by the sale of the property of the claimants for contributions.[2127]

ILLUSTRATION

Three brothers *A*, *B* and *C* mortgaged their joint property first to *D*, and then to *E*. *A*, *B* and *C* effected a partition of the property into three shares. *D* brought a suit for sale on his mortgage and realized the amount by the sale of *A*'s share. *A* obtained a decree for contribution against the shares of *B* and *C*. Thereafter, *B* and *C* redeemed the puisne mortgage to *E* and claimed contribution from *A*. Held that they had no right to contribution as *A*'s share had been sold to satisfy the prior mortgage debt.[2128]

The first para enacts the general rule that if several properties whether of one or several owners, are mortgaged for one debt, they shall contribute ratably to its discharge, after deducting from each property the value of any prior encumbrance to which it may be subject. As the mortgage debt is indivisible, the mortgagee may realize the whole debt out of only one parcel of the property mortgaged and in that case, it is only fair that the other should be liable to contribute. To quote the words of the Privy Council:

> if a person owning one property subject, with the property of other persons, to a common mortgage, has paid off the mortgage, he is entitled to call upon the owners of the other property to bear their proper proportion of the burden.[2129]

The suit for contribution is maintainable when the whole of the mortgage debt has been paid out of parts of the mortgaged property, and it is not necessary that the whole of the debt was paid out of the properties of the plaintiff alone.[2130]

The second para is only an illustration of the first and assumes that payment of the prior encumbrances has been made in which case, the amount of the encumbrance is deducted from the value of that property in ascertaining its ratable contribution.[2131] Thus supposing:—

Property *X* is mortgaged for ₹ 200 to..... *A*

Properties *X* and *Y* are mortgaged for ₹ 400 to ..... *B*

then, if *X* and *Y* are each worth ₹ 500 and are sold wherein *X* is sold to *C* and *Y* to *D*, the contribution of *C* and *D* to the mortgage of ₹ 400 is in the ratio of 300 : 500, and *C* is liable for ₹ 150 and *D* for ₹ 250. As a consequence of this rule, the person who has paid in excess of his share or who has discharged the whole, is entitled to be reimbursed by the others.

2126. *Fisher on Mortgages*, 7th edn, p 567; cited in *Hari Raj v Ahmaduddin Khan*, (1897) ILR 19 All 545, p 546.
2127. *Hari Raj Singh v Ahmaduddin Khan*, (1897) ILR 19 All 545.
2128. *Kashi Ram v Het Singh*, (1915) ILR 37 All 101 : 26 IC 417 (facts simplified).
2129. *Kampta Singh v Chaturbhuj*, 61 IA 85 : (1934) 38 Cal WN 575 : 59 Cal LJ 277 : 66 Mad LJ 662 : (1934) All LJ 462 : 36 Bom LR 547 : 148 IC 486 : AIR 1934 PC 98; *Purbi Din v Hardeo Baksh Singh*, 159 IC 1049 : AIR 1936 Oudh 169.
2130. *Md Yahiya v Rashid-ud-din*, (1908) ILR 31 All 65.
2131. *Gopal Das v Durga Singh*, 38 IC 649.

Thus, if *B* has recovered the whole debt of ₹ 400 from *C*'s property *X*, *C* would be entitled to recover ₹ 250 from *D* by a suit for contribution.

Both, section 43 of the Indian Contract Act, 1872 and section 82 of TP Act deal with the question of contribution.[2132] Section 43 is a general provision dealing with contracts generally. This section applies to mortgages, and excludes section 43 of the Indian Contract Act, 1872. Where three persons jointly mortgaged their three properties, in the absence of a contract to the contrary, the remedy of the mortgagors is to sue for redemption under section 92, and then to claim contribution from his other co-mortgagors under this section.[2133]

The old section used the word "encumbrance", which is a term of wider connotation than mortgage.[2134] With reference to this word, the Judicial Committee have held that if one of the properties, the subject of a second mortgage, is along with different properties the subject of a first mortgage, the value of the property for purposes of contribution to the second mortgage-debt would be ascertained by deducting not the whole of the first mortgage-debt, but the ratable share of that debt.[2135] Sir George Lowndes in delivering the judgment of the Board said:

> Where properties *A*, *B* and *C* are made security for one mortgage, if property *A* is subject to a prior encumbrance jointly with properties *X*, *Y* and *Z*, their Lordships think that the ratable share to be attributed to *A* under the prior encumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage.

In valuing the property for the purpose of ratable contribution, the liability on the other property is to be taken into account.[2136]

(3) Two or More Persons Having Distinct and Separate Rights

These words include not only cases where several properties are mortgaged, but also cases where the property becomes divided after the mortgage either by the death of the mortgagor, or by partition, or by the sale of shares. The old section merely referred to several properties mortgaged. The question was raised in a Madras case[2137] whether this covered a case of subsequent division. The amendment answers the question, but even under the old section, it was held that the rule of contribution would be applicable as between shares purchased from the mortgagor,[2138] or heirs of the mortgagor,[2139] or in cases of partition between joint mortgagors.[2140] This section applies to mortgagors inter se, and gives one mortgagor a right of contribution from the other property. The right cannot be availed of against the mortgagee or the auction purchaser.[2141] Co-judgment debtors are in the position of joint promisors.

2132. See *Meyyappa Chettiar v Murugappa & Sons,* (1960) ILR Mad 24 : (1959) 2 Mad LJ 555 : AIR 1960 Mad 117.
2133. *Kedar Lal v Harilal,* [1952] SCR 179 : [1952] SCJ 137 : AIR 1952 SC 47.
2134. *Faqir Chand v Aziz Ahmad,* 59 IA 106, p 110 : (1932) 36 Cal WN 436 : (1932) All LJ 195 : 62 Mad LJ 492 : 55 Cal LJ 271 : 34 Bom LR 750 : 136 IC 751 : AIR 1932 PC 74; *Aziz Ahmad v Chhote Lal,* (1928) ILR 50 All 569 : 109 IC 38 : AIR 1928 All 241.
2135. *Faqir Chand v Aziz Ahmad,* 59 IA 106; reversing *Aziz Ahmad v Chhote Lal,* 109 IC 38; and by implication overruling *Inder Prasad v Naurang Kuar,* 129 IC 92 : AIR 1930 Pat 607.
2136. *Kuapo Gowda v Lakke Gowda,* (1952) ILR Mad 306 : (1951) 2 Mad LJ 558 : AIR 1952 Mad 49.
2137. *Rajah of Vizianagram v Rajah Setrucheria,* (1903) ILR 26 Mad 686; And see *Rajo Kuer v Brij Bihari Prasad,* AIR 1962 Pat 236.
2138. *Hirachand v Abdal,* (1877) ILR 1 All 455; *Chagandas v Gansing,* (1896) ILR 20 Bom 615; *Jagat Narain v Qutub Husain,* (1879) ILR 2 All 807; *Sirajuddin v Sirajuddin,* (1905) 2 All LJ 698; *Baldeo v Baijnath,* (1891) ILR 13 All 371; *Dhakeswar Prasad v Harihar,* (1915) 21 Cal LJ 104 : 24 IC 780.
2139. *Mutty Lal v Nandu Lal,* (1907) 12 Cal WN 745 but see contra, *Nawab Jahan v Mirza Shujauddin,* (1904) 9 Cal WN 865.
2140. *Ramabhadrachar v Srinivasa,* (1901) ILR 24 Mad 85.
2141. *Jashoda v Sumantra,* (1950) ILR All 9.

Each is jointly and severally liable to the decree holder. Inter se, each is liable to contribute towards discharge of the decretal debt.[2142]

(4) Obligation Not Personal

The obligation to contribute is not personal. The section attaches liability to the properties.[2143] Contribution is in proportion to the value of the properties,[2144] and not according to the extent of the benefit the co-mortgagors have received from the mortgage money.[2145] The owner of the property has an option either to pay his ratable share, or to allow it to be realized out of the property.[2146]

(5) Prior Encumbrance

The amount of a prior encumbrance is deducted for the purpose of ascertaining the ratable contribution to a subsequent debt. However, if the amount due on the earlier mortgage on one property exceeds the value of that property, it follows that the whole amount of the second mortgage is recoverable from the other properties,[2147] for the value of that property for the purpose of contribution is nil. The same result ensues when the prior mortgagee has realized the first mortgage by sale of the mortgaged property.

Thus let us suppose that—

X is mortgaged to ..... *B*

and *X* and *Y* are mortgaged to .....*C*

If *B* sells *X* in execution of a decree on his mortgage, the whole burden of *C*'s mortgage must fall on *Y*. An illustration of this rule is the case of *Bohra Thakur Das v Collector of Aligarh*.[2148] The mortgagor mortgaged the village of Kachaura to N and another in 1868 by simple mortgage, and then again mortgaged an eleven *biswa* share of Kachaura and an eight *biswa* share of another village Agrana to N in 1870. The plaintiffs in 1873, purchased the equity of redemption of Agrana. The first mortgagees obtained a decree on their mortgage and in execution, purchased the 11 *biswa* share of Kachaura. The plaintiffs then sued to redeem the second mortgage, and contended that as the mortgagee had purchased the 11 *biswa* share of Kachaura, they were only liable to pay a proportionate share of the debt of redemption. As to this the High Court said:

> The answer to this question depends on the circumstances under which the purchase was made. Supposing *A* and *B* are mortgagors of certain property which they have jointly mortgaged to *C*. Now if *C*, the mortgagee himself, purchases the equity of redemption from *A*, it is clear that he cannot be permitted to throw upon *B*'s share the whole burden of his mortgage. In such a case, *B*'s share can only be saddled with the proportionate amount of the mortgaged debt. But if, as is the case here, *C*'s purchase was at a sale in execution of a decree obtained on a prior mortgage, the case is different. The learned Judge finds that the mortgagee bought the Kachaura property at an open sale and not subject to any charge and that he must be presumed to have paid fair value for it. The case then stands thus—the whole of the Kachaura property has been swallowed up by the first mortgage and consequently the burden of the second mortgage falls entirely on the Agrana property. The owner of the latter

2142. *MK Alfanso v Ramakant Vinayak Geonkar,* AIR 1977 Kant 185.
2143. *Narayan v Nallamal,* AIR 1942 Mad 685.
2144. *Gopinath v Raghubarish Kumar Singh,* (1949) ILR 28 Pat 325 : AIR 1949 Pat 522.
2145. *Jai Narain v Rashik Behari,* 131 IC 545 : AIR 1931 All 546.
2146. *Bhagirath v Naubat,* (1892) ILR 2 All 115; *Sri Jagapati of Raju v Sri Rajah Sadrusannamma,* (1916) ILR 39 Mad 795 : 31 IC 255.
2147. *Ghulam Hazrat v Gobardhan Das,* (1911) ILR 33 All 397 : 9 IC 933; *Murti Prasad v Sheo Dat,* (1931) 29 All LJ 349 : AIR 1931 All 625.
2148. *Bohra Thakur Das v Collector of Aligarh,* (1906) ILR 28 All 593, p 599.

property has under the circumstances no right of contribution against the owner of the Kachaura property.

The case went on appeal to the Privy Council,[2149] and their Lordships said:

> As Kachaura was sold and purchased by N in execution and part satisfaction of a decree obtained on a prior mortgage of 1868, the courts in India properly overruled the appellants' contention which has not been pressed before this Board.

Another illustration of the rule is the case of *Sesha Ayyar v Krishna.*[2150] The facts, omitting irrelevant details, were:

X and *Y* were mortgaged to ..... *R*

and *X* and *Z* were mortgaged to ..... *P*

R executed his decree for sale on the first mortgage by the sale of *X*. *P* then sued to enforce his mortgage, but as *X* had been sold by the prior mortgagee, the whole burden of *P*'s mortgage fell on *Z*. In this case, *P* sought not only to realize his mortgage by the sale of *Z*, but he also claimed contribution against *Y*, which had been sold to *D*. This claim was not admitted and the reason given in the judgment is as follows:

> In the present case, the plaintiffs who certainly cannot be in a better position than they would be if they had simply bought part of the mortgaged property subsequently sold under *R*'s decree, had their opportunity, and they might by paying off the debt and saving the property from sale, have acquired a right of contribution secured by a lien on the other property. They would then have stood in a position analogous to that of one of several mortgagors who has redeemed the whole property and claims to take advantage of section 95 of the Act. But the plaintiffs did nothing and, therefore, no right to contribution arose and the other property stood free from any lien.

This passage has been criticized by Ghose as suggesting that no right of contribution arises in the case of an enforced sale. However, it is doubtful if the judge meant any more than indicating that the case did not fall under the doctrine of subrogation. In *Raghavachari v Venkatanarayana,*[2151] J Madhavan Nair relying on *Rambhadrachar v Sreenivasa,*[2152] doubted the correctness of the above passage. It is difficult to see why payment in cash by a puisne mortgagee to discharge the prior mortgage should be treated differently from discharge of the prior mortgage by sale of part of the mortgaged property in which the puisne mortgagee is interested. This view was expressed by J Banerji in *Ibn Hasan v Brijbhukan.*[2153] The judgment in *Sesha Ayyar's* case also contains the following passage:

> In our opinion section 82 does not justify the notion that a man who has bought a property which at one time was, with other property, subject to a mortgage, may, after the mortgage debt has passed into a decree and after the decree has been satisfied by the sale of that other property, be held responsible for part of the mortgage debt.

This passage was referred to in a Bombay case[2154] by J Chandavarkar who hesitated to follow it. The decision in *Sesha Iyer v Krishna* has since been overruled by the Full Bench of the Madras High Court in *Narayan v Nallamal.*[2155] The Full Bench held that in deciding *Sesha Iyer's* case, the learned judges did not have sufficient regard to the wording of section 82 even as it stood before the amending Act of 1929. The Full Bench expressed the view that

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2149. *Bohra Thakur Das v Collector of Aligarh,* (1910) ILR 32 All 612 : 37 IA 182, p 188 : 7 IC 732 (PC).
2150. *Sesha Ayyar v Krishna,* (1901) ILR 24 Mad 96 : pp 107, 108.
2151. *Raghavachari v Venkatanarayana,* AIR 1935 Mad 456 : 156 IC 715 : 41 Mad LW 416.
2152. *Rambhadrachar v Sreenivasa,* (1901) ILR 24 Mad 85.
2153. *Ibn Hasan v Brijbhukan,* (1904) ILR 26 All 407 : (1904) All WN 74.
2154. *Dunappa v Yamnappa,* (1902) ILR 26 Bom 379, p 385.
2155. *Narayan v Nallamal,* AIR 1942 Mad 685. See also *Chunilal v Sriniwas,* AIR 1944 Mad 276.

a second mortgagee did not stand in the shoes of the mortgagor, that he held a mortgagee's interest in the property and the fact that some other person had previously received a mortgagee's interest did not detract from the nature of his interest, that when a person agreed to lend money on the security of a second mortgage of a portion of the property, he knew that the first mortgagee had the benefit of the whole of the property; and that the first mortgagee, if he called in the mortgage loan, would have the right to cause the whole of the hypotheca to be sold, and that if the first mortgagee did not cause the whole of the hypotheca to be sold, the second mortgagee had the right to call upon the holder of the unsold portion to contribute his share of the principal debt. It was held, therefore, that when a portion of the mortgaged property was sold and the sale proceeds were sufficient to pay off the mortgage over the entire property, the subsequent mortgagee of the portion sold was entitled to sue the holder of the unsold portion for contribution, irrespective of whether he pays cash to discharge the first mortgage. According to the Bombay High Court, the principle of section 82 can apply where the mortgage is subsisting. It applies even more when the mortgage has been paid off out of only some of the properties mortgaged and the owner or the person interested in the properties from which the mortgage has been paid off then, has a right to claim contribution from the owner of other properties which were liable under the mortgage, but which were not called upon to pay off.[2156]

Cases in the footnote[2157] are further instances of a prior mortgagee's sale removing property from the scope of a second mortgage. A puisne mortgagee may claim for contribution in a suit for sale. Such claim is not premature.[2158]

(6) Mortgagor Sells Part and Retains a Share

If the mortgagor sells part of the mortgaged property and retains part, and the mortgage debt is realized by the sale of the part retained by the mortgagor, the mortgagor's share cannot claim contribution.[2159] The reason for this is clear, for the mortgagor who has sold shares to others cannot derogate from his grant by calling upon the other to contribute to the discharge of the mortgage. But if the mortgagor has sold only the equity of redemption of part of the property, his vendee is in the position of a co-mortgagor, and the mortgagor can claim contribution against him.[2160]

Illustrations

(1) *A* mortgages two properties *X* and *Y* to *B*. *A* sells *X* to *C* alleging that the mortgage to *B* has been discharged. Thereafter, *B* realizes his mortgage by the sale of *Y* only. *A* is not entitled to contribution from *C*.[2161]

(2) *A* mortgages 8 villages to *B*. *A* then sells his interest in 3 of the villages to *C*. *B* realizes his mortgage by the sale of two of *A*'s villages. *A* is entitled to contribution from *C*.[2162]

2156. *Baswannewa v Dadgowda,* (1942) 44 Bom LR 15 : 199 IC 723 : AIR 1942 Bom 95.
2157. *Sheo Baldeo Prasad v Sheo Dial,* (1906) 3 All LJ 441; *Bhagwati Prasad v Shafaat Muhammad,* (1921) ILR 43 All 42 : 58 IC 414 : AIR 1921 All 350; *Raghunath Prasad v Jamna,* (1907) ILR 29 All 233; *Daud Bahadur v Deonandan,* 43 IC 915.
2158. *Chunilal v Sriniwas,* AIR 1944 Mad 276.
2159. *Magniram v Mehdi Hossein,* (1904) ILR 31 Cal 95, p 103; *Visvanatha v Vengamma,* 78 IC 52 : AIR 1924 Mad 749.
2160. *Rama Shankar v Ghulam Husain,* (1921) ILR 43 All 589 : 63 IC 209 : AIR 1921 All 323.
2161. *Visvanatha v Vengamma,* 78 IC 52 : AIR 1924 Mad 749 (facts simplified).
2162. *Ram Shankar v Ghulam Husain,* (1921) ILR 43 All 589 : 63 IC 209 : AIR 1921 All 323 (facts simplified).

The principle of contribution to the mortgage debts has been discussed in Re *Mainwaring, Mainwaring v Verden.*[2163] The following propositions may be deduced from the decision of the Court of Appeal:

(i) where the mortgagor transfers the whole of the mortgaged properties subject to the mortgage, the transferee may in the equity be called upon to indemnify the mortgagor who may have to pay the mortgage debt on his personal covenant to pay the same. This is how the dictum of Lord Eldon in *Waring v Ward*[2164] was explained;

(ii) where the mortgagor transfers the whole mortgaged property, but not subject to the mortgage, ie, without disclosing that there is a mortgage or representing that the mortgage has been paid off, so far from the transferee being bound to indemnify the transferor, the transferor is bound to indemnify the assignee as was held in Re *Best;*[2165]

(iii) where the mortgagor transfers a part of the mortgaged property subject to the mortgage and retains the remaining properties, the prima facie rule is that the mortgage debt as between the transferor and the transferee should be borne ratably in proportion to the respective values of the items of the mortgaged properties;

(iv) where the mortgagor transfers a part of the mortgaged property without reference to the mortgage and retains the remaining mortgaged properties, the mortgagor is not entitled to any indemnity or contribution as was held in Re *Durby's Estate.*[2166]

(7) Not Applicable to Mortgagee

Contribution is only applicable between the mortgagors inter se. It does not affect the mortgagee's power to enforce his mortgage against all or any of the properties mortgaged to him.[2167] Section 60 recognises the integrity of the mortgage security, and the section does not empower the mortgagors to require the mortgagee to split his lien, and distribute the debt among the mortgagors ratably.[2168] The mortgagee cannot, by the act of parties entitled to the equity of redemption, be deprived of his right to resort to any estate comprised in the mortgage—so long as he has not released or given it up, and so long as the mortgage is legally kept alive. This principle was enunciated in the case of *Chinnery v Evans,*[2169] and was followed by the Calcutta High Court in a case[2170] where a suit on the mortgage would have been time-barred, but for payments made by the original mortgagor, and it was held that the remedy not being time-barred, the mortgage could also be enforced against a part of the property which was in the possession of a purchaser. This right of the mortgagee can only be curtailed under the equity of marshalling, either under section 56 or section 81. However, the courts

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2163. Re *Mainwaring, Mainwaring v Verden,* (1937) 1 Ch 96 : [1936] 3 All ER 540.
2164. *Waring v Ward,* (1802) 7 Ves 332, p 337.
2165. (1924) 1 Ch 42 : [1923] All ER Rep 696.
2166. (1907) 2 Ch 465.
2167. *Arunagiri v Radha Krishna,* (1942) 2 Mad LJ 520 : 201 IC 391 : AIR 1942 Mad 44
2168. *Roghu Nath v Harilal Sadhu,* (1891) ILR 18 Cal 320; *Hara Kumari v Eastern Mortgage and Agency Co,* (1908) 7 Cal LJ 274; *Kuppusami Chetti v Papathi Ammal,* (1897) ILR 21 Mad 369; *Krishna Ayyar v Muthukumaraswamiya,* (1906) ILR 29 Mad 217; *Timaji v Rama,* (1918) 20 Bom LR 175 : 45 IC 682; *Wan Taikya v MSS Chettyar,* 155 IC 954 : AIR 1935 Lah 26.
2169. *Chinnery v Evans,* (1864) 11 HLC 115.
2170. *Krishna Chandra v Bhairab Chandra,* (1905) ILR 32 Cal 1077; *Dina Nath v Lachmi Narain,* (1903) ILR 25 All 446; *Shib Lal v Bhawani Shankar,* (1904) ILR 26 All 72; *Inukhan v Naimudin,* (1906) 3 Cal LJ 377; *Ghasi Khan v Kishori,* (1929) 27 All LJ 846 : 119 IC 437 : AIR 1929 All 38[illegible]; *Umesh Chandra v Hemangachandra,* (1933) ILR 60 Cal 87 : 143 IC 315 : AIR 1933 Cal 325.

have sometimes controlled this right by directions under the repealed section 88, now the Code of Civil Procedure O 34, rule 4.[2171]

(8) Mortgagee Purchasing Share in Equity of Redemption Liable

The mortgagee, however, may become liable to contribution when he purchases a share in the equity of redemption, for he then splits his security and a co-mortgagor can redeem for a proportionate part. This is the principle enacted in the last clause of section 60, for the vesting of part of the equity of redemption in the mortgagee is tantamount to a discharge or satisfaction of a proportionate part of the mortgage debt;[2172] and if the mortgagee after his purchase sues for sale of the remaining property, he must give credit for a proportionate part of the debt,[2173] and on the other hand the mortgagor is entitled to redeem the residue for a proportionate part of the debt.[2174] In *Bisheshur Dial v Ram Samp*[2175] the principle is stated as follows:

> When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage.

This principle has been followed in Punjab where the TP Act was not in force.[2176] In applying the principle, the ratio which the value of the items purchased bears to the value of the whole of the mortgaged property is to be taken into account, and not the amount of the debt discharged.[2177]

Illustrations

(1) *A* mortgaged property to *B*. *B* obtained a decree for a sale on the mortgage. *C* purchased a quarter of the property in execution of a money decree against *A*. *B* then assigned the decree to *C*. The decree was extinguished *pro tanto* and *C* could only execute the decree for three-quarters of the amount against the residue of the property.[2178]

(2) *A* mortgages a village to *B* and then mortgages one third of the same village to *C*. *C* brings a suit for sale on his mortgage and purchases one third of the village subject to *B*'s mortgage. *B* obtains a decree for sale on his mortgage, *C* pays the amount of the decree and set aside the sale. *C* has a right of contribution in respect of two third of *B*'s decree.[2179]

(Note that the second illustration is a case of subrogation under section 92 of the present Act. *B*'s mortgage as to one third share is extinguished and *C* is subrogated to the rights of the mortgagee *B* as to two third of the village.)

2171. *Rajkeshwar Prasad v Mohammad,* (1924) ILR 3 Pat 522 : 78 IC 796 : AIR 1924 Pat 459; *Kaisar Beg v Sheo Shankar,* (1931) ILR 53 All 391 : 129 IC 708 : AIR 1932 All 85.
2172. *Bisheshur Dial v Ram Sarup,* (1900) ILR 22 All 284; *Sarju Kumar v Thakur Prasad,* (1920) ILR 42 All 544 : 58 IC 743; *Krishnachandra v Pabna Model Co,* (1932) ILR 59 Cal 76 : 137 IC 620 : AIR 1932 Cal 319; *Chinniah v A B Mirthuraman,* 141 IC 366 : AIR 1934 Mad 250.
2173. *Lakhmidas v Jamnadas,* (1898) ILR 22 Bom 304; *Mutty Lal v Nandu Lal,* (1907) 12 Cal WN 745; *Aulad Ali v Abdul Hamid,* (1923) ILR 2 Pat 715 : 74 IC 102 : AIR 1923 Pat 490; *Nyaunglebin Co-operative Bank v Maung Ba U,* (1928) ILR 6 Rang 417 : 14 IC 290 : AIR 1928 Rang 266; *Prabhu Ram v Kameshwar Prasad,* (1940) ILR 19 Pat 524 : 190 IC 449 : AIR 1940 Pat 420; *Sadigunnissa v Bhugwandan,* 166 IC 779 : AIR 1937 Oudh 284.
2174. *Gangadas v Jogendra,* (1906) 11 Cal WN 403; *Jugdeo v Habibullah,* (1908) 12 Cal WN 107 : 6 Cal LJ 609; *Maharajah Ramnarain v Ram Kumar,* (1916) 1 Pat LJ 228 : 36 IC 208.
2175. *Dial v Ram Samp,* (1900) ILR 22 All 284, p 293; *Mahomed Abdul v Baldeo Sahai,* AIR 1939 All 86.
2176. *Gian Singh v Atma Ram,* 141 IC 596 : AIR 1933 Lah 374.
2177. *Raghavacharya v Kandaswami,* AIR 1947 Mad 277.
2178. *Sarju Kumar v Thakur Prasad,* (1920) ILR 42 All 544.
2179. *Naubat Lal v Mahadeo Prasad,* (1929) ILR 51 All 606 : 116 IC 297 : AIR 1929 All 309.

(3) *A* mortgages, properties *X* and *Y* to *B*. *A* sells *X* to *C* subject to *B*'s mortgage. *A* then mortgages *Y* to *D*. *B* obtains a decree for sale on his mortgage. *D* pays the amount of the decree and averts the sale. *D* is entitled to contribution against *C*.[2180]

(4) *A*, a mortgagee, purchased one-fourth of one of the mortgaged properties for ₹ 3,800. The value of that portion was ₹ 18,000. It was held that *A*'s mortgage debt was satisfied to the extent of ₹ 14,200 and he could enforce the unsatisfied portion of the debt against the other parts of the security.[2181]

However, if the mortgagee buys a share in the equity of redemption but not a share in the property itself, he has paid a higher price and the liability to discharge that share of the mortgage debt is on the mortgagor, and not on him. In such a case, he can enforce the whole of the mortgage debt against the rest of the property.[2182]

If there are successive mortgages of two properties to the same mortgagee and he realizes first one and then the other in successive suits, his first purchase is only of the equity of redemption, and he is liable to contribution in the second suit.[2183] In *Kaliprosonno v Kamini Soonduri*[2184] there were two mortgages by conditional sale of several villages. The plaintiff purchased the equity of redemption of one village, and then took an assignment of the mortgages. He then sought to escape contribution by foreclosing the first mortgage as to the remaining villages, and suing for a personal decree on the second mortgage. This, however, was not permitted and the foreclosure of the first mortgage was reopened, and he was made to contribute to both mortgages. The case of *Fakiraya v Gadigaya*[2185] is a good illustration of a mortgagee on purchasing part of the equity of redemption, being liable to contribution. Three fields and a house were mortgaged to the plaintiff's uncle for ₹ 2,000. The uncle got a money decree against the mortgagor and sold the property. The fields he purchased himself and the house was purchased by the first defendant. The plaintiff who had succeeded to his uncle's rights sued on the mortgage, and at the time of the suit the mortgage debt had increased to ₹ 4,000. The fields were valued at ₹ 3,600 and the house at ₹ 340. The first defendant was, therefore, liable for 340/3940 x 4000 = ₹ 345. In this case, J Fulton in a dissenting judgment said that as the mortgagee had brought to sale the equity of redemption instead of enforcing his mortgage and bringing the property to sale free of encumbrance, there was an equity requiring satisfaction of the mortgage debt primarily out of the share purchased by the mortgagee. The sale was before the TP Act came into force in Bombay, but even if the principle of section 99 (now the Code of Civil Procedure, O 34, rule 14) were applied, the only equity was that of the mortgagor to treat the plaintiff mortgagee's purchase as of a trustee. However, the defendant could not avail himself of this equity, for he held the house under the same title.

It was at one time supposed that the mortgagee was accountable to the mortgagor if he paid less that the full value for the property; but it is now settled that even if the value of the property exceeds what is due on the mortgage, yet, in the absence of fraud, the mortgage debt is not discharged but only a portion of it which bears the same proportion to the whole

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2180. *Raghavachari v Venkatanarayana*, 156 IC 715 : 41 Mad LW 416 : AIR 1935 Mad 456; *Pandurang v Hari*, (1948) ILR Nag 595; *Ayyappan Raman v K V Ithappiri*, (1957) ILR Ker 598 : AIR 1958 Ker 386.

2181. *Suraj Narain v Bisheshwar Singh*, (1940) ILR 19 Pat 688 : 191 IC 773 (fact simplified). Following *Doolichand v Ram Kishan Singh*, (1881) ILR 7 Cal 648 : 8 IA 93 (PC).

2182. *Gaya Prasad v Salik Prasad*, (1881) ILR 3 All 682, p 686; *Sesha Ayyar v Krishna*, (1901) ILR 24 Mad 96, p 113.

2183. *Mahomed Taki v Thomas*, (1906) 4 Cal LJ 317; *Moro Raghunath v Balaji*, (1889) ILR 13 Bom 45.

2184. *Kaliprosonno v Kamini Soonduri*, (1879) ILR 4 Cal 475.

2185. *Fakiraya v Gadigaya*, (1900) ILR 26 Bom 88.

amount of the debt as the property purchased bears to the whole property mortgaged.[2186] The fact that the property was purchased at a low price does not affect the case in any way.[2187]

(9) Release by the Mortgagee

If the mortgagee releases any part of the property mortgaged, he only diminishes his own security, and the rest of the property remains subject to the mortgage for the full amount.[2188]

So when a part of the property mortgaged was acquired under the Land Acquisition Act and by consent of the mortgagors the compensation money was applied in discharge of an unsecured debt due by the mortgagor to the mortgagees, subsequent transferees of the equity of redemption could not claim credit for the amount.[2189] If the interest in the equity of redemption has been divided either by partition or part-sale before the release, the burden on the shares not released is increased. The holders of such shares have a right of contribution against the share released.[2190]

Before that section was amended by the insertion of the word "only," it was generally thought that a release by a mortgagee of part of the property mortgaged had the same effect as if the mortgagee had himself bought the property released, and apportioned the mortgage debt,[2191] and that the mortgagee was liable to contribution and must abate a proportion of the mortgage debt,[2192] though of course, part payment of the debt did not have that effect.[2193] The reason was that the mortgagee could not release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected,[2194] but the obligation is not personal. The burden is upon the property and though the mortgagee may release his claim, the liability of the property released towards the mortgagors of the other shares is not affected, and they can enforce contribution against it.[2195]

ILLUSTRATION

A mortgaged a Three anna share to *B*. In execution of a money decree against *A*, the Three anna share was sold and a purchase worth of one anna by *C*, one anna by *D* and one anna by *E*. *B* sued on his mortgage and got a decree for ₹ 15,533-54. *B* entered into a compromise with *C* and released *C*'s share for ₹ 1,333-54 and agreed to indemnify *C* for any further sum he might

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2186. *Ponnambala Pillai v Annamalai,* (1920) ILR 43 Mad 372 : 55 IC 666 : 38 Mad LJ 239 : AIR 1921 Mad 475; following *Bisheshur Dial v Ram Sarup,* (1900) ILR 22 All 254 and overruling *Sami Rowappa v Kuppusami,* (1911) 2 Mad WN 342 : 12 IC 130.
2187. *Bhagwati Prasad v Shafaat Muhammad,* (1921) ILR 43 All 42 : 58 IC 414 : AIR 1921 All 350.
2188. *Sheo Prasad v Behari Lal,* (1903) ILR 25 All 79; *Sheo Tahal v Sheodan Rai,* (1906) ILR 28 All 174; *Jugal Kishore Sahu v Kedar Nath,* (1912) ILR 34 All 606 : 16 IC 400; *Perumal v Roman Chettiar,* (1917) ILR 40 Mad 968 : 42 IC 352; *Rama v Manak,* (1905) 7 Bom LR 191; *Ram Chand v Parbhu Dayal,* (1942) ILR All 608 : 69 IA 98 : (1942) All LJ 463 : 45 Bom LR 1 : (1943) 47 Cal WN 1 : (1942) 2 Mad LJ 390 : 202 IC 265 : AIR 1942 PC 50; *Ramanna v Butchamma,* AIR 1958 AP 598.
2189. *Kustea Loan Office v Annanda Charan,* (1923) 27 Cal WN 763 : 77 IC 26 : AIR 1923 Cal 681.
2190. *Jugal Kishore v Kedar Nath,* (1912) ILR 34 All 606 : 16 IC 400; *Perumal v Raman Chettiar,* (1917) ILR 40 Mad 908 : 42 IC 352. See also note "Partial redemption" under section 60.
2191. *Huri Kissen v Veliat Hossein,* (1903) ILR 30 Cal 755.
2192. *Mir Eusuff Ali v Panchanan,* (1910) 15 Cal WN 800 : 11 Cal LJ 639 : 6 IC 842; *Ponnusami Mudaliar v Srinivasa,* (1908) ILR 31 Mad 333.
2193. *Pande Satdeo v Ramayan Tewari,* (1923) ILR 2 Pat 335 : 71 IC 705 : AIR 1923 Pat 242.
2194. *Surjiram v Barhamdeo,* (1905) 1 Cal LJ 337 : 2 Cal LJ 202; *Imam Ali v Baij Nath,* (1906) ILR 33 Cal 613; *Hakim Lal v Ram Lal,* (1907) 6 Cal LJ 46; *Ponnusami Mudaliar v Srinivasa,* (1908) ILR 31 Mad 333; *Mukatakeshi v Ramani,* 98 IC 504 : AIR 1927 Cal 195.
2195. *Jugal Kishore Sahu v Kedar Nath,* (1912) ILR 34 All 606 : 16 IC 400; *Perumal v Raman Chethiar,* (1917) ILR 40 Mad 968 : 42 IC 352; *Ram Chand v Parbhu Dayal,* (1942) ILR All 608 : 69 IA 38 : (1942) ILR All LJ 463 : 45 Bom LR 1 : (1943) 47 Cal WN 1 : (1942) 2 Mad LJ 390 : 202 IC 265 : AIR 1942 PC 50.

be required to pay under the decree. *B* then brought *D*'s share to sale and it realized ₹ 4,200. *B* then brought *E*'s share to sale and it realized ₹ 10,000 and the mortgage was discharged. *E* then sued for contribution. As *C*'s share had been released for less than the rateable proportion, it was liable to contribute. *D*'s share could not contribute as it has been sold. But as the sale of *D*'s share realized only ₹ 4,200, the burden on the shares of *C* and *E* was ₹ 11,333-54, ie ₹ 5,666-108 each. *E* had therefore a right to recover ₹ 5,666-10-8 less ₹ 1,333-5-4, ie ₹ 4,333-5-4, from *C*'s share. The first court however dismissed the suit against *C* and gave *E* a decree against *B* on the indemnity. This was wrong, as *E* was not a party to the agreement of indemnity, *E* appealed against the dismissal of his suit against *B* but not against the dismissal of his suil against *C* and so he got no relief. If *E*'s case had been properly conducted he would have had a decree against *C* for ₹ 4,333-5-4 and *C* could then have sued *B* on the indemnity.[2196]

If the mortgagee releases part of his security, his right to proceed for the whole debt against the remainder is not affected. Therefore, if the remainder is not sufficient to discharge the whole debt, he is still entitled to a personal decree in cases in which the mortgagor is personally liable.[2197] The decisions of Calcutta High Court to the contrary[2198] proceed on the mistaken view that by such release the mortgagee makes himself liable to contribution. The mortgagee's remedy under O 34, rule 6 of the Code of Civil Procedure is not impaired when he releases one of several mortgagors, for the liability for the debt in India is joint and several.[2199]

(10) Laches of the Mortgagee

It is no part of the duty of the mortgagee to keep an account of what the mortgagor himself was doing with his equity of redemption. It is, therefore, fundamentally erroneous to talk of a mortgagee who is out of time in discovering that an equity of redemption has been assigned as a person who is guilty of negligence or laches.[2200]

(11) Suit for Contribution

The extension of the doctrine of subrogation under section 92 of TP Act to the case of redemption by a co-mortgagor has limited the scope of suits for contribution. Thus, if three brothers *A*, *B* and *C* mortgage their joint property and then effect partition in equal shares and *A* redeems the whole mortgage, then *A* would have a right of suit for contribution out of the sharers of *B* and *C* for two-third of the mortgage money. But under the doctrine of subrogation enacted in section 92, the mortgage of *A*'s one-third share is extinguished, and he is subrogated to the rights of the mortgagee, as to two-third on the shares of *B* and *C*. It would make no difference if *A* instead of redeeming the whole mortgage paid the whole mortgage money in order to avoid a sale by the mortgagee, for in that case also he would, before the present section 92, have had a right of contribution,[2201] while now he is subrogated to the rights of the

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2196. *Kammat Ali v Gorakhpur Bank,* (1922) ILR 44 All 488 : 67 IC 29 : AIR 1922 All 495.
2197. *Sheo Prasad v Behari Lal,* (1903) ILR 25 All 79; *Ghafur Hasan v Muhammad,* (1906) ILR 28 All 19; *Prabhu Narayan v Amir Singh,* (1907) ILR 29 All 369; *Arunachala Velan v Venkatarama,* (1920) 26 Mad LJ 192 : 51 IC 84.
2198. *Ram Ranjan v Indra Narain,* (1906) ILR 33 Cal 890. See also cases cited under section 67 "Partial foreclosure or sale."
2199. *Chand Mall v Ban Behari,* (1923) ILR 50 Cal 718 : 74 IC 1021 : AIR 1924 Cal 209.
2200. *Rajani Kanta v Sourendra Nath,* (1924) 38 Cal WN 124 : 151 IC 454 : AIR 1934 Cal 421.
2201. *Ibn Hasan v Brijbhukan,* (1904) ILR 26 All 407 : 1 All LJ 148 : (1904) All WN 74; *Rajah of Vizianagram v Raja Setrucherlu,* (1903) ILR 26 Mad 686; *Dhukeswar Prasad v Harihar,* (1915) 21 Cal LJ 104 : 27 IC 780; *Muhammad Mian v Thakur Bharat,* (1930) ILR 5 Luck 727 : 125 IC 402 : AIR 1930 Oudh 260; *Krishnaswami Pillai v Janaklaxmi Ammal,* (1934) 66 Mad LJ 308 : 148 IC 217 : AIR 1934 Mad 189.

mortgagee. However, there would be no right of contribution or of subrogation as to the 5 per cent paid to the disappointed purchaser, for that is not a charge on the property.[2202]

(12) After the Enactment of Section 92

Cases of contribution arise only when the mortgagee realizes his debt from different parcels of the property unequally, and not when one co-mortgagor redeems or pays the amount of the mortgage to avert a sale. The liability to contribute which arises when the mortgagee realizes his debt unequally is by the joint effect of sections 82 and 100, so that limitation is 12 years under Article 132[2203] from the time when the excess payment was made.[2204]

This was so held by the Allahabad High Court. The point was referred to, but not decided when the case went on appeal to the Privy Council.[2205] The Patna High Court has held that where a purchaser of a part of the mortgaged property deposits the whole of the mortgage debt in court to secure the whole property being sold in execution of a decree obtained by the mortgagee, he is entitled to a right of contribution under this section, but was subrogated to the right of the mortgagor under section 92 and had a charge under section 100.[2206] The remedies under section 82 and section 95 are independent and mutually exclusive, and a co-mortgagor who pays the mortgage money has a right of contribution in addition to the right of subrogation.[2207]

(13) Before the Enactment of Section 92

When one co-mortgagor redeemed the whole mortgage, there were conflicting decisions as to his rights over the other shares. In some cases it was held that he had a charge—on the analogy of the charge that was given in the old section 95.[2208] However, in a case where one of several representatives of the deceased mortgagor paid the mortgage debt, the Calcutta High Court held that he had no charge,[2209] but this was dissented from in a later case in which a charge was allowed when a purchaser of one of two properties mortgaged, paid off the mortgaged debt.[2210]

2202. *Bhagwan Singh v Mazhar Ali,* (1914) ILR 36 All 272 : 23 IC 339; *Krishnaswami Pillai v Janakalaxmi Ammal,* AIR 1934 Mad 189; *Jag Mohan v Jugal Kishore,* (1932) 36 Cal WN 4 : 54 Cal LJ 407 : 137 IC 475 : AIR 1932 PC 99; *Nisar Ahmad Khan v Manjur Ahmad,* 154 IC 267 : AIR 1935 Oudh 245; *Rajbahadur v Setal Prasad,* AIR 1950 All 596.

2203. Now Article 62 of the Act of 1963.

2204. *Aziz Ahmad v Chhote Lal,* (1928) ILR 50 All 569 : 109 IC 38 : AIR 1928 All 241; *Bhagwandas v Karam Husain,* (1911) ILR 38 All 708 : 11 IC 145; *Brij Bhukhan v Bhagwan Datt,* (1943) ILR 19 Luck 70 : 203 IC 285 : AIR 1942 Oudh 449, (the charge relates back to the first mortgage for the purpose of determining priority, but not for purposes of limitation).

2205. *Faquir Chand v Aziz Ahmad,* 59 IA 106 : 36 Cal WN 436 : 55 Cal LJ 271 : (1932) All LJ 195 : 62 Mad LJ 492 : 34 Bom LR 760 : 136 IC 751 : AIR 1932 PC 74.

2206. *Rameshwar v Ramnath,* (1949) ILR 28 Pat 955 : AIR 1950 Pat 174.

2207. *Gopinath v Raghubansh Kumar Singh,* (1949) ILR 28 Pat 325 : AIR 1949 Pat 522; *Aley v Kekkaru,* (1964) ILR 1 Ker 526 : AIR 1964 Ker 256.

2208. *Ibn Husain v Ramdai,* (1890) ILR 12 All 110; *Baldeo Sahai v Baij Nath,* (1891) ILR 13 All 371; *Hari Raj v Ahmaduddin Khan,* (1897) ILR 19 All 545; *Shanto Chandar v Nain Sukh,* (1901) ILR 23 All 355; *Danappa v Yamnappa,* (1902) ILR 26 Bom 379; *Bhagwan v Har Dei,* (1903) ILR 26 All 227; *Yakub Ali v Kishan,* (1906) ILR 28 All 743; *Har Prasad v Raghunandan,* (1909) ILR 31 All 166 : 1 IC 825; *Bhagwan Das v Karam Husain,* (1911) ILR 33 All 708 : 11 IC 145; *Muhammad Mian v Thakur Bharat,* (1930) ILR 5 Luck 727 : 125 IC 402 : AIR 1930 Oudh 260; *Kashi Ram v Het Singh,* (1915) ILR 37 All 101 : 26 IC 417. See also *Pancham Singh v Ali Ahmad,* (1881) ILR 4 All 58; and *Bhagirath v Naubat Singh,* (1879) ILR 2 All 115 : both cases before the TP Act.

2209. *Nawab Jahan v Mirza Shujauddin,* (1904) 9 Cal WN 865.

2210. *Dhakeswar Prasad v Harihar,* (1915) 21 Cal LJ 104 : 27 IC 780.

The same court also held that though a co-mortgagor paying off a mortgage debt had a charge, that charge cannot be claimed when an assignee of a *mokurrari* interest created by the mortgagor paid off the mortgage debt,[2211] a distinction which is not intelligible. In some cases the Calcutta High Court allowed a charge as a matter of equity.[2212] A charge would be enforceable against a bona fide purchaser for value without notice, but the Allahabad High Court nevertheless held that a redeeming co-mortgagor was entitled to priority over a subsequent mortgagee.[2213] All these cases have been rendered obsolete by the extension of the doctrine of subrogation to co-mortgagors.

(14) Co-mortgagor Omitted from the Mortgagee's Suit

It is no defence that the co-mortgagor against whom contribution is sought, was improperly omitted from the mortgagee's suit.[2214] In *Shanto Chandar v Nain Sukh,*[2215] the mortgagee obtained a decree for sale against the *karta* of a joint Hindu family, and brought the property to sale. The mortgage was discharged by the price paid by the auction purchaser. Four sons, who were not parties to the suit, were bound by the mortgage, but not by the decree. The sons' shares in the property were exempted from the sale. The auction purchaser was not entitled to recover any part of the purchase money from the decree holder; but as he had relieved their shares from the mortgage he was entitled to a charge for four-fifths of the mortgage money.

(15) Parties

The claim must be preferred against each party liable to contribute, and not against all collectively.[2216] However this may be, all persons in whom the mortgaged property is vested should be made parties to the suit.[2217] If apart from any question of non-joinder of parties, the materials placed before the court are not sufficient to work out the account, the suit should be dismissed.[2218]

(16) Scope of the Suit

The owner of property sold on two separate occasions may bring a single suit as to both sales.[2219] In a suit to enforce a mortgage, the decree may settle questions of contribution between the mortgagors inter se.[2220] But in a redemption suit, the Allahabad High Court refused to determine questions of contribution between the holders of the equity of redemption.[2221] A suit for contribution is not barred by res judicata or by O 2, rule 2 of the Code of Civil Procedure on the ground that the claim was not included in the suit for redemption.[2222] This was a suit by the owner of one of several properties mortgaged and such a case is now not one of

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2211. *Raushan Ali v Kali Mohan,* (1906) 4 Cal LJ 79.
2212. *Parbhu Narain v Baba Beni,* (1909) 14 Cal WN 361 : 5 IC 779; *Digambar Das v Harendra Narayan,* (1910) 14 Cal WN 617 : 5 IC 165.
2213. *Har Prasad v Raghunandan,* 1 IC 825; followed in *Kashi Ram v Het Singh,* 26 IC 417.
2214. *Jagat Narain v Qutub Husain,* (1879) ILR 2 All 807; *Chagandas v Gansing,* (1896) ILR 20 Bom 615; *Krishna Ayyar v Muthukumaraswamiya,* (1906) ILR 29 Mad 217; *Ayyappan Raman v K V Ithappiri,* (1957) ILR Ker 598 : AIR 1958 Ker 386.
2215. *Shanto Chandar v Nain Sukh,* (1901) ILR 23 All 355.
2216. *Hira Chand v Abdal,* (1877) ILR 1 All 455.
2217. *Shankarlal v Latafat,* (1916) 14 All LJ 713 : 35 IC 600.
2218. *Faquir Chand v Aziz Ahmad,* 59 IA 106 : 54 All 199 : (1932) 36 Cal WN 436 : 55 Cal LJ 271 : (1932) All LJ 195 : 62 Mad LJ 492 : 34 Bom LR 760 : 136 IC 751 : AIR 1932 PC 74.
2219. *Ibn Husain v Ramdai,* (1889) ILR 12 All 110.
2220. *Bhyrub Chunder v Nuddiar Chand,* (1869) 12 WR 291; *Ibn Hasan v Brijbhukan,* (1904) ILR 26 All 407 :p 432 : 1 All LJ 148 : (1904) All WN 74; *Chunilal v Sriniwas,* AIR 1944 Mad 276.
2221. *Rugad Singh v Sat Narain,* (1905) ILR 27 All 178.
2222. *Sabir Hasain v Firasat Ghaus,* (1929) 27 All LJ 1162 : AIR 1929 All 696.

contribution, but of subrogation, and there would be no subrogation until the mortgage was discharged. In the case of *Sesha Ayyar v Krishna Ayyangar*,[2223] the Madras High Court said that if *P* had a right of contribution against *Y*, he could not join that in a suit to enforce his mortgage against *Z*. As stated above, this case has been overruled by a Full Bench on the main point. It is doubtful whether this case can be supported on the present point as to a claim for contribution being premature in a suit on the mortgage. That such a claim is not premature has been definitely held in *Chunilal v Sriniwas* cited above. Questions of contribution are sometimes referred to execution proceedings;[2224] but the practice is improper,[2225] for a claim to contribution cannot said to relate to the execution, discharge or satisfaction of the decree,[2226] and should be enforced by an independent suit.

(17) Contribution if Mortgage Debt Not Fully Discharged

Prior to the enactment of the doctrine of subrogation, it was a point of controversy whether a suit for contribution was maintainable by a co-mortgagor who had paid more than his ratable proportion, but without fully satisfying the mortgage debt. A Full Bench of the Allahabad High Court has by a majority held that it is not,[2227] and this is also the view taken in Calcutta.[2228] The cases decided by Madras High Court are not consistent.[2229] Ghose suggests that there may be a personal claim for reimbursement, when the mortgage is not fully satisfied, but no charge until the mortgage is fully paid off.[2230] This view has not been accepted in a subsequent decision of the Madras High Court. In *Munjappa v Pacha*,[2231] it was held that in section 92 the legislature had taken care to provide that the right of subrogation did not arise, unless the mortgage in respect of which the right was claimed had been redeemed in full. It was remarked that there was no such provision in section 82. In an Allahabad case,[2232] a suit for contribution was held to be maintainable when further realization of the mortgage decree had became time-barred. The new section 92 excludes the right of partial subrogation, and it is submitted that contribution when the mortgage debt is not fully discharged must also be excluded, for it would give rise to complications and multiplicity of actions, if claims for contributions were allowed, while further realizations of the mortgage debt were pending.

(18) Redemption by One Mortgagor of the Entire Mortgage—Remedy of a Co-mortgagor

Where one of the co-mortgagors redeems the entire mortgaged property and enters into possession, the other mortgagors can bring a suit for possession, and for partition without bringing a suit for redemption.[2233]

2223. *Sesha Ayyar v Krishna Ayyangar*, (1901) ILR 24 Mad 96; See note "Prior encumbrance" above.
2224. *Harendra Kumar v Din Dayal*, (1906) 4 Cal LJ 195.
2225. *Amir Chand v Bukshi*, (1907) ILR 34 Cal 13; *Veerapa v Chandra Mereleshwara*, (1943) 2 Mad LJ 45 : 56 Mad LW 365 : AIR 1943 Mad 637.
2226. *Ram Saran v Janki*, (1896) ILR 18 All 106; *Sarju Lal v Baijnath Prasad*, 71 IC 26 : AIR 1923 Pat 44.
2227. *Ibn Hasan v Brijbhukan*, (1904) ILR 26 All 407 : 1 All LJ 148 : (1904) All WN 74; *Muhammad Yahiya v Rashid-ud-din*, (1909) ILR 31 All 65 : 1 IC 5; approved in *Muhammad Mian v Thakur Bharat*, (1930) ILR 5 Luck 727 : 115 IC 402 : AIR 1930 Oudh 260.
2228. *Gurdeo Singh v Chandrikah*, (1908) ILR 36 Cal 193 : 1 IC 913.
2229. *Pattabhiramayya v Ramayya*, (1897) ILR 20 Mad 23; *Rajah of Vizianagram v Raja Setrucherla*, (1903) ILR 26 Mad 686, p 716.
2230. Ghose, Law of Mortgages, p 398.
2231. *Munjappa v Pacha*, AIR 1947 Mad 86.
2232. *Udit Narain v Asharfi Lal*, (1916) ILR 38 All 502 : 35 IC 732.
2233. *Ganeshi Lal v Joti Pershad*, AIR 1949 East Punj 234.

(19)Valuation

The section requires that the valuation of the properties should be made as at the date of mortgage. There was no such express provision in the old section, but the courts had held that valuation should be made as at the date of the mortgage, irrespective of the price that may have been paid by a purchaser.[2234] This rule has the support of a decision of the Judicial Committee which in assessing contribution to a decree for mesne profits, assessed liability as at the date of the decree.[2235] When a mortgagor died and one of his three sons sold his share of the equity of redemption to the mortgagee, the latter had to give credit for one third share of the mortgage debt.[2236] In a Bombay case, the valuation was made as at the date of sale, but there does not appear to have been a change in the value.[2237] In *Mardan Singh v Thakur Sheo Dayal,*[2238] a simple money decree holder purchased in execution of his decree a two-thirds share of two mortgaged villages, and paid off the mortgage in order to avert a mortgagee's sale. He claimed contribution on the basis of the value at the time of his purchase, but the court held that the valuation should be made as at the time of mortgage. Hence, if a mortgagee purchases some items of the property mortgaged, for a sum equal to the amount of the mortgage debt, the mortgage will not be extinguished, for the value of the portion purchased will be assessed as at the date of the mortgage.[2239]

The proportion of contribution has to be worked out with reference to the value of the hypotheca at the date of mortgage, and not with reference to any other date.[2240]

(20) Contract to the Contrary

The liability to rateable contribution imposed by this section may be modified by the terms of the mortgage.[2241] If the mortgage specifies one property as the primary security for the debt, the liability will be thrown entirely on that property to the exoneration of the ancillary security.[2242] However, the description of a property as collateral security does not necessarily imply that it is a secondary security so as to be exonerated.[2243] The contract to the contrary is one between the mortgagor and mortgagee,[2244] and not necessarily at the time of the mortgage.[2245] It is not a contract between the mortgagor and their representatives inter se.[2246] It was, however, held by the Allahabad High Court that the contract to the contrary is

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2234. *Mutty Lal v Nandu Lal,* (1907) 12 Cal WN 745; *Jugdeo v Habibullah,* (1908) 12 Cal WN 107 : 6 Cal LJ 609; *Shib Lal v Bhagwani Shankar,* (1904) ILR 26 All 72; *Bhagwan Singh v Mazhar Ali,* (1914) ILR 36 All 272 : 23 IC 339; *Meghraj v Krishna Chandra,* (1924) ILR 46 All 286 : 78 IC 243 : AIR 1974 All 265; *Shankarlal v Latafat,* (1916) 14 All LJ 713 : 35 IC 600; *Gobind v Kailash,* (1917) 25 Cal LJ 354 : 40 IC 230.
2235. *Jotindra Mohun v Guru Prosunno,* (1904) ILR 31 Cal 597 : 31 IA 94.
2236. *Mutty Lal v Nandu Lal,* (1907) 12 Cal WN 745.
2237. *Fakiraya v Gadigaya,* (1902) ILR 26 Bom 88.
2238. *Mardan Singh v Thakur Sheo Dayal,* (1905) ILR 27 All 549.
2239. *Ponnambala v Annamalai,* (1920) ILR 43 Mad 372 : 55 IC 666 : 38 Mad LJ 239 : AIR 1927 Mad 475; overruling *Sami Rowappa v Kuppusami,* (1911) 2 Mad WN 342 : 12 IC 130.
2240. *Indian Overseas Bank v R E M Ibrahim,* AIR 1975 Mad 92, p 95.
2241. Re *Dunlop, Dunlop v Dunlop,* (1882) 21 Ch D 583 (CA).
2242. *Stringer v Hopper,* (1858) 26 Beav 33.
2243. Re *Athill, Athill v Athill,* (1880) 16 Ch D 211 (CA).
2244. *Ramabhadrachar v Srinivasa,* (1901) ILR 24 Mad 85; *Charan Singh v Ganeshi Lal,* (1926) 24 All LJ 401 :94 IC 1048 : AIR 1926 All 352; *Muhammad Inamullah v Aisha Bibi,* (1926) 24 All LJ 714 : 96 IC 765; *Sonaji v Krishna Rao,* (1931) 27 Nag LR 258 : 134 IC 856 : AIR 1931 Nag 172; *Muthu Ramaswami v Govind Vedayachi,* 137 IC 285 : AIR 1932 Mad 218; *Damodarsami v Govindrajalu,* (1943) ILR Mad 531 : (1943) 1 Mad LJ 291 : 56 Mad LW 194 : 208 IC 370 : AIR 1943 Mad 429; *Official Receiver v Murari Mohan,* AIR 1949 Mad 19.
2245. *Rama v Manak,* (1905) 7 Bom LR 191.
2246. *Satyanarayan Murthi v Official Receiver,* AIR 1949 Mad 884.

general, and may refer to any contract such as an implied agreement between the surety and the principal debtor.[2247] In *Ramabhadrachar v Srinivasa,*[2248] a sharer in the equity of redemption, sold his share in the property to the plaintiff with an indemnity bond, authorizing him to proceed against other properties of the vendor in case his share was sold by the mortgagee. The mortgagee realised his debt by sale of the share sold to the plaintiff who thereupon recovered the amount on the indemnity bond. The plaintiff was nevertheless entitled to contribution because the indemnity bond merely represented the difference between the value of the property and the value of the equity of redemption, so that the net result of the transaction was a sale of the equity of redemption. The right to contribution was, therefore, not affected by the indemnity bond. In *Kunchithapatham v Palamalai,*[2249] a contract between a vendor and a purchaser of a share in the equity of redemption was held not to be a contract to the contrary; but the contrary has been held in a Patna case.[2250] But no doubt, the statutory liability could be altered by a subsequent contract between the contributories.[2251]

The following case[2252] was decided as an instance of a contract to the contrary under the law before the enactment of section 92. There was a first mortgage of village *K* and *L* to *A*, a second mortgage of village *K* to *B*, and a third of village *L* to *C*. *B* enforced his mortgage by sale and purchased village *K*. *B* then paid off *A*'s mortgage of villages *K* and *L*. *B* then sued *C* for contribution as he had relieved *L* of the first mortgage. It was held that there was no right of contribution as by agreement, the whole burden of the first mortgage had been put upon *K*. Under the new section 92, this was a case of subrogation. *B* when he paid off the first mortgage was subrogated to the rights of the first mortgagee as against *C*. But as the whole burden of the first mortgage had been placed upon *K*, there was no prior mortgage of *L* and, therefore, no subrogation as against *C*.

The Judicial Committee have said that the statutory liability to contribution under this section is not subject to any extrinsic principle.[2253] If there is no contract to the contrary, the right cannot be controlled by equitable considerations.

ILLUSTRATION

A in 1906 mortgaged properties *X* and *Y* to *B* for ₹ 8,000. Various creditors of *A* attached his interest in both properties. Nevertheless, *A* in May 1914 purported to sell *X* to *C* and left ₹ 17,000 part of the price, with *C* to discharge *B*'s mortgage. *Y* was then brought to sale by an attaching creditor and purchased by *D* in July 1914. *X* was then brought to sale by an attaching creditor and purchased by *C* in November 1914. This sale overrode the sale of May 1914 which was contrary to the attachment. *C* was therefore, purchaser of *X* by the execution sale of November 1914 and *D* was purchaser of *Y* by the execution sale of July 1914, both subject to *B*'s mortgage. *B* in 1918, obtained a decree for sale on his mortgage for ₹ 31,939. *C* paid off this

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2247. *Karim Khalesan v Narendra Nath,* (1936) ILR 58 All 548 : 162 IC 117 : (1935) All LJ 1273 : AIR 1936 All 258.
2248. *Ramabhadrachar v Srinivasa,* (1901) ILR 24 Mad 85; See also *Bara Saheb v Krishna Bayan,* AIR 1936 Mad 898; *Muthuswami v Arasayee,* AIR 1936 Mad 901.
2249. *Kunchithapatham v Palamalai,* (1917) 32 Mad LJ 347 : 39 IC 405; So also in *Mothooranath Chattopadhaya v Kristokumar,* (1879) ILR 4 Cal 369, a case decided under section 69 of the Contract Act.
2250. *Isri Prasad v Jagat Prasad,* (1937) ILR 16 Pat 557 : 172 IC 187 : AIR 1937 Pat 628.
2251. *Satya Kripal v Gopi Kishore,* (1901) 6 Cal WN 583; and see *Subbiah Chettiar v Seeranga Chettiar,* (1955) 1 Mad LJ 525 : AIR 1955 Mad 557.
2252. *Gulzari Lal v Ali Ahsan,* 147 IC 521 : (1933) All LJ 1639 : AIR 1933 All 929.
2253. *Ganeshi Lal v Charan Singh,* (1930) ILR 52 All 358 : 57 IA 189 : 124 IC 911 : AIR 1930 PC 183; confirming *Charan Singh v Ganeshi Lal,* (1926) 24 All LJ 401 : 94 IC 1048 : AIR 1926 All 352 and distinguishing *Muhammad Abbas v Muhammad Hamid,* (1912) 9 All LJ 499 : 44 IC 179; *Isri Prasad v Jagat Prasad,* (1937) ILR 16 Pat 557 : 172 IC 187 : AIR 1937 Pat 628.

decree and claimed contribution against *Y* which had been purchased by *D*. It was held that he was entitled to contribution for a ratable proportion of ₹ 31,939, although if he had performed in 1914 his contract with A, the mortgage might have been paid off for ₹ 17,000.[2254]

(21) One Debt

There is no liability to contribute unless the properties are subject to a common debt. Thus, if property *X* is mortgaged to *A*, and property *Y* to *B*, and then properties *X* and *Y* to *C*, and *A* and *B* agree to give priority to *C's* mortgage then if *C's* mortgage is realized by the sale of *X* and *Y*, and the surplus sale proceeds of *X* are insufficient to pay *A's* mortgage, he has no right of contribution against *B*.[2255]

Nor is there a right of contribution when one property is mortgaged and the other property is subject to a general lien for debt.[2256]

(22) Subject to Marshalling

The last para of the section is somewhat cryptic, but it apparently means that the right of contribution is subject to the right of marshalling. Thus, if the owner of two properties *X* and *Y*:

mortgages	*X*	to	*A*
mortgage	*Y*	to	*B*
mortgages	*X* and *Y*	to	*C*
mortgages	*X*	to	*D*

then, *X* and *Y* both contribute to *C's* mortgage in the proportion to their values after deducting from *X* the amount of *A's* mortgage and from *Y* the amount of *B's* mortgage; but under the right of marshalling, *D* could require *C* to proceed first against *Y*. This right of *D* to marshal would prevail against the right of contribution.

(23) Equal Equities

There is no liability to contribution unless the equities are equal; in other words, both the properties must be equally liable for the debt. If a person mortgages and subsequently assigns part of the mortgaged property without mention of the mortgage, he is not entitled to call on the assignee to contribute.[2257]

Deposit in Court

83. Power to deposit in Court money due on mortgage.—At any time after the principal money [2258][payable in respect of any mortgage has become due] and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

2254. *Ganeshi Lal v Charan Singh*, (1930) ILR 52 All 358 : 57 IA 189 : 124 IC 911 : AIR 1930 PC 183.
2255. Re *Keily*, (1858) 9 Ir Ch R 57; *Meyyappa Chettiar v Murugappa & Sons*, (1960) ILR Mad 24 : (1959) 2 Mad LJ 555 : AIR 1960 Mad 117.
2256. Re *Dunlop, Dunlop v Dunlop*, (1882) 21 Ch D 583.
2257. *Visvanatha v Vengama*, 78 IC 52 : AIR 1924 Mad 749; *Muhammad Abbas v Muhammad Hamid*, (1912) 9 All LJ 499 : 44 IC 179; Re *Darby's Estate, Randall v Darby*, (1907) 2 Ch 465.
2258. Subs. by Act 20 of 1929, sec. 44, for "has become payable".

Right to money deposited by mortgagor.—The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law[2259] for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed [2260][and all documents in his possession or power relating to the mortgaged property], apply for and receive the money, and the mortgage-deed, [2261][and all such other documents] so deposited shall be delivered to the mortgagor or such other person as aforesaid.

[2262]Where the mortgagee is in the possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.

Synopsis

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(1) Amendments

Three amendments have been made in this section by Act 20 of 1929.

(2) Deposit in Court

This section is a survival from the repealed Bengal Regulation 1 of 1778, which enabled the mortgagor to redeem by payment into court, and Bengal Regulation 17 of 1806 required the mortgagee to make an application in court if he intended to foreclose a mortgage by conditional sale, and allowed the mortgagor a year's grace for redemption.

A mortgagor, after the mortgage money has become due and before his right to redeem has become barred, may either (1) pay or tender at the proper time and place the amount

2259. See the Code of Civil Procedure, 1908 (5 of 1908), Sch. I, Order VI, rule 15.
2260. Subs. by Act 20 of 1929, sec. 44, for "if then in his possession or power".
2261. Ins. by Act 20 of 1929, sec. 44.
2262. Ins. by Act 20 of 1929, sec. 44.

due on the mortgage under section 60; or (2) deposit the amount due on the mortgage under section 83; or (3) sue for redemption under section 91 of the TP Act.[2263]

Under the Regulations, the proceedings of the judge were ministerial.[2264] Similarly, this section provides a summary procedure for redemption which is not a suit. The provisions of section 375 of the Code of Civil Procedure 1882, now O 23, rule 3, do not apply, and an agreement between the mortgagor and mortgagee that the mortgagee should accept the deposit as a discharge of his mortgage on the mortgagor conveying part of the mortgaged premises to him, is not a compromise of a suit, and is enforceable though not recorded in the court.[2265] The function of the court being ministerial, it is submitted that it is not for the court to ascertain the amount due on the mortgage or the sufficiency of the deposit, or to decide the rival claims of contending mortgagees.[2266] So in an Allahabad case,[2267] as also in a Madras case,[2268] and a Patna case,[2269] it was held that a mortgagor could not make a deposit to the account of a mortgagee, and a third person. This is because the association of a third person would make it impossible for the mortgagee to withdraw the money without his consent, and it makes no difference if the mortgagor acted bona fide. But as a sub-mortgagee is an assignee of a mortgagee, the deposit may be in favour of a legal representative of the mortgagee and his sub-mortgagee.[2270] However, the Madras High Court has gone to the length of saying that a mortgagor should not deposit the money in the court if there is no dispute,[2271] and that he should deposit the money when he is in doubt as to who is the rightful claimant and that by so doing, he absolves himself from liability as to the person entitled to receive it.[2272] The Patna High Court followed the decisions of Madras High Court in the case of a deposit made to credit both of the beneficial owners and the *benamidar* mortgages, but at the same time held that ordinarily, it is the duty of the person interested to find out who the mortgagee is and to make the deposit to his account.[2273] Again, when one of the mortgagees was dead, the Allahabad High Court held that the court was competent to inquire who were the mortgagees on the date of the application.[2274] A deposit, however, made to the account of the estate of the deceased mortgagee is a good deposit, although one of the heirs may have been wrongly named.[2275]

It is submitted that this is wrong for the summary procedure under this section, and is not applicable to contentious cases. For instance, in an Allahabad case,[2276] when there was a dispute as to who was the legal representative of a deceased mortgagee, the mortgage was held to be discharged, although the court had ordered the deposit to be paid to the claimant with

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2263. *Het Singh v Bihari,* (1921) ILR 43 All 95 : 59 IC 92 : AIR 1921 All 358; *Sardar Karan Singh v Raja Muhammad Siddik,* (1901) 4 OC 387.
2264. *Forbes v Ameeroonissa Begum,* (1865) 10 MIA 340.
2265. *Tatayya v Pichayya,* (1890) ILR 13 Mad 316.
2266. *K Rajendra v P Somanna,* AIR 2010 (NOC) 1117 (Kar).
2267. *Debendra Mohan v Sona,* (1904) ILR 26 All 291; *Ganeshi Lal v Rohni,* (1928) ILR 50 All 655 : 108 IC570 : AIR 1928 All 311 dissenting from *Ram Sumran v Sahibzada,* (1885) All WN 328.
2268. *Madhavi Amma v Kunhi Pathumma,* (1900) ILR 23 Mad 510.
2269. *Anup Kuar v Kameshwar Nath,* 183 IC 454 : AIR 1939 Pat 415.
2270. *Subba Rao v Pakkiamma Nadathi,* (1924) 46 Mad LJ 74 : 80 IC 363 : AIR 1924 Mad 453.
2271. *Vasava v Kelu,* (1926) Mad WN 648 : 97 IC 735 : AIR 1926 Mad 1087.
2272. *Thevaraya Reddy v Venkatachalam,* (1917) ILR 40 Mad 804 : 37 IC 444; *Nagathal v Arumugham,* (1923) 44 Mad LJ 362 : 79 IC 40 : AIR 1923 Mad 354; *Baluswami Iyer v Krishnaswami Iyer,* (1924) 46 Mad LJ 497 : 84 IC 698 : AIR 1924 Mad 559.
2273. *Narayan Sahu v Krishna Sahu,* 153 IC 1035 : AIR 1934 Pat 622.
2274. *Balbhaddar Prasad v Bitto,* (1929) ILR 51 All 1016 : 118 IC 657 : AIR 1929 All 754.
2275. *Ram Gopal v Lachhman Das,* (1938) ILR All 767 : (1938) All LJ 617 : 176 IC 509 : AIR 1938 All 423.
2276. *Ram Sumran v Sahibzada,* (1885) All WN 328.

the worse title. The mortgagor should make the deposit on account of the person whom he alleges to be the mortgagee. If the mortgagee is willing to accept the deposit and returns the mortgage deed, the court pays him the money; otherwise the deposit should be returned to the mortgagor, and the parties referred to a regular suit.[2277] Therefore, apart from deposit of the money, the other necessary ingredients of this section are: mortgagee should also express his willingness to receive the amount in full discharge of the mortgage amount, and that he shall deposit the mortgage deed and all other documents. However, if a dispute is raised, section 83 would not entitle the court to resolve the dispute.[2278] Where the mortgagor deposits the amount towards the mortgage due, and the mortgagee refuses to accept the amount, the mortgagor should institute a suit for redemption with a plea therein that the entire mortgage due has been deposited, and that the mortgage stood redeemed. The mortgagee cannot be compelled to accept the deposit.[2279] The mortgagee cannot be allowed to withdraw a deposit conditionally without prejudice to further contentions that he might raise. When a mortgagor successfully opposed a mortgagee's application to withdraw on such terms, the opposition did not invalidate the deposit.[2280]

(3) Or Any Other Person Entitled

The summary procedure for redemption is available not only to the mortgagor, but to any person entitled to redeem under section 91; and so a person under contract to purchase cannot make a deposit.[2281] A prior mortgagee who has foreclosed without making the puisne mortgagee a party may make a deposit in court to redeem the puisne.[2282] In a Patna case,[2283] the court said that section 83 deals with the right to deposit the mortgage money in court and not with the right to redeem'. If this means that a person not entitled to redeem may make a deposit, it conflicts with the express words of the section.

(4) At Any Time After the Principal Money has become Due

These are the same words as in section 60, and indicate that the summary procedure for redemption is available only when the mortgagor's right to redeem arises. A premature deposit is ineffectual. When the terms of a consent decree provided that the mortgagee was to enter into possession in default of payment of certain installments of the mortgage money, a deposit after default and before the mortgagee had taken possession was held to be premature, and the mortgagee was entitled to take possession in spite of the deposit.[2284] The reason is that the section presupposes that the mortgagor is not exercising the right of redemption in a manner contrary to the contract between the parties.[2285] A mortgage deed provided that the mortgage could be discharged only by payment after the expiry of the fruit season. A deposit made during the fruit season was not considered premature in the absence of proof that immediate withdrawal was made a condition for the deposits, for it was quite open to the mortgagee to wait till the fruit season was over, and then take out the money forthwith.[2286]

2277. *Ahmadullah v Abdul Rahim,* (1923) ILR 45 All 592 : 74 IC 763 : AIR 1924 All 26.
2278. *District Co-op Central Bank, Chittoor v V Suryanarayana Setty,* AIR 2000 AP 371, p 374.
2279. *Chandramani v Hari Pasawat,* AIR 1974 Ori 47, p 48.
2280. *Subba Rao v Savarayudu,* (1924) ILR 47 Mad 7, p 21 : 72 IC 292 : AIR 1923 Mad 533.
2281. *Mayappa v Kolandaivelu,* (1926) Mad WN 459 : 92 IC 715 : AIR 1926 Mad 597.
2282. *Paras Ram Singh v Pandohi,* (1922) ILR 44 All 462 : 67 IC 533 : AIR 1922 All 135.
2283. *Jagdeo Sahu v Mahabir Prasad,* (1934) ILR 13 Pat 111 : 153 IC 602 : AIR 1934 Rang 127.
2284. *Ram Sonji v Krishnaji,* (1902) ILR 26 Bom 312.
2285. *Bayya Sao v Narasinga,* (1912) ILR 35 Mad 209 : 10 IC 393.
2286. *Horay Krishna v Sashi Bhushan,* AIR (1941) ILR Cal 18 : 45 Cal WN 174 : 192 IC 781.

Where a mortgage was redeemable only in *Chaitra* (13 March to 14 April) and the usufruct thereof was to be appropriated towards interest, a deposit of the principal sum by the mortgagor on 4 April 1967 complied with all legal requirements, and was valid.[2287]

(5) Before a Suit for Redemption is Barred

If a suit for redemption is barred, the summary procedure for redemption is, of course, not available. But it is also not available if the mortgagee has instituted a suit on his mortgage, and in that case the deposit would be treated as one made under O 23, rule 1 of the Code of Civil Procedure.[2288] This would be so even if the mortgagor had not received notice of the mortgagee's suit.[2289] A deposit in court pending a suit by the mortgagee was treated by the Privy Council as a deposit under O 23, rule 1 of the Code of Civil Procedure 1908, in *Shib Chandra v Lachmi Narain,*[2290] although the judgment of the Judicial Committee refers to section 83.

(6) In Any Court In Which He Might Have Instituted Such Suit

The deposit must be made in the same court in which the suit for redemption would have to be instituted, ie, the lowest competent court within the local limits of whose jurisdiction the property is situated.[2291] The deposit cannot be made in any other court.[2292]

(7) Deposit

Under section 83, the amount of the deposit must be the whole amount due on the mortgage, including interest.[2293] Mesne profits cannot be claimed if the amount deposited is not proper.[2294]

The fact that the mortgagee has obtained decree for interest will not justify tender of principal only.[2295] A mere readiness on the part of the mortgagor to pay is not sufficient.[2296] Sums which the mortgagee is entitled to tack to the mortgage money under section 72 should also be included.[2297] The deposit may be for more than is due on the principle that *omme majus continet in se minus*[2298] but it must not be less even if the deficiency is very small;[2299] though a small deficiency has been excused when the mortgage included penal interest, and the amount due could not be calculated with accuracy.[2300] Again, the deposit

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2287. *Ghana Biswal v Ramanath Mohapatra,* AIR 1974 Ori 196, pp 198, 199.
2288. *Bayya Sao v Narasinga,* 10 IC 393; *Thevaraya Reddy v Venkatachalam,* (1917) ILR 40 Mad 804 : 37 IC 444; *Brij Gopal v Masuda Begam,* 153 IC 263 : AIR 1935 Oudh 93; *Rajakrishnan Menon v Sundaram Pillai,* (1963) Ker LT 103; *Poulose v State Bank of Travancore,* AIR 1989 Ker 79, p 80.
2289. *Thiagaraja v Ramaswamy,* (1918) 35 Mad LJ 605 : 48 IC 693.
2290. *Shib Chandra v Lachmi Narain,* (1929) ILR 51 All 686 : 56 IA 339 : 199 IC 612 : AIR 1929 PC 243.
2291. Code of Civil Procedure 1908, sections 15, 16.
2292. *Bayya Sao v Narasinga,* 10 IC 393.
2293. *Narayan Swami v Rama Swami,* AIR 1939 Mad 503 : (1939) 1 Mad LJ 324 : 49 Mad LW 218 : (1939) Mad WN 455.
2294. *Thakur Singh v Rambaran Singh,* 1973 SC 45, p 48 : [1973] 1 SCR 1016 : (1972) 2 SCC 740.
2295. *Hewanehal v Jawahir,* (1889) ILR 16 Cal 307 (PC).
2296. *Goperam v Shanker Rao,* AIR 1950 MB 72.
2297. *Anandi Ram v Dur Najaf Ali,* (1891) ILR 13 All 195; *Nadershaw v Shirinibai,* (1923) 25 Bom LR 839 : 87 IC 129 : AIR 1924 Bom 264.
2298. *Subramania Aiyar v Narayanaswami,* (1918) 34 Mad LJ 439 : 45 IC 638, and cases there cited; *Raja Baikunth v Benode Behari,* (1919) 29 Cal LJ 256 : 51 IC 13; *Subba Rao v Savarayudu,* (1924) ILR 47 Mad 7 : 72 IC 292 : AIR 1923 Mad 533.
2299. *Subbai Goundan v Palani,* (1916) 30 Mad LJ 607 : 34 IC 825; *Debi Prasad v Kedar Singh,* (1921) 19 All LJ 582 : 63 IC 563 : AIR 1921 All 280.
2300. *Ram Rao v Gopala,* 140 IC 406 : AIR 1932 Nag 169.

must not be conditional and a deposit accompanied with a prayer that the mortgagee be called upon to produce certain documents is invalid,[2301] unless the documents are those which the mortgagee is bound to produce under the section.[2302] In a case under the regulations, a deposit accompanied with a threat of legal proceeding was held to be invalid.[2303] A deposit accompanied with a denial of the mortgage is invalid,[2304] but when the application making the deposit contained a statement that moneys were due by the mortgagee in respect of a different transaction of which the mortgagor would sue after redemption, this was not a conditional deposit.[2305] The section does not provide for an inquiry by the court as to the amount due by the mortgagor to the mortgagee.[2306] When a defendant makes a deposit in the court and then applies for its transfer to the credit of the suit, it was held that it was not a valid deposit under section 83.[2307] The deposit operates as tender as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of court. This includes service of notice as the mortgagee.[2308] In the case of the mortgage of an agricultural tenancy redeemable only on a fixed date, a deposit which did not give the court time to serve notice by that date was held to be ineffectual.[2309]

Section 67 shows that after a valid deposit, the mortgagee cannot sue for foreclosure, or for sale. It has been observed that after a valid deposit, there is a subsisting mortgage which can be enforced or redeemed.[2310] However, this, it is submitted, is incorrect. The deposit does not per se operate to discharge the mortgage, and the relationship of mortgagor and the mortgagee does not cease with the deposit.[2311] The deposit does not become the property of the mortgagee until he has presented a petition expressing his willingness to accept it, and has deposited the mortgage deed in court. Unless these two conditions have been complied with, the deposit cannot be attached by the mortgagee's creditors;[2312] and if the mortgagee has refused to accept the deposit, it stands to the credit of the mortgagor only.[2313] The mere fact of making a deposit or tender does not merge the money in the mortgaged property, and the money does not cease to be the property of the mortgagor.[2314] Withdrawal of the deposit by the mortgagee has the effect of discharging the mortgage,[2315] and the mortgagee is thereafter estopped from disputing the validity of the tender.[2316] If the mortgagee withdraws a deposit which does not include money spent by him under section 72 in payment of arrears of government revenue, he cannot recover it under the mortgage,[2317] though he might sue the

2301. *Nanu v Manchu,* (1891) ILR 14 Mad 49; Re *Achath Sankaran,* 29 IC 586; cf *Anandrao v Durgabai,* (1898) ILR 22 Bom 761.
2302. *Kora Nayar v Ramappa,* (1894) ILR 17 Mad 267; *Goluckmonee v Nabungo,* (1864) WR 14.
2303. *Prannth Roy v Rookea Begum,* (1859) 7 Mad IA 323; *Makhan v Jasoda,* (1884) ILR 6 All 399.
2304. *Abdoor Ruhman v Kisto Lal,* (1868) 6 WR 225.
2305. *Salik Ram v Ashik Husain,* (1901) 4 OC 355.
2306. *Cherukuri v Shri Krushi Vidyalaya,* AIR 1945 Mad 46.
2307. *Bala Changiah v Subbaya,* AIR 1939 Mad 200 : 49 Mad LW 929 : (1939) MQN 76 : 183 IC 871.
2308. *Janaki Amma v Mathiri,* AIR 1952 Tr & Coch 236.
2309. *Dwarka Pershad v Sheoamber,* 15 IC 592; *Saiyid Ahmad v Dharmun,* (1921) ILR 43 All 424 : 60 IC 760 : AIR 1921 All 71; but see *Munshi Singh v Narain Prasad,* AIR 1956 Pat 201.
2310. *Rugad Singh v Sat Narain,* (1904) ILR 27 All 178, p 181.
2311. *Ahmadullah v Abdul Rahim,* (1923) ILR 45 All 592 : 74 IC 763 : AIR 1924 All 26; *Balasidhantam v Perumal,* (1914) 27 Mad LJ 475 : 27 IC 162; *Abohala Sastriar v Kalumurthu,* (1962) 1 Mad LJ 304 : AIR 1962 Mad 308.
2312. *Mothiar Mira v Ahmatti Ahmed,* (1906) ILR 29 Mad 232.
2313. *Dal Singh v Pitam Singh,* (1903) ILR 25 All 179.
2314. *Gupteshwar v Radha Mohan,* 170 IC 99 : AIR 1937 Pat 253.
2315. *Minakshi v Janaki,* AIR 1942 Mad 592.
2316. *Kora Nayar v Ramappa,* (1894) ILR 17 Mad 267.
2317. *Anandi Ram v Dur Najaf Ali,* (1891) ILR 13 All 195.

mortgagor personally for reimbursement.[2318] In *Ram Chandra Marwari v Rani Keshobati*,[2319] the mortgagor made a deposit of a sum which he claimed to be the whole balance due under the mortgage, and it was then withdrawn by some contrivance or manoeuvre by the mortgagee's agent without complying with the conditions of section 83, and without depositing the mortgage bond. The mortgagees then sued on their bond giving credit for the amount withdrawn as part payment. The Privy Council dismissed the suit holding that the onus was on the mortgagees to show that their agent acted under such conditions that the statutory result of a full discharge had not ensued. However, if the mortgagee refuses to accept the deposit, and the plaintiff sues in redemption and obtains a decree, and the mortgagee then withdraws the deposit, he is not estopped from prosecuting an appeal, for he has withdrawn the money in execution.[2320] It is submitted that this is correct, but in *Dal Singh v Pitam Singh*[2321] the mortgagee at first refused to accept the deposit, and then after the mortgagor filed a redemption suit, and obtained a decree, the mortgagee changed his mind and withdrew the amount pending his appeal. The Allahabad High Court then held that the mortgagee was not competent to prosecute his appeal. But it is submitted that the proceeding under section 83 terminated with the mortgagee's refusal to accept the deposit and the court had no jurisdiction to allow the mortgagee to withdraw, under that section, the money which then belonged to the mortgagor. This has been so held by the Patna High Court.[2322] However, a contrary view has been taken by the Madras High Court.[2323] No doubt the mortgagee might with the mortgagor's consent be allowed to change his mind and withdraw a deposit, or the mortgagor might make a fresh deposit. In a case in which the deposit was insufficient, the court, with the consent of the mortgagor's pleader, endorsed payment on the deed and returned it to the mortgagee as discharge *pro tanto*.[2324] In another case,[2325] the mortgagor was allowed to supplement an inadequate deposit.

If the mortgagee refuses to accept a valid deposit, not only does interest cease to run, but he must under section 76(i) account for his gross receipts from the mortgaged property from the time when he could have withdrawn the deposit.[2326] The mortgagee continues in possession as mortgagee, and is not a trespasser.[2327]

(8) Amount Remaining Due on the Mortgage

This is the whole balance due on the mortgage, including interest[2328] and sums which the mortgagee is entitled to add under section 72,[2329] but not penal interest.[2330] Where a mortgagor is liable to pay cesses or taxes, the amount due on these cesses or taxes must be

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2318. Cf *Lachman Singh v Sulig Ram*, (1886) ILR 8 All 384.
2319. *Ram Chandra Marwari v Rani Keshobati*, (1909) ILR 36 Cal 840 : 36 IA 85.
2320. *Subba Rao v Savarayudu*, (1924) ILR 47 Mad 7, pp 21-22 : 72 IC 292 : AIR 1923 Mad 533.
2321. *Dal Singh v Pitam Singh*, (1903) ILR 25 All 179.
2322. *Ratna Koer v Nanhaki*, 73 IC 1053 : AIR 1924 Pat 41.
2323. *Nachiappan v Muthiah Ambalam*, (1966) ILR 1 Mad 84 : AIR 1966 Mad 77.
2324. *Har Dayal v Pirthisingh*, (1901) ILR 32 All 142.
2325. *Deo Dat v Ram Autar*, (1886) ILR 8 All 502.
2326. *Nagathal v Arumugam*, (1923) 44 Mad LJ 362 : 79 IC 40 : AIR 1923 Mad 354; *Ayyakutti v Periyaswami*, (1916) ILR 39 Mad 579 : 30 IC 497; *Tarachand v Narayan*, (1922) 18 Nag LR 47 : 65 IC 174 : AIR 1922 Nag 199; cf *Phool Kuer v Rewari Singh*, (1930) 28 All LJ 1020 : 124 IC 191 : AIR 1930 All 609. See note under section 76(i).
2327. *Satyabadi v Harabati*, (1907) ILR 34 Cal 223, p 228; *Rukhminibai v Venkatesh*, (1907) ILR 31 Bom 527; *Ma Nyo v Maung Hla Ba*, (1925) ILR 2 Rang 382, p 384 : 84 IC 395 : AIR 1925 Rang 13; *Harbans v Ramdhari*, AIR 1960 Pat 51.
2328. *Hewanchal v Jawahir*, (1889) ILR 16 Cal 307 (PC).
2329. *Anandi Ram v Dur Najaf Ali*, (1891) ILR 13 All 195.
2330. *Ayyakutti v Periyaswami*, (1916) ILR 39 Mad 579 : 24 IC 771; *Ram Rao v Gopal*, 140 IC 406 : AIR 1932 Nag 169.

included in the deposit.[2331] The deposit must include interest for the day on which the deposit is made,[2332] but not interest from that day till the service of notice on the mortgagee.[2333] This was the position before 1929. Now section 84 has been amended by Act 20 of 1929. If the mortgage is an usufructuary mortgage in which profits are taken in lieu of interest, there would be no occasion to deposit interest, and in a case where an usufructuary mortgagee was, by the terms of his mortgage, entitled to interest for the period for which he was out of possession, it was held that a purchaser of the equity of redemption who was not aware that interest was due, made a valid deposit when he deposited only the principal.[2334] If the amount of deposit is less, the mortgagee is entitled, unless he has agreed otherwise, to appropriate it first to the satisfaction of his claim to interest.[2335]

Under section 171 of the Bengal Tenancy Act, 1885, a mortgagee who pays money due for arrears of rent to avert a sale acquires a statutory charge, and such money is not part of the amount remaining due on the mortgage, and need not be deposited.[2336]

Compensation under the Malabar Compensation for Tenants Improvements Act, 1900, cannot be brought under the expression "amount remaining due on the mortgage".[2337]

(9) Notice

Until the mortgagee gets the notice under this section or is in the knowledge of the deposit, he has the right to sue to enforce his security.[2338] Where a mortgagor makes a deposit under this section, it is the duty of the court to see that the notice of the deposit is duly served upon the mortgagee; it is not the business of the mortgagor to see that this is done.[2339]

Where the serving peon hands over the notice to the mortgagee who reads it, but refuses to grant a receipt, the notice is deemed to have been duly served, even if the peon did not suspend a copy as required by O 5, rule 17, Code of Civil Procedure.[2340] So long as a guardian *ad litem* is not appointed for a minor, there cannot be any valid service of notice upon the minor.[2341] Where there is a covenant in a usufructuary mortgage that the mortgagor would redeem the mortgage on the last day of *Jeth* (22nd June), then, if the mortgagor deposits the mortgage-money in court, the notice must reach the mortgagee on or before 22nd June. If, therefore, the deposit was made on 17th June and the notice of deposit was ineffectual, and the mortgagee was entitled to possession till the last day of *Jeth* of the next year.[2342] Deposit made under this section will operate as a valid tender of the mortgage money only when the notice of the deposit is given to the mortgagee.[2343]

2331. *Thakur Singh v Rambaran Singh,* AIR 1973 SC 45 : (1972) 2 SCC 740.
2332. *Subbai Goundan v Palani,* (1916) 30 Mad LJ 607 : 34 IC 825; but see *Raghub Prusti v Bhobui,* (1903) 8 Cal WN 216; *Kushal Singh v Ram Kishun Singh,* AIR 1937 All 706.
2333. *Subbai Goundan v Palani,* (1916) 30 Mad LJ 607 : 34 IC 825.
2334. *Bhabani v Kadambini,* (1929) 33 Cal WN 279 : AIR 1929 Cal 304.
2335. *Megh Raj v Baya Bai,* [1970] 1 SCR 523 : (1969) 2 SCC 274.
2336. *Manmatha Nath v Sarat Chandra,* (1915) 21 Cal LJ 429 : 29 IC 939.
2337. *Chami v Anu Pattar,* (1916) 1 Mad WN 160 : 32 IC 861.
2338. *Sitaramayya v Venkataramanna,* (1888) ILR 11 Mad 371.
2339. *Nibaran v Parbati,* 60 IC 454.
2340. *Dundbahadur Singh v Durga Prasad,* AIR 1953 Pat 346.
2341. *Jagdeo Mahton v Ram Bahadur Singh,* AIR 1959 Pat 457.
2342. *Dwarka Pershad v Sheoambar,* 15 IC 592; *Saiyid Ahmad v Dharmun,* (1921) ILR 43 All 424, p 426 : 60 IC 760 : 19 ALJ 259.
2343. *Janaku v Mathiri,* AIR 1952 Tr & Coch 236.

(10) Delivery of Possession

Third paragraph of section 83 inter alia provides that where the mortgagee is in possession of the mortgaged property, the court, before paying to him the amount so deposited, may direct him to deliver possession thereof to the mortgagor. However, the court under this provision can direct delivery of possession only if possession is found to derive from mortgage, and not under any other capacity like that of a tenant. In the case of *Nirmal Chandra v Vimal Chand,*[2344] the Supreme Court has held that the tenant-mortgagee cannot be directed to deliver possession on redemption of mortgage because the tenant-mortgagee was entitled to continue in possession as a tenant. Relying on its earlier judgments,[2345] the Apex Court has held that, "... there is no automatic merger of two rights where mortgage is executed in favour of a tenant and on redemption of mortgage, the tenancy rights kept in abeyance would revive and entitle the tenant to continue in possession even after the redemption of the mortgage. On execution of mortgage, tenancy rights would terminate only if it is clear expressly or impliedly by conduct or other related circumstances that the parties had intended so, which would be a question of fact. Thus, as a normal rule except in intention being to the contrary, mortgage and lease operate independent of each other, and on mortgage coming to an end by redemption, tenancy would revive."[2346]

Despite redemption of mortgage, delivery, of possession can be denied if possession was obtained on prior tenancy and there was no merger.[2347] However, if the recitals in the mortgage deed stipulate that on payment of the mortgage amount actual physical possession shall have to be delivered by the mortgagee to the mortgagor, it was held that tenancy rights would not revive.[2348]

(11) Tender or Deposit not a Pre-condition to the Suit

Tender or deposit under section 83 is not a pre-condition to a redemption suit, and such a suit cannot be dismissed on the ground of absence of previous deposits, or of non-service of notice of tender.[2349]

The mortgagor's deposit of the mortgage money into court, operates as a continuous tender, and the mortgagee is at liberty to accept it at any time before the mortgagor rescinds the tender by withdrawing the amount from the court. If the mortgagee files a verified statement accepting the deposit, it is sufficient compliance with the section.[2350] Where the borrowed money is not deposited by borrower before the stipulated date and the property is sold and purchased by the auction purchaser , it is not open to the borrower to enter into a subsequent agreement with the mortgagee bank and return the amount to auction purchaser The auction purchaser would not be bound by such settlement . The right of redemption having come to an end cannot be exercised after the sale of the property at the court auction and the auction purchaser having acquired the title.[2351]

2344. *Nirmal Chandra v Vimal Chand,* (2001) 5 SCC 51 : AIR 2001 SC 2284.
2345. *Gambangi Applaswami Naidu v Behara Venkataramanayaa Patra,* (1984) 4 SCC 382 : AIR 1984 SC 1728; *Narain Gopalan Krishan Kutty v Kunjamma Pillai Sarojani Amma,* (1996) 3 SCC 424 : AIR 1996 SC 1659; *Vishnu Hendre v Baburao Savalaram Kothawale,* (1995) 6 SCC 608; *Nemi Chand v Onkar Lal,* (1991) 3 SCC 464 : AIR 1991 SC 2046; *Nand Lal v Sukh Deo,* 1987 SCC 87 (Supp).
2346. *Nirmal Chandra v Vimal Chand,* (2001) 5 SCC 51, p 56. Similar view was taken in *Cheriyan Sosomma v Sundarsohan Pillai Paraswathy,* (1999) 3 SCC 251.
2347. *MK Seetharam Naidu v Poovammal,* AIR 2001 Mad 343, para 10.
2348. *Chand Mal v Sumer Mal,* AIR 2001 Raj 95, p 100.
2349. *Deopato Kuer v Kamal Prasad Singh,* AIR 1976 Pat 18.
2350. *Pushparani Padhi v Ramchandra Panda,* AIR 1977 Ori 23 : (1976) ILR Cut 1118.
2351. *Gaurav Enterprises, Gwalior v State Bank of India,* AIR 2012 MP 35 : (2012) 1 MPHT 40.

(12) Charges

This section applies to charges.[2352] Depositing money in court is one of the three ways available to the mortgagee before filing a suit for redemption (the other two are tender under section 60 and suit under section 91). The mortgagor is free to choose any one of them, and his suit for redemption cannot fail because of non-deposit.[2353]

84. Cessation of interest.—When mortgagor or such other person as aforesaid has tendered or deposited in court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or [2354][in the case of a deposit, where no previous tender of such amount has been made] as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, [2355][and the notice required by section 83 has been served on the mortgagee:

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.]

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest where there exists a contract that he shall be entitled to a reasonable notice before payment or tender of the mortgage- money [2356][and such notice has not been given before the making of the tender or deposit, as the case may be].

Synopsis

(1) Cessation of Interest 744
(2) Done All that has to be done to Enable the Mortgagee 745
(3) Notice 746
(4) Stipulation for notice before redemption 746

(1) Cessation of Interest

A deposit under section 83 operates as a valid tender, but in regard to the cessation of interest, the amendment makes a distinction, which was not expressed in the old section, between (1) deposit in court after tender out of court; and (2) deposit in court without previous tender out of court. This distinction is necessary, as the deposit in court is usually made after a tender out of court has been refused, and the deposit then becomes a judicial record of the tender. If there has been a valid tender previous to the deposit which has been refused, such tender operates under the general law to stop the running of interest, provided there is a continued readiness to pay.[2357] In

2352. *Krishnayya v Sankayya,* AIR 1949 Mad 649.
2353. *Shiva Narayan Sah v Baidya Nath,* AIR 1972 Pat 380, p 389.
2354. Ins. by Act 20 of 1929, sec. 45.
2355. Subs. by Act 20 of 1929, sec. 45, for "as the case may be".
2356. Added by Act 20 of 1929, sec. 45.
2357. *Satyabadi v Harabti,* (1907) ILR 34 Cal 223; *Jagat Tarini v Naba Gopal,* (1907) ILR 34 Cal 305; *Kripa Sindhu v Annada Sundari,* (1908) 35 Cal 34; *Lal Batcha Sahib v Arcot Naraianaswami Mudaliar,* (1911) ILR 34 Mad 320 : 12 IC 502; *Venkatrama Ayyar v Gopalakrishna Pillai,* (1929) ILR 52 Mad 322 : 116 IC 844 : AIR 1929 Mad 230. See note "Tender" under section 60.

such a case, it is submitted that the withdrawal of the deposit by the mortgagor would indicate that the mortgagor was no longer ready and willing to pay, and interest would be payable from the date of withdrawal. This is in accordance with the general rule that a plea of tender before action is ineffectual to stop interest, unless accompanied by a payment into court after action.[2358] However, where after such withdrawal, the money is re-deposited, interest would not run.[2359] If there has been no previous tender, the deposit in court stops interest running only when the mortgagor has done all that has to be done to enable the mortgagee to take the amount out of court, and when the notice under section 83 has been served upon the mortgagee.

In both cases, therefore, the effect of withdrawal is the same, and the mortgagor who withdraws a deposit becomes liable for interest, and it seems reasonable that if the mortgagor has the benefit of the money withdrawn, he should not be relieved of interest on the mortgage debt.

In order that the deposit in court should operate to stop interest running, two conditions must be satisfied:

(1) The mortgagor must have done all that has to be done to enable the mortgagee to take the amount out of the court.

(2) Notice under section 83 must have been served on the mortgagee.

Interest does not cease on the mere giving of a notice unaccompanied by any actual tender of the mortgage amount.[2360] But interest only ceases to run if there is a valid unconditional tender; a conditional tender does not have that effect.[2361]

The section only relates to a tender; and it has been held that the filing of a suit for redemption of an usufructuary mortgage is not tantamount to a tender within the meaning of this section.[2362]

(2) Done All that has to be done to Enable the Mortgagee

If the mortgagee is a minor, the deposit does not have the effect of stopping interest, unless the mortgagor has procured the appointment of a guardian *ad litem*.[2363] According to the Allahabad High Court, it is open to the person making the deposit to pay the difference of interest between the date of the deposit, and the date of the appointment of the guardian *ad litem*.[2364] It cannot be laid down as a general rule that a tender must be in money. If the creditor by his own conduct dispenses with the production of money, he cannot contend that there was no valid tender on account.[2365] Where the mortgagor had applied under section

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2358. *Haji Abdul Rahman v Haji Noor Mahomed,* (1892) ILR 16 Bom 141, pp 149-150.
2359. *Nachiappan v Muthiah Ambalam,* (1966) ILR 1 Mad 84 : AIR 1966 Mad 77.
2360. *Shrinarayan v Bhaskar,* AIR 1954 Nag 193; *Shankerlal v Bai Jiykor,* (1965) ILR Guj 277 : 6 Guj LR 177 : AIR 1966 Guj 40.
2361. *Re Jilumudu Venkureddi,* (1954) 2 Mad LJ 88 : AIR 1954 Mad 830; following *Sitaram v Ramrao,* (1931) 13 Nag LJ 213 : 130 IC 817 : AIR 1931 Nag 91.
2362. *Rajballam Lal v Ram Autar Rout,* AIR 1962 Pat 203; diss from *Maung Po Tun v Maung E Kha,* 33 IC 735 : AIR 1917 Lower Burma 122.
2363. *Pandurang v Mahadaji,* (1903) ILR 27 Bom 23; *Sheo Saran Chaudhri v Ram Lagan,* (1922) ILR 44 All 64 : 64 IC 413 : AIR 1922 All 355; *Kannu Mal v Indar Pal,* (1922) ILR 44 All 102 : 64 IC 907 : AIR 1922 All 147 : on app (1923) ILR 45 All 273 : 71 IC 278 : AIR 1923 All 183; *Appa Pai v Somu* (1925) 49 Mad LJ 327 : 90 IC 754 : AIR 1925 Mad 1017; *Gokul Kalwar v Chandar Sekhar,* (1926) ILR 48 All 611 : 96 IC 1 : AIR 1926 All 665; *Phool Kuer v Rewari Singh,* (1930) 28 All LJ 1020 : 124 IC 191 : AIR 1930 All 609. And see cases noted under "Notice" in the commentary on section 83 above.
2364. *Kannu Mal v Indar Pal,* (1922) ILR 44 All 102 : 64 IC 907 : AIR 1922 All 147 : on appeal (1923) ILR 45 All 273 : 71 IC 278 : AIR 1923 All 183.
2365. *Naraindas v Rikhabchand,* AIR 1952 Raj 72.

83 and thereafter, actually deposited in court the amount of the principal only of the mortgage and offered to pay the amount in respect of the cost of repairs and interest, but the mortgagee refused the money on the ground that the mortgage could not be redeemed, it was held that there was a legal tender, and the interest ceased to run.[2366]

(3) Notice

The requirement of service of notice under section 83, overrules cases which held that it was the duty of the court to serve notices and that it was sufficient if the mortgagor had applied to the court for service of notice, and had given a correct address.[2367] Service of notice must be in accordance with sections 102 and 103, which provide for service on the agent of an absent person, or on the curator or guardian of a person under a disability to contract.

(4) Stipulation for notice before redemption

Some mortgages contain a stipulation for notice before redemption after the due date in order to enable the mortgagee to find another investment. Subject to certain exceptions, a mortgagor in England who redeems after due date must give six months' notice. If such notice is not given, the mortgagee is entitled to six months' interest in lieu of notice.[2368] The right to interest in lieu of notice is not subject to the provisions of this section as to cessation of interest.

[2369]***Suits for Foreclosure, Sale or Redemption***

85. Parties to suits for foreclosure, sale and redemption.—[*Rep. by the Code of Civil Procedure, 1908 (5 of 1908), sec. 156 and Sch. V*].

[2370]***Foreclosure and Sale***

86 to 90.—[*Rep. by the Code of Civil Procedure, 1908 (5 of 1908), sec. 156 and Sch. V*].

Redemption

[2371][**91. Persons who may sue for redemption.**—Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) any surety for the payment of the mortgage-debt or any part thereof; or

(c) any creditor of the mortgagor who has in a suit for administration of his estate obtained a decree for sale of the mortgaged property.]

2366. *Bhagwat Prasad v Ganga, Din* AIR 1947 All 68.
2367. *Jiva Ram v Khem Koer,* 70 IC 811 : AIR 1923 All 24; *Nibaran Chandra v Parbati,* (1921) 35 Cal LJ 202 : 60 IC 454; but see *Deo Dat v Ram Autar,* (1886) ILR 8 All 502 (mortgagee's knowledge of deposit suffices).
2368. *Smith v Smith,* (1891) 3 Ch 550, p 553; *Johnson v Evans,* (1889) 61 LT 18 (CA); *Nadershaw v Shirinbai,* (1923) 25 Bom LR 839 : 87 IC 129 : AIR 1924 Bom 264.
2369. For the repealed provisions, as re-enacted, see the Code of Civil Procedure, 1908 (5 of1908), Sch. I, Order XXXIV.
2370. For the repealed provisions, as re-enacted, see the Code of Civil Procedure, 1908 (5 of1908), Sch. I, Order XXXIV.
2371. Subs. by Act 20 of 1929, sec. 46, for section 92.

Synopsis

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(1) The Old Section

The above section was inserted by the amending Act 20 of 1929 in place of the old section.

(2) Mortgagor

The word "mortgagor" means a mortgagor who has a subsisting interest in the mortgage.[2372]

(3) Clause (a)

This clause follows the English rule that the mortgagor and all persons having any interest in the property subject to the mortgage are entitled to redeem.[2373] It has been held that any interest, however small, in the property gives a right to redeem,[2374] and that the words "interest in... the property mortgaged" have a broader meaning than "interest in the mortgage security" in O 34, rule 1 of the Code of Civil Procedure.[2375] Such an interest would exist in an alienee of property, even though the alienation is later found to be defective.[2376] The sub-section excludes the mortgagee because the right to redeem is exercised against him. The right to redeem represents the mortgagor's interest in the property, and the mortgagor or any person who has any interest in or charge upon that estate can redeem. The interest must be a proprietary interest.[2377] It must be a present interest, not a contingent interest;[2378] as in the case of a Hindu reversioner.[2379] In a Patna case, the plaintiff purchased the equity of redemption of agricultural land before 1 January 1923 without notice of the landlord. Thereafter, in a rent suit filed by the ex-intermediary against the mortgagor *raiyat*, a decree was passed, and there was auction sale of the suit land in execution of the decree. The plaintiff, however, was not impleaded in the rent suit. It was held that the auction sale could not extinguish the mortgage, as the decree was not legal, since the equity of redemption had been validly transferred. The plaintiff, as the purchaser of the equity of redemption, was entitled to redemption.[2380]

2372. *Rajkumar v Mritunjoy,* (1951) ILR 2 Cal 202.
2373. *Pearce v Morris,* (1869) 5 Ch App 227, p 229; *Turn v Turner,* (1888) 39 Ch D 456 (CA).
2374. *Shanker Mahadeo v Bhikaji,* (1929) ILR 53 Bom 353 : 116 IC 225 : AIR 1929 Bom 139; *Gudarmal v Bansilal,* AIR 1971 Raj 175; *Hiragauri Rati Lal v Hajm Samar Lodha,* AIR 2007 Guj 76.
2375. *Pawankumar v Jagdeo,* (1947) ILR Nag 740 : AIR 1947 Nag 210; *Sonnakka v D Munekka,* (1958) ILR Mys 239 : AIR 1959 Mys 39; and see *Kaliyamma Pillai v Krishna Pillai,* AIR 1969 Ker 73.
2376. *Gaviya v Lingiah,* (1957) ILR Mys 1 : AIR 1957 Mys 65; foll *Munni Bibi v Trilok Nath,* (1932) ILR 54 All 140 : 30 All LJ 63 :136 IC 66 : AIR 1932 All 332.
2377. *Ganesh v Rajaram,* (1934) ILR 58 Bom 75 : 35 Bom LR 1123 : 148 IC 1145 : AIR 1934 Bom 32.
2378. *Thayammal v Adhimoolam Servai,* (1956) 1 Mad LJ 75 : AIR 1956 Mad 304.
2379. See note "Hindu Reversioner" below.
2380. *Manju Kaur v Ramratan Singh,* AIR 1981 Pat 153.

(4) Landlord

The landlord of the mortgagor may redeem if the tenancy is vested in him on the tenant's death without heirs.[2381] If the tenancy is subsisting, the landlord has no present interest, and so he cannot redeem a mortgage by an occupancy tenant.[2382] In deciding the question whether, in section 91(a), the words "any person who has any interest in the property mortgaged" include the landlord, the test to be applied is whether some residuary interest remains with the landlord. If there is no full transfer, the landlord can redeem a mortgage created by a tenant.[2383]

(5) Lessee

A lessee of the mortgagor has a right to redeem. Even when the lease is not binding on the mortgagee, it has been held in England that the mortgagor's lessee has a right to redeem.[2384] This has been followed in the case of a permanent tenant,[2385] who came on the land subsequent to the mortgage, but not one who is on the land before the execution of the mortgage,[2386] an ex-proprietary tenant,[2387] a *verumpatam* tenant[2388] and tenant for a term of years.[2389]

It is immaterial whether such a lease is valid and binding on the mortgagee.[2390] In a Nagpur case, however, it was held that when, after a mortgage has been executed, the mortgagor grants a lease of the mortgaged property in the ordinary course of the management of the property and the lease is binding on the mortgagee, the lessee, not being a person whose interests are in any way jeopardised by the mortgage, is not entitled to redeem the mortgage.[2391] However, this case has been explained as being limited to a lease governed by local revenue laws.[2392]

The *patnidar* of the whole,[2393] or part[2394] of the property mortgaged can redeem. In other agricultural tenancies, the right to redeem depends upon the nature of the interest created by the holding. If it is not a proprietary interest, the tenant cannot redeem. Thus a Bengal *ryot* cannot redeem,[2395] nor can a cultivating tenant in Oudh.[2396] Junior members of a Malabar *tarwad* have a proprietary interest in the property, but are, in the absence of special

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2381. *Tulshi Ram v Gur Dayal Singh,* (1911) ILR 33 All 111 : 7 IC 231; overruling *Ram Dihal v Maharaja of Vizianagram,* (1908) ILR 30 All 488 where it was erroneously supposed that the tenancy vested in the Crown by escheat); *Basdeo Rai v Jaimongal Rai,* (1931) 29 All LJ 914 : 136 IC 69 : AIR 1932 All 53; *Arjun Singh v Mahesha Nand,* (1932) 30 All LJ 474 : 138 IC 366 : AIR 1932 All 437; *Sri Kanta Prasad v Jag Sah,* (1924) ILR 3 Pat 818 : 84 IC 293 : AIR 1924 Pat 57.
2382. *Ganpat v Bhangi,* (1902) 15 CPLR 175; cf *Jaggeswar Dutt v Bhuban Mohan,* (1906) ILR 33 Cal 425.
2383. *Dattatraya v Shripad,* AIR 1976 Bom 398.
2384. *Tarn v Turner,* (1888) 39 Ch D 456 (CA).
2385. *Raghunandan Prasad v Ambika,* (1907) ILR 29 All 679; *Venkatesh v Bhujaballi,* (1933) ILR 57 Bom 194 : 35 Bom LR 60 : 142 IC 481 : AIR 1933 Bom 97; *Mahabir v Dip Narain,* (1922) 20 All LJ 976 : 76 IC 862 : AIR 1923 All 140; *Shankar v Hukumchand,* (1918) 14 Nag LR 117 : 47 IC 90; *Balram Missir v Ram Ratan Misir,* (1954) 52 All LJ 767 : AIR 1955 All 610.
2386. *Sakharam Jiwaji v Pandurang,* (1953) ILR Bom 727 : 55 Bom LR 286 : AIR 1953 Bom 315.
2387. *Muhammad Husain v Hanuman,* (1918) 16 All LJ 796 : 47 IC 861.
2388. *Paya Matathil v Kovamel,* (1869) ILR 19 Mad 151.
2389. *Pannalal v Rajaram,* AIR 1926 Nag 496; *Ananda Pandurung v Uttamrao,* 144 IC 521 : AIR 1933 Nag 44; *Tulsi Ram v Muna Koer,* (1936) ILR 12 Luck 161 : 162 IC 225 : AIR 1937 Oudh 146.
2390. *Raja Kamakshya Narain Singh v Ramzanali,* AIR 1945 Pat 106.
2391. *Pawan Kumar v Jagdeo,* (1947) ILR Nag 740 : AIR 1947 Nag 210.
2392. *Piarelal v Bhagwati Prasad,* (1969) ILR All 35.
2393. *Kusumunnissa v Nilratna,* (1882) ILR 8 Cal 79.
2394. *Jugal Kissore v Kartic Chunder,* (1882) ILR 21 Cal 116.
2395. *Girish Chunder v Juramoni,* (1900) 5 Cal WN 83.
2396. *Kalu Singh v Hansraj,* 78 IC 47 : AIR 1925 Oudh 270; *Govind Pillai v Ahmed Mussa,* AIR 1954 Tr & Coch 251.

circumstances, disentitled by their personal law from redeeming.[2397] A junior member of a Malabar *tarwad* cannot file a suit for redemption of mortgage of *tarwad* property. Where, however,a junior member has obtained possession of *tarwad* property by redeeming an earlier mortgage and subsequently mortgaged the same, it is his interest that he has mortgaged, and not that of the *tarwad*. Hence, a suit for redemption by other members is not maintainable.[2398] An ex-proprietary tenant in *sir* land in Allahabad has an interest which entitles him to redeem.[2399] If the succession to the tenancy is governed by statute, it is the statutory heir—and not the heir according to the personal law of the tenant—who is entitled to redeem.[2400] A tenant in occupation of a non-residential building paid the municipal property tax on behalf of the landlord and sued for recovery of tax, claiming a charge as subrogee of the municipality. It was held that on the principle that any tenant in occupation of property subject to a simple mortgage had an interest in the equity of redemption, it should follow that he would be one of the persons entitled to subrogation under section 91.[2401] Where there was a mortgage by an occupancy tenant, and subsequently the tenant, with the landlord's consent, transferred his rights to other persons, the transferee can redeem the mortgage. The mortgagee, by remaining in possession for over 12 years, does not extinguish the mortgagor's right to redeem.[2402]

(6) Auction Purchaser

Any person who is having any interest in or charge upon the property mortgaged is competent to redeem mortgage. An auction-purchaser of the property has got interest in the property, and hence, can redeem the mortgage.[2403]

(7) Purchaser Under section 88, Code of Criminal Procedure

When property subject to a mortgage has been attached and sold under section 88 of the Code of Criminal Procedure 1898, the purchaser has a right to redeem the mortgage.[2404]

(8) Hindu Illegitimate Son

The right of maintenance of an illegitimate son in Hindu law is a personal right, and will not support a suit for redemption.[2405]

(9) Hindu Reversioner

The interest must be a present interest so that a reversionary heir in Hindu law is not entitled to redeem.[2406] In some cases, however, it has been suggested that the reversioner may redeem in case of waste, or of necessity for the preservation of the property.[2407]

2397. *Soopi v Mariyoma,* (1920) ILR 43 Mad 393 : 55 IC 760; *Sankara Pillai v Ananda Pillai,* (1957) ILR Ker 859 : AIR 1958 Ker 307; *Gopala Menon v Kalyani Amma,* AIR 1964 Ker 81.
2398. *Krishnan v Ayyappan Pillai,* AIR 1974 Ker 218, p 220.
2399. *Muhammad Husain v Hanuman,* (1918) 16 All LJ 790 : 47 IC 861.
2400. *Ram Singh v Baldeo Prasad,* (1932) All LJ 605 : 138 IC 552 : AIR 1952 All 643.
2401. *R Singavelu v Govindasami Chettiar,* (1978) 1 Mad LJ 276.
2402. *Raj Narain v Sant Prasad,* AIR 1973 SC 291; (1973) 2 SCC 35; [1973] 2 SCR 835.
2403. *Pranil Kumar Sett v Kishorilal Bysack,* AIR 2003 Cal 1, p 4.
2404. *Alagammal v Sadasiva,* (1930) 60 Mad LJ 72 : 129 IC 47 : AIR 1930 Mad 1017.
2405. *Balwant Singh v Roshan Singh,* (1896) ILR 18 All 253; *Roshan Singh v Balwant Singh,* (1900) ILR 22 All 191 : 27 IA 51.
2406. *Ram Chandar v Kallu,* (1908) ILR 30 All 497; *Narayana Kutti v Pechiammal,* (1912) ILR 36 Mad 426 : 15 IC 206; *Chhotey Singh v Surat Singh,* (1930) ILR 5 Luck 691 : 123 IC 211 : AIR 1930 Oudh 294; *Basant Singh v Rampal Singh,* (1919) 6 Oudh LJ 248 : 51 IC 985; overruling *Gumani Singh v Chakkar Singh,* (1905) 8 OC 349; which was however followed in *Basawan v Natha,* 82 IC 747 : AIR 1925 Oudh 30.
2407. *Narayana Kutti v Pechiammal,* (1912) ILR 36 Mad 426 : 15 IC 206; *Chottey Singh v Swat Singh,* (1930) ILR 5 Luck 691 : 123 IC 211 : AIR 1930 Oudh 294; *Bhag Singh v Santi,* AIR 1952 Pepsu 74.

(10) Co-mortgagor or Purchaser of the Equity of Redemption

Any of several co-mortgagors can redeem.[2408] A co-sharer in mortgaged property is a "person interested" in such property, and is entitled to redeem the mortgage.[2409] So can a purchaser or execution purchaser of the whole[2410] or part of the equity of redemption,[2411] or a purchaser in execution of a decree in a rent suit.[2412] But a contract to purchase does not create an interest in or charge on the property, and a person who has merely contracted to purchase the equity of redemption has no right to redeem.[2413] An assignee of the equity of redemption during the pendency of the mortgagee's suit may redeem before the sale is confirmed,[2414] and may be brought on the record for that purpose.[2415] A donee of the equity of redemption can redeem,[2416] and under section 59A all persons who derive title from the mortgagor, are included in the term "mortgagor," and, therefore, entitled to redeem. A person erroneously believing himself to stand in the shoes of the mortgagor and paying off the mortgage-debt was held to have sufficient interest within the meaning of the section to be subrogated to the rights of the mortgagee.[2417] Where a person who has absolutely no title to the property mortgaged, sells it, then the purchaser's position is no more than that of an intervenor between the mortgagor and the true owner of the equity of redemption, and he will not be entitled to the equitable doctrine of subrogation by paying off the mortgage.[2418] A prior mortgagee who purchases the mortgaged property becomes entitled as assignee of the equity of redemption to redeem the subsequent mortgages.[2419] In a Madras case, *A* and *B* were each owners of half shares in certain property. *A* mortgaged the entire property to *X*. *B* took an assignment of the mortgage right from *X*. It was held that *A* can sue *B* for redemption of his share.[2420]

The redeeming co-mortgagor can merely claim to be re-imbursed for the moneys he has spent. He does not become a "mortgagee" for the purposes of section 4A of the Kerala Land Reforms Act.[2421]

Redemption suit against a redeeming co-mortgagor is maintainable if filed within 60 years from the date of the original mortgage.[2422] Two brothers *M* and *S* after the death

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2408. *Norendar Narain v Dwarka Lal Mandur,* (1878) ILR 3 Cal 397, p 408 : 5 IA 18; *Ambu Ram v Bhau Halya,* (1957) ILR Bom 283 : 58 Bom LR 972 : AIR 1957 Bom 6; *Govinda Pillai Madhav Kurup v Mathavan Pillai Padmanabha Pillai,* AIR 1990 Ker 73 (NOC).
2409. *Nabi Rasool v Mohd Maqsood,* AIR 1982 All 503.
2410. *Periandi v Angappa,* (1884) ILR 7 Mad 423; *Radha Kishun v Hem Chandra,* (1906) 11 Cal WN 495; *Chaluvegowda v Chennegowda,* AIR 1952 Mys 12.
2411. *Nainappa v Chidambaram,* (1898) ILR 21 Mad 18; *Baikuntha Nath v Mohesh Chandra,* (1917) 22 Cal WN 128 : 44 IC 77; *Protap Chandra v Peary Mohan,* (1917) 22 Cal WN 800 : 48 IC 669; *Sri Kanta Prasad v Jag Sah,* (1924) ILR 3 Pat 818 : 84 IC 293 : AIR 1925 Rang 57: *Huthasanan v Parameswaran,* (1899) ILR 22 Mad 209; *Rugad Singh v Sat Narain,* (1905) ILR 27 All 178; *Shankar v Bhikaji* (1929) ILR 53 Bom 353 : 116 IC 225 : AIR 1929 Bom 139; *Jhum Lal v Sham Narayan,* 140 IC 845 : AIR 1933 Pat 33; *Konnan Sanku v K Parvathi Amma,* AIR 1963 Ker 249.
2412. *Shamrao v Kamal,* (1947) ILR Nag 942 : AIR 1948 Nag 316.
2413. *Mayappa v Kolandaivelu,* (1926) Mad WN 459 : 92 IC 715 : AIR 1926 Mad 597.
2414. *Har Shankar v Shew Gobind,* (1899) ILR 26 Cal 966; *Sheo Narain v Chunni Lal,* (1900) ILR 22 All 243.
2415. *Muhammad Masihiullah v Jarao,* (1915) ILR 37 All 226 : 27 IC 771.
2416. *Sitaram v Khandu* (1921) ILR 45 Bom 105 : 59 IC 480 : AIR 1921 Bom 413.
2417. *Ramkrishna v Venkat Swami* AIR 1945 Mad 175; *Perumal Reddiar v Suppiah Thevar,* AIR 1945 Mad 500; *Kelu v Chakkara Cheppan* AIR 1937 Mad 451.
2418. *Ananatha Raman v Arunachallan,* AIR 1952 Tr & Coch 105.
2419. *C V Raghavachar v Lakshminarasamma,* AIR 1981 SC 160, p 161.
2420. *O M Jalati v Anusuddin,* AIR 1974 Mad 340.
2421. *Krishna Menon Bhaskara Menon v Madhavan,* AIR 1976 Ker 62.
2422. *Nattammal v Swami Ammal,* AIR 1975 Mad 100.

of their father, effected usufructuary mortgages of certain properties during 1881-1884 which were redeemed by obtaining release deeds from the mortgagee-in-interest by *P* being the son of *S* (co-mortgagor) and father of the defendants in 1913 and 1918, by paying the entire redemption money, and alone obtaining possession thereof. The plaintiff, the successor-in-interest and grand-daughter of the non-redeeming co-mortgagor *M*, instituted in 1946, a suit for partition and possession of her one-half share of the suit properties, and claimed possession on contribution of her share of the mortgage money that had been paid by the redeeming co-mortgagor to the mortgagees. The High Court (by a majority judgment) held that the suit was barred by limitation under the Travancore Limitation Regulations, or the corresponding Limitation Act, 1908. One of the questions for determination by the Supreme Court was whether the articles of the Travancore Limitation Regulation will govern a suit by a non-redeeming co-mortgagor, to recover possession of his share of the hypotheca on payment of the proportionate amount of the mortgage debt discharged by the redeeming co-mortgagor. It was held that where the TP Act is not in force and a mortgage with possession is made by two persons only, one of whom redeems the mortgage by discharging the whole of the common mortgage debt, he has, in equity, two distinct rights: first, to be subrogated to the rights of the mortgagee discharged, vis-à-vis the non- redeeming co-mortgagor, including the right to get into possession of the latter's portion or share of the hypotheca. Secondly, to recover contribution towards the excess paid by him on the security of that portion or share of the hypotheca which belonged not to him, but to the other co-mortgagor. It follows that where one co-mortgagor gets the right to contribution against the other co-mortgagor by paying off the entire mortgage debt, a co-related right also accrues to the latter to redeem his share of the property, and to get its possession on payment of his share of the liability to the former. This corresponding right of the non-redeeming co-mortgagor is purely an equitable right, which exists irrespective of whether the right of contribution which the redeeming co-mortgagor has against the other co-mortgagor amounts to a mortgage, and subsists as long as the latter's right to contribution subsists.

A suit for possession of his share or portion of the property by a non-redeeming co-mortgagor (on payment of the proportionate amount of the mortgage debt), may be filed either within the limitation prescribed for a suit for redemption of the original mortgage, or within the period prescribed for a suit for contribution by the redeeming co-mortgagor against the other co-mortgagor.[2423]

Section 92 does not provide that the redeeming co-mortgagor shall be deemed to be a mortgagee, or shall be substituted to the full rights of the mortgagee for all purposes. The section is careful enough to provide that he shall have the same rights as the mortgagee redeemed, only for the limited purpose of redemption, foreclosure or sale.[2424]

(11) Puisne Mortgagee

A puisne mortgagee is an assignee of the equity of redemption and is, therefore, entitled to redeem a prior mortgage:[2425]

2423. *Valliamma Champaka Pillai v Sivathanu Pillai,* AIR 1979 SC 1937 : (1979) 4 SCC 429.
2424. *Lakshmi Pillai Subhadra Amma v Eswara Pillai Velayudhan Pillai,* AIR 1977 Ker 148 : (1977) ILR 2 Ker 187 : (1977) KLT 464.
2425. *Dhanwanti v Hargobinda,* (1924) ILR 3 Pat 435 : 78 IC 614 : AIR 1924 Pat 484; *Amba Prasad v Moonga Ram,* 128 IC 235 : AIR 1930 All 523; *Abdul Hamid v Ram Kumar,* 200 IC 146 : AIR 1942 Oudh 260.

Thus, let us suppose that *A*, the mortgagor, executes successive mortgages as follows:—
First mortgage by *A* to..... *B*

Second mortgage by *A* to.....*C*

Third mortgage by *A* to..... *D*

Now *C*, is assignee of part of the equity of redemption of *A* against *B* and has, therefore, the right to redeem *B*. For the same reason, *D* can redeem *C* and *B*. On the other hand, *B* can foreclose or bring to sale *A*, and, as part of *A*'s equity of redemption is transferred to C and to *D*, *B* can foreclose or bring to sale *C* or *D*. This is the familiar rule "redeem up and foreclose down." This clause, therefore, is a statement of the first part of the rule "redeem up". The second part of the rule is enacted in section 94.

If the puisne mortgage is invalid, the puisne mortgagee has no right to redeem a prior mortgage.[2426] So also, if the puisne mortgage is time-barred, or if the puisne mortgagee has lost all remedies of foreclosure or sale on his own mortgage, he has no right to redeem a prior mortgage.[2427] If the mortgagor has made a tender of the mortgage money which the prior mortgagee has wrongfully refused, the puisne mortgagee redeeming the prior mortgagee will not be liable for interest from the date of the tender.[2428] The rights of a second mortgagee, who was not impleaded in the suit by the first mortgagee, are not affected by the decree or sale in execution thereof, and he is entitled to redeem the first mortgage.[2429] If the second mortgagee files a suit on his mortgage without impleading the first mortgagee, and pays off the encumbrance which is not barred by limitation, he is subrogated to the rights of the first mortgagee. The second mortgagee who purchases the mortgaged property in execution of a decree acquires not only the interest of the mortgagee, but also the equity of redemption of the mortgagor, and he is entitled to redeem other mortgages on the same property created by the mortgagor.[2430] An execution purchaser of the whole or part of the equity of redemption has the right to redeem the mortgaged property.[2431] In a Calcutta case, a prior mortgagee purchased the equity of redemption in a sale held in execution of his decree. The puisne mortgagee was not made a party to the suit. It was held that, the decree, and consequent purchase by the prior mortgagee, did not affect the right of the puisne mortgagee to sue for sale subject to prior mortgage, or to redeem the mortgage before putting the property for sale, to satisfy his own claim.[2432]

(12) Sub-mortgagee

As a puisne mortgagee can redeem a prior mortgage, a sub-mortgagee of the puisne mortgagee, being an assignee of the puisne mortgagee, can also redeem the prior mortgage.[2433]

A prior mortgagee who has purchased the equity of redemption stands in the shoes of the mortgagor, and can redeem a puisne mortgagee.[2434] Otherwise, a prior mortgagee holds by title paramount to the puisne mortgagee, and cannot redeem it. However, the Calcutta High

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2426. *Banmali v Bisheshar,* (1907) ILR 29 All 129.
2427. *Ram Adhar v Shankar Baksh Singh,* 153 IC 808 : AIR 1935 Oudh 139.
2428. *AMKM Chettyar Firm v AKOML Chettyar Firm,* 127 IC 594 : AIR 1930 Rang 255.
2429. *AMA Firm by Mg Partner Murugappa Chettiyar v Manidachalam Chettiar,* AIR 1948 Mad 412.
2430. *Kora Miah Saheb v Velayudha Konar,* AIR 1974 Mad 248.
2431. *Samarendra Nath Sinha v Krishna Kumar Nag,* AIR 1967 SC 1440, p 1445.
2432. *Amulya v United Industrial Bank Ltd,* AIR 1981 Cal 404.
2433. *Ram Subhag v Nar Singh,* (1905) ILR 27 All 472; *Venkatanaryanasami v Kani Ammal,* (1913) Mad WN 903 : 21 IC 560.
2434. *Mangali Prasad v Pati Ram* (1904) 1 All LJ 360; *Hasanbhai v Umaji,* (1903) ILR 28 Bom 153; *Dhanwanti v Hargobind,* AIR 1924 Pat 484; *Debendra Narain v Ramtaran,* (1903) ILR 30 Cal 599.

Court has held that if he is a party to the puisne mortgagee's suit, he may pay off the puisne mortgage in order to save the property from sale.[2435]

(13) Charge

A charge upon the property or upon the equity of redemption will give a right to redeem. This may be illustrated by a Madras case,[2436] where a mortgagor was allowed to redeem, although he had sold the equity of redemption, because he had a charge for unpaid purchase money.[2437] A charge holder can file a suit for redemption of the mortgaged property.

(14) Clause (b)

A surety has a right to redeem, as he is liable for the debt and is entitled on payment of the debt to avail himself of the creditor's securities.[2438] He cannot, of course, redeem a mortgage for a different debt or a mortgage for a part of a debt, of which he is only surety for another distinct part.[2439] This subject is also discussed under section 92.

(15) Clause (c)

A plaintiff who had obtained a decree for sale in a suit for the administration of a mortgagor's estate, was held to have a right to redeem so as to get the benefit of the decree.

(16) Repealed clause (f)

Before the passing of the TP Act, an attaching judgment creditor was not entitled to redeem.[2440]

The question of entitlement cannot be raised after a preliminary decree has been passed.[2441]

[2442]**92. Subrogation.**—Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

2435. *Bhajahari Maiti v Gajendra,* (1910) ILR 37 Cal 282 : 5 IC 142.
2436. *Rutnam Pillai v Kamalambal,* (1925) 48 Mad LJ 213 : 86 IC 793 : AIR 1923 Mad 778.
2437. *Tara Singh v Kehar Singh,* AIR 1989 SC 1426 : (2007) 3 SCC 136.
2438. *Green v Wynn,* (1869) 4 Ch App 204, p 207; *Forbes v Jackson,* (1882) 19 Ch D 615; *Heera Lall v Syud Oozeer,* (1874) 21 WR 347; Indian Contract Act, 1872, sections 140 and 141.
2439. *Wade v Coope,* (1827) 2 Sim 155; Fisher, section 1427; *Bhushayya v Suryanarayan,* AIR 1944 Mad 195.
2440. *Radhey Tewari v Bujha,* (1881) ILR 3 All 413; *Soobul Chunder v Russick Lal,* (1888) ILR 15 Cal 202.
2441. *M G Easwara Rao v Rabiyabi,* AIR 2000 Kant 232 : (2000) 2 Kar LJ 568.
2442. Ins. by Act 20 of 1929, sec. 47. Earlier sections 92 to 94 were repealed by Act 5 of 1908,sec. 156 and Sch.V.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

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(1) Amendment

This section was inserted by the Amendment Act 20 of 1929.

(2) Scope of the Section

The first para of the section deals with subrogation by the operation of law, and the third para with subrogation by agreement. The Nagpur High Court holds that the first para is not subject to the third paragraph.[2443] According to the Allahabad High Court, the two paragraphs do not overlap, and are mutually exclusive.[2444]

The principle of subrogation as embodied in the section applies to Punjab.[2445]

(3) Subrogation

Subrogation means substitution, for the person redeeming is substituted for the encumbrancer whom he has paid off.[2446] Subrogation is either conventional, or legal.[2447]

2443. *Ramgopal v Nanakram,* 161 IC 651 : AIR 1936 Nag 32; *Taibai v Wasudeorao,* (1938) ILR Nag 206 : 172 IC 142 : AIR 1937 Nag 372; *Lal Mohan v Govind Sahi,* 188 IC 417 : AIR 1940 Pat 620.
2444. *Hira Singh v Jai Singh,* AIR 1937 All 588 : (1937) ILR All 880. See note "Advance to pay off a mortgage" below.
2445. *Sham Lal v Chajju Ram,* AIR 1941 Lah 53 : 42 Punj LR 812 : 194 IC 297; *Simla Banking & Industrial Co v Firm Luddar Mal,* AIR 1959 Punj 490; See the discussion in *Lakshmi Pillai v Easwara* AIR 1977 Ker 148.
2446. *Lala Manmohan v Janki Prasad,* 72 IA 39 : (1945) All LJ 51 : 47 Bom LR 250 : 49 Cal WN 195 : (1945) 1 Mad LJ 97 : 221 IC 408 : AIR 1945 PC 39; *Balchand v Ratanchand,* (1942) ILR Nag 393 : AIR 1942 Nag 111.
2447. *Gurdeo Singh v Chandrikah Singh,* (1909) ILR 36 Cal 193 : 1 IC 913.

Subrogation is conventional when there is an agreement, express or implied, that the person making the payment shall exercise the rights and powers of the original creditor,[2448] and that very slight evidence is sufficient to establish such an agreement.[2449] The law as to conventional subrogation has been amended by the third para of this section which requires (1) that the agreement of subrogation should be in writing; and (2) that the writing should be registered.[2450]

Legal subrogation, or subrogation by operation of law, arises when a person, who has, in the property an interest of his own to protect, discharges a prior encumbrance.[2451] The principle cannot, therefore, avail a mere volunteer where there is no obligation to repay.[2452] He has no equities in his favour, and is not subrogated to the rights of the mortgagee.[2453] Subrogation by operation of law rests, therefore, on the same equity of reimbursement as is enacted in section 69 of the Indian Contract Act, 1872, that "a person who is interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other." Such a payment sometimes carries with it an equitable charge.[2454] Hence, there may arise:

(1) A personal right of reimbursement.

(2) An equitable charge.

(3) Subrogation by operation of law.

(4) Personal Right of Reimbursement

This arises in cases to which section 69 of the Indian Contract Act, 1872 applies. The right of reimbursement under section 69 of the Contract Act, 1872 is personal, while the right of subrogation affects the property.[2455] An officious or voluntary payment carries with it no right of reimbursement, or of subrogation. This was settled by the Privy Council in the case of *Ram Tuhul Singh v Biseswar Lall*[2456] where their Lordships said:

It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support a suit, there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B*'s debt.

Again in *Gurdeo Singh v Chandrikah Singh*[2457] J Mookerjee said:

The principle is, that subrogation, a matter of right, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior

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2448. Ibid.
2449. Re *Wrexham, Mold & Connah's Quay Ry,* (1899)1 Ch 440, p 463.
2450. *Chunilal v Lakshmichand,* (1940) ILR All 141 : (1940) All LJ 234 : 188 IC 328 : AIR 1940 All 237. See note "Advance to pay off a mortgage" below.
2451. *Gurdeo Singh v Chandrikah Singh,* 1 IC 913; *Bisseswar Prosad v Lala Sarnam Singh,* (1907) 6 Cal LJ 134.
2452. *Nadar A V v Bhagavathi,* AIR 1972 Mad 207.
2453. *Jago Devi v Widow (name not known),* AIR 1984 Pat 362, p 364.
2454. *Hira Singh v Jai Singh,* (1937) ILR All 880 : (1937) All LJ 659 : 171 IC 153 : AIR 1937 All 588.
2455. *Savitribai v Nanhelal,* 148 IC 815 : AIR 1934 Nag 84.
2456. *Ram Tuhul Singh v Biseswar Lall,* (1875) 23 WR 305 : 2 IA 131, p 143; *Raj Bahadur Singh v Nar Singh,* AIR 1941 Oudh 226.
2457. *Gurdeo Singh v Chandrikah Singh,* (1909) ILR 36 Cal 193, p 219 : 1 IC 913; *Anantha Raman v Arunachallam,* AIR 1952 Tr & Coch 105.

creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co- obligor or surety, who discharges the debt, or of an heir, who pays the debt of the succession. Any one, who is under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, he is a mere volunteer.

This principle was followed in an Allahabad case,[2458] where the plaintiff purchased property from a minor and, discharged a prior mortgage. The minor's sale was invalid and, therefore, the plaintiff was treated as a volunteer, and neither subrogated to the rights of the mortgagee, nor held entitled to reimbursement. In cases to which section 69 of the Indian Contract Act, 1872 applies, the right of reimbursement is available even though there be in addition an equitable charge, or an assignment of the surety by subrogation.[2459]

(5) Equitable Charge

An equitable charge is analogous to a salvage lien in maritime law, but differs from it in that it is not available to a volunteer. The doctrine of salvage lien was recognized by the Privy Council in *Nugenderchunder Ghose v Sreemutty Kaminee,*[2460] where their Lordships said in the case of a mortgagee paying revenue to prevent a *taluq* from being sold "that they would find it difficult to come to any other conclusion than that the person who had such an interest in the "*Talook* as entitled him to pay the revenue due to the government, and did actually pay it, was thereby entitled to a charge on the *Talook* as against all persons interested therein, for the amount of the money so paid." Again, in *Dakhina Mohan Roy v Saroda Mohan Roy,*[2461] a person in possession under a decree of a court paid money to prevent a sale of the estate for arrears of revenue and was entitled to reimbursement, even though the decree was afterwards set aside. The Judicial Committee said that the claim was in the nature of salvage, and that the law relating to sales for arrears of government revenue recognizes an equity of repayment in the case of a person who not being a proprietor pays the government revenue in good faith to protect a claim which turns out to be unfounded. However, this doctrine is said to have been repudiated in England in the case of *Falcke v Scottish Imperial Insurance Co.*[2462] This was a case in which a mortgagor was claiming against his own mortgagee a charge for premiums paid by him, and had no bearing on claims made against a mortgagor in respect of payments made to protect the property. But this supposed repudiation has influenced the Calcutta, Allahabad and Bombay High Courts, but not the Madras High Court. Thus, when one of the two co-sharers in a revenue paying estate pays the whole revenue to save the estate, he is entitled to a charge on the share of the defaulting purchaser in Madras,[2463] Nagpur,[2464] and Kerala,[2465] but not in Calcutta,[2466] Allahabad,[2467] and Patna,[2468] Rangoon[2469] or Bombay.[2470] The

2458. *Shiam Lal v Ram Piari,* (1909) ILR 32 All 25 : 4 IC 706.
2459. *Durga Charan v Ambica Charan,* (1927) ILR 54 Cal 424 : 101 IC 130 : AIR 1927 Cal 393.
2460. *Nugenderchunder Ghose v Sreemutty Kaminee,* (1867) 11 Mad IA 241, p 258.
2461. *Dakhina Mohan Roy v Saroda Mohan Roy,* 20 IA 160 : (1894) ILR 21 Cal 142.
2462. *Falcke v Scottish Imperial Insurance Co,* (1886) 34 Ch D 234.
2463. *Seshagiri v Pichu,* (1887) ILR 11 Mad 452; *Srinivasa v Rama,* (1893) ILR 17 Mad 247; *Rajah of Vizianagam v Raja Setrucherla,* (1902) ILR 26 Mad 686; *Alayakammal v Subbaraya,* (1905) ILR 28 Mad 493; *Amman Pariyayi v Pakran,* (1913) ILR 36 Mad 493 : 15 IC 262; *Kotayya v Kotappa,* (1926) 49 Mad LJ 117 : 90 IC 551 : AIR 1926 Mad 141; *Swaminath Iyer v Ramanath Iyer,* (1944) ILR Mad 44 : 56 Mad LW 289 : (1943) 2 Mad LJ 24 : AIR 1943 Mad 573.
2464. *Gulab Nathuram v Bindraban Sheocharan,* (1941) ILR Nag 474 : AIR 1941 Nag 245.
2465. *Ayyappan Roman v Kunuju Varki Ithappiri,* AIR 1958 Ker 386; *Mariam v Narayanan,* AIR 1965 Ker 55.
2466. *Kinu Ram v Mozaffer,* (1887) ILR 14 Cal 809.
2467. *Seth Chitor Mal v Shib Lal,* (1892) ILR 14 All 273; *Munni Bibi v Triloki Nath,* (1932) ILR 54 All 140 : 30 All LJ 63 : 136 IC 66 : AIR 1932 All 332.
2468. *Bhuneshwari Kuer v Manir Khan,* (1928) ILR 7 Pat 613 : 111 IC 84 : AIR 1928 Pat 641.
2469. *U Shwe Bwe v Maung Thank,* (1928) ILR 6 Rang 500 : 113 IC 801 : AIR 1928 Rang 278.
2470. *Shivrao v Pundlik,* (1902) ILR 26 Bom 437.

law on this point is, therefore, unsettled, and there is no clear line of demarcation showing when the personal right of reimbursement carries with it also an equitable charge.

(6) Subrogation by the Operation of Law

The distinguishing feature of subrogation is that the encumbrance that is paid off is not extinguished, but is treated as kept alive and assigned to the person making the payment. But just as there is no clear line of demarcation showing when the charge comes to the assistance of the personal right of reimbursement, so until this section was enacted, there was no clear line of demarcation between cases of equitable charge, and cases of subrogation.

The TP Act recognized the equitable rule of intention in section 101 in connection with the rule of merger when the owner of an encumbrance acquires full ownership, but made no provision for its application to cases of subrogation. The only case of subrogation provided for was the one case of a puisne mortgagee redeeming a prior mortgage, and under section 74 of the TP Act he was subrogated to the rights of the prior mortgagee irrespective of any question of intention; and it has been expressly held that no question of benefit or intention arises under section 74 when a puisne mortgagee redeems a prior mortgagee.[2471]

Cases of legal subrogation occur in four ways—

(1) A puisne mortgagee redeeming a prior mortgagee.

(2) A co-mortgagor redeeming the mortgage.

(3) The mortgagor's surety redeeming the mortgage.

(4) A purchaser of the equity of redemption redeeming a mortgage.

The distinction between legal subrogation and conventional subrogation is that in the case of the former, the person having the pre-existing interest discharged the prior mortgage to protect his interest and by meeting an obligation in excess of his liability, whereas in the latter case he would be discharging only an obligation he had undertaken under a specific agreement.

The foundation of the right of legal subrogation is the equitable principle of reimbursement. If a person is interested in the payment of money which another is bound by law to pay and, therefore, pays it, he is entitled to be re-imbursed by the other. The personal obligation arising under the circumstances is embodied in section 69 of the Indian Contract Act, 1872, and the equitable right of subrogation, under section 92 of TP Act. In either case, the right of subrogation or re-imbursement will arise only on the discharge of the prior mortgage, and not earlier.

(7) Where the Puisne Mortgagee Redeems

Before the TP Act, the subrogation of a puisne mortgagee paying off a prior mortgagee was determined under the rule of intention. Thus, in a Madras case,[2472] a third mortgagee paid off the first mortgagee in ignorance of a second mortgage represented by a registered decree, and he was held entitled to a first charge on the ground that he must be presumed to have intended to keep the first mortgage alive in accordance with the ruling of the Privy Council. But in a Bombay case,[2473] the plaintiff paid off a prior mortgage and retained the title deeds becoming an equitable puisne mortgagee, yet it was held that he was not subrogated to the prior mortgagee as that mortgage had not been assigned to him. The TP

2471. *Nagayyar v Govindayyar,* 70 IC 286 : AIR 1923 Mad 349.
2472. *Gangadhara v Sivarama,* (1884) ILR 8 Mad 246. See also *Ghanaya v Pandit Chhajju,* (1894) PR 38.
2473. *Khushal v Punamchand,* (1897) ILR 22 Bom 164.

Act did not apply to the case, but under the TP Act, even before the amendment, he would have been subrogated. According to the old section 74, a puisne mortgagee redeeming a prior mortgagee was always subrogated,[2474] unless he was under covenant to discharge the prior encumbrance.[2475] The next case before the Privy Council of redemption by a puisne mortgagee seems to have been a case of conventional subrogation, and not of subrogation by operation of law. This was the case of *Dinobundhu Shaw v Jogmaya Dasi.*[2476] The Privy Council held that as there was no intention to extinguish the two mortgages to *A* and *B*, and as the mortgagor had paid his debts in pursuance of an agreement with *C* for the benefit of *C* and not for the benefit of the attaching creditor, there was no subrogation. The case seems, therefore, to be one of subrogation by agreement rather than by operation of law. But if the case be considered as one of subrogation by operation of law, ie, if there was no agreement with the mortgagor and the payment be treated as made by the puisne mortgagee, the conclusion is consistent both with section 74 and the rule of intention.

The last case of subrogation of a puisne mortgagee decided by the Privy Council was the case of *Mahomed Ibrahim Hossein Khan v Ambika Persad Singh*[2477] where the fifth mortgagee paid off the first mortgagee, and as there were three intervening mortgages, the Privy Council held that he must have intended to keep it alive, and to stand in the place of the first mortgagee. Both the Privy Council cases of *Dinobundhu Shaw v Jogmaya Dasi* and *Mahomed Ibrahim Hoosein Khan v Ambika Persad Singh* were decided after the TP Act, but no reference was made to the said Act. If the puisne mortgage is collusive or fraudulent, there is of course, no subrogation.[2478] If the mortgagor has sold the equity of redemption before execution of the puisne mortgage, the latter is not entitled to subrogation.[2479] An attachment renders a subsequent alienation void only so far as it prejudices the attaching creditor, and if there is no prejudice, a puisne mortgagee (by a mortgage subsequent to the attachment) can claim to be subrogated.[2480] Subrogation was refused under section 74 in the undermentioned case on the ground that the section implied a tender by the subsequent mortgage on his own account, and not as an agent of the mortgagor.[2481] However, it would be otherwise under the present section. There can be subrogation more than once. If *C* by redeeming off *A* can be subrogated to his right, there is no reason why *D* by paying off *C* cannot be substituted to the same right, provided the security of *A* is legally alive at the time.[2482] Subrogation cannot be refused to a puisne mortgagee who may have paid a prior mortgage on the ground that the mortgagor's liability would be increased.[2483]

2474. *Nagayyar v Govindayyar,* 70 IC 286 : AIR 1923 Mad 349; *Ram Sahai v Kunwar Sah,* (1932) ILR 7 Luck 26 : 139 IC 626 : AIR 1932 Oudh 314; *Bappu v Venkatachalapathy Ayyar & Co,* (1934) 64 Mad LJ 606 : 148 IC 311 : AIR 1934 Mad 227; *Jagarnath Prasad v Chunilal,* (1940) ILR All 580 : (1940) All LJ 511 : 191 IC 547 : AIR 1940 All 416.
2475. *Said Ahmed v Raja Bar Khandi Mahesh,* (1932) ILR 8 Luck 40 :139 IC 64 : AIR 1932 Oudh 255.
2476. *Dinobundhu Shaw v Jogmaya Dasi,* (1902) ILR 29 Cal 154 : 29 IA 9, p 14.
2477. *Mahomed Ibrahim Hossein Khan v Ambika Persad Singh,* (1912) ILR 39 Cal 527 : 39 IA 68 : 14 IC 496.
2478. *Gulzari Lal v Aziz Fatima,* (1919) ILR 41 All 372 : 50 IC 375; *Bansidhar v Shiv Singh,* (1933) ILR 56 All 134 : (1933) All LJ 1564 : 147 IC 575 : AIR 1933 All 908 (mortgage void as property under Collector's execution).
2479. *Apaji v Kavji,* (1882) ILR 6 Bom 64.
2480. *Dinobundhu Shaw v Jogmaya Dasi,* (1901) ILR 29 Cal 154 : 29 IA 9 : 14 IC 496; *Jamil-un-nissa v Pitambar,* (1913) 11 All LJ 127 : 18 IC 704.
2481. *Kalagayya v Vandamma,* (1911) 21 Mad L J 180 : 9 IC 139; *Kandasami v Venkata,* 91 IC 577 : AIR 1925 Mad 1219; *Shafiq Ullah Khan v Sami Ullah,* (1930) ILR 52 All 139 : 123 IC 101 : AIR 1929 All 943. But see *Muhammad Tabarak Ali v Dalip Narain,* 98 IC 968 : AIR Pat 117.
2482. *Gopal Devi v Ghulam Fatima,* (1943) All LJ 113 : 45 Punj LR 143 : 209 IC 75; app from (1940) All LJ 269 : 190 IC 599.
2483. *Ishwar Dayal Dube v Gyan Singh,* (1948) ILR All 421 : AIR 1948 All 331.

It is a mistake to suppose that a new charge comes into existence with the decree, and that a puisne mortgagee who discharges the decree of a prior mortgagee is subrogated to the position of decree holder. The fact that a decree has been passed makes no difference, and the puisne mortgagee is subrogated to the rights of the prior mortgagee even though the debt has merged in the decree.[2484] This is well illustrated by a case of redemption by a co-mortgagor. The prior mortgage was by *A* and *B* to *C*, and the puisne mortgage was by *A* alone to *C*. *C* realized the puisne mortgage by sale and bought the property himself. *C* then obtained a decree on the prior mortgage, this decree being of a date later than his decree on the puisne mortgagee. *A* paid off the later decree on the prior mortgage and had priority over *C*. It was the date of the mortgage, not the date of the decree that determined priority.[2485] A mortgagee who has obtained a decree for sale which he has not executed may use the mortgage as a shield even after execution of the decree has become time-barred. In the language of a Nagpur judge "because the mortgagee can no longer wield his mortgage as a sword, it does not follow that he cannot use it as a shield to protect his own interests".[2486] In an Allahabad case,[2487] a puisne mortgagee paying off a decree obtained by a mortgagee was held to be entitled to a charge only. However, this was a case of subrogation as pointed out by the Patna High Court.[2488]

Although the repealed section 89 professed to extinguish the equity of redemption after a decree absolute for sale, yet when a puisne mortgagee discharged a decree absolute for sale obtained by a prior mortgagee, he was subrogated, and entitled to priority over mesne mortgages.[2489]

(8) Where Co-mortgagor Redeems

A co-mortgagor redeeming a mortgage is a simple case of subrogation,[2490] for a co-debtor is a principal debtor in respect of his own share and surety in respect of his co-debtor's shares, and when a surety has paid the debt, he is entitled to avail himself of all the creditor's securities.[2491] In *Jagan Nath v Abdulla*,[2492] there was a prior mortgage by *A* and *B*, and a puisne mortgage by *A*. *A* paid off the prior mortgagee's decree and when the puisne mortgagee brought the property for sale, *A* was entitled to set up the prior mortgage as a shield. The co-mortgagor's right to subrogation was admitted even before the TP Act.[2493]

2484. *Kotappa v Raghavayya*, (1927) ILR Mad 626 : 102 IC 316 : AIR 1927 Mad 631; *Babu Lal v Bindhyachal Rai*, (1942) ILR 22 Pat 187 : AIR 1943 Pat 305; *Shamsuddin v Haidar-ali* AIR 1945 Cal 194 : (1945) 49 Cal WN 104. See note "Limitation" below.
2485. *Jagan Nath v Abdulla*, (1934) ILR 15 Lah 746 : 150 IC 366 : (1934) All LJ 248.
2486. *Ramshankar v Gulab Shankar*, 144 IC 736 : AIR 1933 Nag 241, p 242.
2487. *Shib Lal v Munni Lal*, (1922) ILR 44 All 67 : 19 All LJ 84 : 63 IC 604 : AIR 1922 All 153; followed in *Paras Ram v Mewa*, (1930) 28 All LJ 890 : 125 IC 754 : AIR 1930 All 561.
2488. *Sibanand v Jagmohan*, (1922) ILR 1 Pat 780, p 785 : 68 IC 707 : AIR 1922 Pat 499.
2489. *Abbas Ali Khan v Chote Lal*, (1927) ILR 49 All 162 : 97 IC 594 : AIR 1927 All 28.
2490. *Raushan Ali v Kali Mohan*, (1906) 4 Cal LJ 79; *Khuda Bakhsh v Ata Mahomed*, (1942) All LJ 135 : 44 Punj LR 133 : 201 IC 159; *Pashupati Nath v Sachi Nath Roy*, AIR 1943 Cal 330 : (1943) ILR 2 Cal 180 : 47 Cal WN 405 : 209 IC 15; *Kundan Lal v Faqir Baksh*, AIR 1938 Oudh 127; *Subraya v T unmanna*, AIR 1938 Rang 508.
2491. *Green v Wynn*, (1869) 4 Ch App 204, p 207; *Forbes v Jackson*, (1882) 19 Ch D 615; *Heera Lall v Syud Oozeer*, (1874) 21 WR 347; Indian Contract Act, 1872, sections 140, 141; *Abdul Gafur Khan v Mangat Rai*, (1938) ILR Lah 103 : 40 Punj LR 546 : 178 IC 778 : (1938) All LJ 184. This proposition was cited with approval in *Lakshmi Pillai v Easwara*, AIR 1977 Ker 148, para 6.
2492. *Jagan Nath v Abdulla*, (1934) ILR 15 Lah 746 : 150 IC 366 : (1934) All LJ 248.
2493. *Asansab Ravuthan v Vamana*, (1879) ILR 2 Mad 223; *Ganesh v Raghu*, (1880) PJ 300; *Pandji v Sadasheva* (1881) PJ 57; *Pancham Singh v Ali Ahmad*, (1881) ILR 4 All 58.

In Punjab, where the TP Act was not in force, rules of justice, equity and good conscience applied. Applying those principles, the Supreme Court held in *Ganeshi Lal v Joti Pershad*[2494] that when one of several co-mortgagors redeems the entire mortgage by paying a sum less than the full amount due under the mortgage, he is entitled to receive from his co-mortgagors only proportionate shares of the amount actually paid by him; and the same principle has been applied where the TP Act is in force.[2495] The High Court of Punjab and Haryana held that a redeeming co-mortgagor will be subrogated to the right of the mortgagee, only to the extent necessary for his own equitable protection. The view that a co-mortgagor who redeems the entire mortgage is to be subrogated or treated as a mortgagee for all intents and purposes qua the non-redeeming mortgagors, is not a correct enunciation of the law.[2496]

Where one co-mortgagor, by paying off the entire mortgagee debt, gets a right to contribution against the other co-mortgagor, a co-related right also accrues to the non-redeeming co- mortgagor to redeem his share of the property and to get possession thereof on payment of his share of the liability, to the redeeming co-mortgagor. This right subsists as long as the redeeming mortgagor's right to contribution subsists.[2497] Redeeming co-mortgagor is subrogated to the rights of the mortgagee in respect of the rights of the defaulting co-mortgagor.[2498]

A plain reading of this section does not warrant a construction that the substitutee becomes a mortgagee. The rights that are created in favour of a co-mortgagee as a result of discharge of debt are "so as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems". The section confers certain rights on the co-mortgagor and provides for the manner of its exercise as well. The rights are of redemption, foreclosure, and sale. And the manner of exercise is as a mortgagee. Thus, a co-mortgagor in possession, of excess share redeemed by him, can enforce his claim against the non-redeeming mortgagor by exercising his right of foreclosure or sale as is exercised by mortgagee under section 67 of the TP Act. However, that does not make him a mortgagee. Thus, a co-mortgagor or a junior member of the *tarwad* who continued in possession over the excess share got redeemed by him, could not be deemed to be a mortgagee so as to acquire right of a tenant under section 4A(1)(a) of the Kerala Land Reforms Act, 1963.[2499]

(9) Where Mortgagor's Surety Redeems

There was one case before the TP Act in which a mortgagor"s surety was subrogated on redemption.[2500] There were no cases under the TP Act, and before the amending Act of 1929, he would probably have been treated in the same way as a redeeming co-mortgagor. Under the TP Act as amended, he would of course, be subrogated. It has been held that even before payment of debt by the guarantor to the creditor, the guarantor by invoking the equitable doctrine of subrogation can apply for temporary injunction.[2501] Where the sureties paid the

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2494. *Ganeshi Lal v Joti Pershad,* [1953] SCR 243 : AIR 1953 SC 1; *Janardhan v Sham Lal,* AIR 1959 Punj 170; *Kunjayamma v Kunchali,* AIR 1970 Ker 289.
2495. *Mamundi Kaduvetti v Somasundaram Chetti,* (1959) ILR Mad 883 : (1959) 2 Mad LJ 122 : AIR 1959 Mad 555.
2496. *Jaimat Singh v State of Punjab,* AIR 1984 P&H 351.
2497. *Valliama Champaka Pillai v Sivathanu Pillai,* AIR 1979 SC 1937; following *Ganeshi Lal v Jyoti Pershad,* AIR 1953 SC 1.
2498. *Gyasiram v Brij Bhushandas,* AIR 1973 MP 155, p 156.
2499. *Variavan Saraswathi v Eachampi Thevi,* (1993) 2 SCC 201, p 207 (Supp).
2500. *Heera Lall v Syud Oozeer,* (1874) 21 WR 347.
2501. *Mamata Ghosh v United Industrial Bank Ltd,* AIR (1987) ILR Cal 280, p 284.

mortgagee amount due under the preliminary decree during the pendency of proceedings for final decree, it was held that they had the right of subrogation.[2502]

(10) Where Purchaser of Equity of Redemption Redeems

Where the purchaser of the equity of redemption redeems or pays off a mortgage, the encumbrance may be merged or drowned in the estate of ownership. This is the case of merger referred to in the old section 101 when the rights of the mortgagee and of the owner meet in the same person. As per that section and the Privy Council case of *Gokuldas v Puranmal,*[2503] already referred to, it was purely a question of the intention, express or implied, of the person paying off the mortgage. The rule of intention on which the case was decided by the Privy Council is implied in section 92, for it is when there are other mortgages that it is to the benefit of the person redeeming to keep the mortgage alive for future defence. If the auction purchaser in execution of a decree obtained on the foot of a prior mortgage without impleading the subsequent mortgagee, acquires at least the rights of the mortgagor who was a party to the action, then he has got the right to redeem the puisne mortgagee. The auction purchaser holds a double capacity of a prior mortgagee as well as the equity of redemption. In the first capacity, he can use his prior mortgage as a shield against the puisne mortgagee, and in his second capacity, he can redeem the second mortgage.[2504]

(11) Purchaser's Covenant Excludes Subrogation

The last sentence from the passage cited from the judgment in *Malireddi's* case refers to an important exception which will be discussed later in notes "Other than the mortgagor" and "Cove- nant excludes subrogation" below. For the present, it is sufficient to say that when a mortgagor himself pays off the mortgage, he cannot use it as a shield against a subsequent mortgage of his own, and this, for the simple reason that he cannot derogate from his own grant.

(12) Redemption by Claimant Under Invalid Purchase

If the purchase is invalid, the purchaser is a volunteer, and there is no right of subrogation.[2505] So also, a purchaser from a *benamidar* who has no title to sell the equity of redemption.[2506] This judgement may not be applicable any more after the enactment of the Benami Transaction (Prohibition) Act.

ILLUSTRATION

A mortgages property to *B* in 1912 and then sells the equity of redemption to *C* in 1918. After *A's* death his widow in 1920 purports to sell the property to *D* who retains part of the consideration and pays off *B's* mortgage. *D* had acquired no interest in the property by his professed purchase from *A's* widow. His payment was that of a volunteer and he was not subrogated to the rights of the mortgagee *B.*[2507]

2502. *Kadamba Sugar Industries Pvt Ltd v Devru Ganapathi Hegde,* AIR 1993 Kant 288, p 294.
2503. *Gokuldas v Puranmal,* (1884) ILR 10 Cal 1035 : 11 IA 120 (PC).
2504. *Abdul Gaffar v Sagun Chowdhari,* AIR 1952 Pat 321; *Rattan Chand v Prite Shah,* AIR 1962 Punj 402.
2505. *Pichaiyappa v Govindaraju,* 130 IC 506 : AIR 1931 Mad 110; *Govinda v Lokanatha* (1921) 40 Mad LJ 114 : 62 IC 291 : AIR 1921 Mad 51; *Velayudhan v Nallathambi,* 11 IC 690 : AIR 1928 Mad 541; *Sarjug Devi v Dulhin Kishori,* AIR 1960 Pat 474.
2506. *Anantha Raman v Arunachallam,* AIR 1952 Tr & Coch 105.
2507. *Pichaiyappa v Govindaraju,* 130 IC 506 : AIR 1931 Mad 110.

(13) Redemption by Purchaser Whose Purchase is Set Aside

the purchase is subsequently set aside, the purchaser may still claim the benefit of the securities he had discharged. Thus, in *Mahomed Shumsool v Shewukram*[2508] a reversioner set aside a sale by a Hindu widow, but the purchaser was held to be entitled to claim redemption of a prior mortgage that he had discharged. In *Nasiruddin v Ahmad Husain,*[2509] when a sale was set aside in a suit for specific performance of a prior contract of sale, and the purchaser had discharged mortgages on the property, the Privy Council said:

> It seems that the appellants have, in virtue of their claim to be purchasers, discharged mortgages upon the property. In respect of any money paid by way of such discharge they are entitled to stand in the shoes of the mortgagees who they have paid off.

Other instances are cited below.[2510] A very extreme instance of the application of this rule was the case of *Syamalarayudu v Subbarayudu.*[2511] In that case, the owner agreed to sell land to the defendant, but the plaintiff got the owner to give him an antedated deed and took possession. The defendant sued for specific performance, and pending the suit the plaintiff paid off a mortgage in order to strengthen his title. The defendant succeeded in the suit and dispossessed the plaintiff, who then sued to recover the amount of the mortgage. The suit was decreed on the ground that the payment of the mortgage debt was not illegal. In *Karupan v Sakuth,*[2512] a collusive transferee was refused subrogation as he did not come to court with clean hands. Also in *Gulzari Lal v Aziz Fatima,*[2513] a prior mortgage was paid off by a collusive and fraudulent puisne mortgagee.

(14) Rule of Intention Implied in the Section

Under the present section, the rights of the purchaser of the equity of redemption when he redeems are the same, but they are stated more simply and directly. Under the TP Act, a purchaser of the equity of redemption redeeming is a case of subrogation under section 92, but the mortgagee acquiring the ownership, or the mortgagor's interest, is a case of merger or non- merger under section 101, and in neither section there is any reference to the rule of intention. In India, there is no common law rule of merger so it is unnecessary to state the case of non- merger as an exception. Again, the equitable rule of intention is an artificial one,

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2508. *Mahomed Shumsool v Shewukram,* 2 IA 7 : 22 WR 409 : 14 BLR 226 : in appeal from (1870) 14 WR 315; *Baban v Biswanath,* AIR 1934 Pat 681.
2509. *Nasiruddin v Ahmad Husain,* (1926) 25 All LJ 20, p 22 : 97 IC 543 : AIR 1926 PC 100.
2510. *Nilo Pandurang v Rama,* (1885) ILR 9 Bom 35 (purchaser's title barred by limitation); *Narayan Lakskman v Bapu,* (1893) ILR 17 Bom 741 (purchaser's title defeated by registered deed); *Kesri Mal v Mubarak Husain,* (1911) 8 All LJ 663 : 10 IC 556 (purchase at auction sale set aside); *Chama Swami v Padala,* (1908) ILR 31 Mad 439 (purchase at sale held invalid); *Palamalai v South Indian Export Co,* (1910) ILR 33 Mad 334 : 5 IC 33 (purchase at sale voidable against creditors); *Sibanand v Jagmohan,* (1922) ILR 1 Pat 780 : 68 IC 707 : AIR 1922 Pat 499 (purchase at court sale set aside); *Subramania v Palaniappa Mudali,* (1913) 26 Mad LJ 94 : 21 IC 978; *Appana v Yelamarti,* (1926) 51 Mad LJ 358 : 97 IC 932 : AIR 1926 Mad 1082 (purchase invalid against attaching creditor); *Dwarka v Ali Muhammad,* 127 IC 17 : AIR 1930 Oudh 397 (purchase invalid against attaching creditor); cf *Ram Charan Lonia v Bhutan Das,* (1926) ILR 48 All 443; *Ammani Ammal v Ramaswami,* (1919) 37 Mad LJ 113 : 51 IC 57 (purchase from guardian held invalid); *Ganga Prasad v Hardei,* (1931) 29 All LJ 601 : 133 IC 536 : AIR 1932 All 32; *Govinda v Murugesa,* 135 IC 529 : AIR 1931 Mad 720; *Jagdeo Sahu v Mahabir Prasad,* (1934) ILR 13 Pat 111 : 153 IC 602 : AIR 1934 Rang 127.
2511. *Syamalarayudu v Subbarayudu,* (1898) ILR 21 Mad 143.
2512. *Karupan v Sakuth,* (1914) 26 Mad LJ 74 : 22 IC 253.
2513. *Gulzari Lal v Aziz Fatima,* (1919) ILR 41 All 372 : 50 IC 375.

for it is applied even when the party does not know that non-merger would be beneficial to him, as, for instance, in *Dinobundhu Shaw v Jogmaya Dasi,*[2514] where the third mortgagee was not even aware of the existence of the attachment when he supplied the money to discharge the first and second mortgages. The only case in which non-merger is beneficial, and when it is necessary to apply the equitable rule of intention is when the property is subject to other encumbrances.[2515] So, section 92 gives rights of subrogation only as against a mortgagor or any other mortgagee. In the case of a purchase of the whole of the equity of redemption, there are no rights of subrogation against the mortgagor, for the purchaser is himself the mortgagor.[2516] In the case of a purchase of a share of the equity of redemption, the purchaser has a right of subrogation against his co-mortgagor recognized in section 95. There would be no right of subrogation against a mortgagee, unless there was another mortgage. The result is, therefore, the same that the purchaser of the equity of redemption redeeming a mortgage is subrogated only when there is a co-mortgagor or when there are other encumbrances. So also, in the case of a puisne mortgagee redeeming a prior mortgage, there is no charge in the law, for under the TP Act, subrogation is irrespective of the existence of other encumbrances. A puisne mortgagee who has redeemed a prior mortgage would have the rights of a prior mortgagee against a mortgagor. In the case of the mortgagee purchasing the rights of the owner or mortgagor, section 101 expressly says that this does not effect merger as between such mortgagee, and a subsequent mortgagee. The law remains the same, but the fiction of intention which is not necessary in India has been dispensed with.

(15) Redemption by *Benamidar*

A *benami* purchaser is treated as a volunteer, and is not subrogated,[2517] and as he has acquired no interest in the property, he has not even a personal right of reimbursement.[2518] But when a person erroneously believes that he is entitled to stand in the shoes of the mortgagor, and pay off the mortgage, he was held entitled to be subrogated to the rights of the mortgagee.[2519]

(16) "Other than the Mortgagor"

These words indicate that a mortgagor is not subrogated. The discharge of a prior encumbrance by a mortgagor stands on a different footing to redemption by a purchaser, or by a puisne mortgagee. When a mortgagor pays a mortgagee debt for which he is liable, he is not allowed to set up the charge against a subsequent encumbrancer.[2520] The rule rests upon the same principles as section 43 of TP Act, for the mortgagor cannot use his subsequently

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2514. *Dinobundhu Shaw v Jogmaya Dasi,* (1902) ILR 29 Cal 154 : 29 IA 9 : 14 IC 496; see also *Girdhar Das v Ram Autar Singh,* (1903) 8 Cal WN 690; *Tara Sundari v Khedan Lal,* (1909) 14 Cal WN 1089 : 7 IC 980.
2515. *Raja of Kalahasti v Sree Mahant Prayag,* (1916) 30 Mad LJ 391, p 400 : 35 IC 224.
2516. *Peary Lal v Dina Nath,* AIR 1939 All 190.
2517. *Karuppan v Sakuth,* (1914) 26 Mad LJ 74 : 22 IC 253. But see *Parvati Ammal v Venkatarama,* (1925) 47 Mad LJ 316 : 81 IC 771 : AIR 1925 Mad 80, where the point was not considered.
2518. *Govinda v Lokanatha,* (1921) 40 Mad LJ 114 :62 IC 291 : AIR 1921 Mad 51.
2519. *Ram Krishna v Venkat Swami,* AIR 1945 Mad 175; *Perumal Reddiar v Suppiah Thevar,* AIR 1945 Mad 500; *Kelu v Chekkara Cheppan,* AIR 1937 Mad 451.
2520. *Sheodhyan Singh v Samichara Kuer,* [1962] 2 SCR 753 : [1961] 2 SCJ 540 : AIR 1963 SC 1879; *Syed Lutf Ali Khan v Futteh Bahadoor,* (1890) ILR 17 Cal 23 : 16 IA 129; *Raghunath Sahay v Lalji Singh,* (1896) ILR 23 Cal 397; *Bhaju Chowdhury v Chuni Lal,* (1906) 11 Cal WN 284; *Fazal Rab v Manzoor,* (1930) 28 All LJ 1222 :133 IC 142 : AIR 1931 All 76; *Audinatha v Bharathi,* (1929) 30 Mad LW 981 :124 IC 194 : AIR 1929 Mad 890.

acquired interest to defeat his grant to the puisne mortgagee,[2521] and the enlarged estate ensures for the benefit of the puisne mortgagee increasing the value of the security.

ILLUSTRATION

A mortgaged his property first to *B* and then to *C*. *B* obtained a decree for sale on his mortgage without joining *C*. *B* assigned his decree to *A*'s brother. *C* then obtained a decree for sale on his mortgage without joining *B*. *A*'s brother died leaving *A* as his sole heir. *C* was entitled to sell the property free of the prior mortgage encumbrance, for it would be inequitable to allow *A* to set up a prior mortgage against a mortgage he had himself granted.[2522]

The rule was applied in an obiter dictum in an Allahabad case,[2523] where a puisne mortgagee paid off a prior mortgage at the mortgagor's request, and it was said that he paid as the agent of the mortgagor and such payment could not be regarded as tender by him under section 74 and, therefore, he could not be regarded as the representative of the mortgagee within the meaning of section 244 of the Code of Civil Procedure. It may be mentioned that the above case was dissented from in a later case.[2524] In a suit for foreclosure, the mortgagee claimed recovery of the mortgage amount. The suit was decreed. The judgment-debtor transferred the equity of redemption relating to the mortgage to *J*, for a certain sum *J* paid the decree-holder and satisfied the decree for the mortgage amount. It was held that the money paid belonged to the mortgagor, and not to the mortgagee, *J* paid it for, and on behalf of, the mortgagor. Being the mortgagor, *J* was not entitled to subrogation.[2525]

Section 70, Indian Contract Act, 1872 is applicable even if the contract is void. Liability in such cases is not contractual. The foundation for the claim made under section 70 of the Indian Contract Act, 1872 is not a contract expressed or implied. The liability is quasi-contractual; it may resemble a contract, but in reality, it does not rest upon a contractual obligation. It is, therefore, immaterial, that there is no contract executed in such a case, or that the alleged contract is found ab-initio void, or rendered void subsequently by any circumstance.

(17) Exception to the Rule Against Subrogation of the Mortgagor

The rule that a mortgagor cannot derogate from his grant, has no application when the second mortgage is made expressly subject to the first, and in such a case if the mortgagor redeems the prior mortgage he is not estopped, for the second mortgage was made expressly of what was left after the first was satisfied.[2526] In a Nagpur case,[2527] the puisne mortgagee had expressly covenanted to redeem the prior mortgage, but failed to do so. The prior mortgagee foreclosed, and made a grant of a rent free tenancy of part of the property to the mortgagor. The court held that the mortgagor was entitled to retain this tenancy against the puisne mortgagee. If a puisne mortgagee retains part of the mortgage money to redeem a prior mortgage and fails to do so, he is liable in damages to the mortgagor.[2528] If the mortgagor has sold the property itself, ie, free from encumbrances, he is under a liability to discharge the mortgage for the benefit of his purchaser, and cannot claim subrogation when he does so. On

2521. *Manjappa v Krishnayya,* (1906) ILR 29 Mad 113; *Badan v Murari Lal* (1915) ILR 37 All 309 : 28 IC 973 : 13 All LJ 407; *Chelamanna v Parameswaran,* AIR 1971 Ker 3.
2522. *Badan v Murari Lal,* (1915) ILR 37 All 309 : 29 IC 973.
2523. *Tufail Fatma v Bitola,* (1905) ILR 27 All 400 followed in *Baijnath v Murlidhar,* (1907) 4 All LJ 349 but dissented from in *Gur Narain v Shadi Lal,* (1912) ILR 34 All 102 : 12 IC 607.
2524. *Gur Narain v Shadilal,* (1912) ILR 34 All 102 : 12 IC 607.
2525. *Assar Ali Khan v Baijnath Prasad,* AIR 1983 All 197.
2526. Ghose, Law of Mortgages, p 325; Jones, p 679.
2527. *Amarchand v Sardar Singh,* 82 IC 190 : AIR 1925 Nag 90.
2528. *Hakim Ali v Dalip Singh,* (1913) 11 All LJ 478 : 19 IC 676.

the other hand, if the mortgagor has sold the equity of redemption, the purchaser buys subject to the mortgage and although as between the mortgagor and the mortgagee, the liability to pay the debt is still on the mortgagor. He (the mortgagor), is entitled to be subrogated if he is afterwards compelled to pay it.[2529] It has to be considered whether, in view of the section as it now stands, these principles can be given effect to. Under the section, the disability of the mortgagor appears to be absolute, and it is doubtful if any exception may now be made in favour of the mortgagor as regards subrogation.

Although the word "mortgagor" includes a purchaser of the equity of redemption, yet the purchaser of an equity of redemption is not excluded from the right of subrogation. This is because: (1) he is under no covenant or personal liability to the mortgagee whose mortgage he discharges; and (2) the principle that the mortgagor cannot derogate from his grant has no application to him. A vendee from a mortgagor who pays off a prior mortgage out of money left with him by his vendor, which money he is bound to pay under the terms of the contract for sale cannot claim to be subrogated to the rights of the mortgagee, unless a registered instrument expressly creating such right of subrogation was executed.[2530]

(18) Covenant Excludes Subrogation

The rule against the subrogation of a mortgagor is extended to any purchaser of the equity of redemption or encumbrancer who discharges a prior encumbrance, which he is by contract, express or implied, bound to discharge. A person cannot claim subrogation when he simply performs his own obligation or covenant.[2531] So also, if the purchaser has covenanted to discharge the puisne mortgagee, he cannot on redeeming the prior mortgage, use it as a shield against the puisne mortgagee;[2532] and this rule has been applied to a transferee from the purchaser with notice of the covenant.[2533] If a prior mortgagee purchasing the equity of redemption covenants to discharge a puisne mortgage, he cannot use the prior mortgage as a shield against the puisne mortgagee.[2534]

The rule that a covenant excludes subrogation was applied in the following case:[2535]

A and *B* effected a partition of property subject to a mortgage of ₹ 11,000. By the terms of the partition, *A* covenanted to pay ₹ 1,000 and *B* covenanted to pay ₹ 10,000 of the mortgage debt. *B* also covenanted that if any excess over ₹ 1,000 were levied from *A*, he would pay the excess and that *A* should have a charge for the excess on *B*'s share. *B* sold his share to *C* and paid part of the mortgagee's decree. There was a deficit of ₹ 5,000 which *A* paid. *A* then sued to enforce his charge for this amount from *C* who had purchased with notice of the charge. *C* claimed to be subrogated to the mortgage which had been partly discharged with the purchase money. The court held that as *C* had notice of the covenant in the partition deed to pay the excess, he could not claim

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2529. Ghose, Law of Mortgages, p 373; Jones, pp 678, 863.
2530. *Raj Bahadur Lal v Sitla Prasad,* AIR 1951 All 596; *Sita Ram v Sharda Narain,* (1951) ILR 2 All 384 : (1950) All LJ 570 : AIR 1950 All 682. See note "Advance to pay off a Mortgage".
2531. *Surjiram v Barhamdeo,* (1905) 2 Cal LJ 202; *Satnarain Tewari v Chowdhuri,* (1911) 14 Cal LJ 500 : 11 IC 649; *Jaidevi v Sripat,* 147 IC 628 : AIR 1934 Oudh 129.
2532. *Bisseswar Prosad v Lala Sarnam Singh,* (1907) 6 Cal LJ 134; *Govindasami Tevan v Dorasami,* (1910) ILR 34 Mad 119 : 6 IC 781; *Mulchand v Radhakisan,* 100 IC 272 : AIR 1927 Nag 100; *Bansidhar Dhandania v Kairoo Mandar,* (1938) ILR 17 Pat 666 : 176 IC 655 : AIR 1938 Pat 532.
2533. *Lakshmi Achi v Narayanasami,* (1930) ILR 53 Mad 188 : 124 IC 497 : AIR 1930 Mad 51.
2534. *Thiruvadi Ayyangar v P Janaki,* (1923) 45 Mad LJ 693 : 75 IC 1016 : AIR 1934 Mad 103. See also note "Advance to pay off a Mortgage."
2535. *Abdul Razak Rowther v Abdul Rahiman Sahib,* (1933) 65 Mad LJ 390 : 149 IC 287 : AIR 1933 Mad 715.

subrogation. Apart from this, it is submitted that subrogation was excluded by the rule against partial subrogation.

Bisseswar Prosad v Lala Sarnam Singh,[2536] this exception to subrogation was explained to be on the ground that the doctrine of subrogation being a doctrine of equity jurisprudence, it "'will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities." In *Malireddi Ayyareddi v Gopalakrishnayya,*[2537] the Privy Council said that the rule of subrogation would not apply if the owner of the property had covenanted to pay the later debt. In *Muhammad Sadiq v Ghaus Muhammad,*[2538] the purchaser of the equity of redemption undertook to discharge two mortgages, but discharged only the prior, and not the puisne mortgage. When the puisne sued, it was held that the purchaser was not entitled to use the prior mortgage as a shield.

ILLUSTRATIONS

(1) *A* gave a first mortgage to *B*, a second mortgage to *C* and a third mortgage again to *B*. Out of the consideration for the third mortgage, *B* retained ₹ 499 for the discharge of the first mortgage and ₹ 790 with which he agreed to pay off *C*'s mortgage. *B* did not pay off *C*'s mortgage. *C* sued on his mortgage and *B* was not entitled to use the first mortgage as a shield.[2539]

(2) *A* purchased a half share in certain villages and covenanted to pay half the amount due on a mortgage of those villages, and retained part of the price for that purpose. He did not pay until the mortgagee had brought the villages to sale ie then paid the whole decretal amount plus 5 per cent to set aside the sale. He was subrogated as to the half share he had not covenanted to pay. But he was not subrogated as to the half he had covenanted to pay, nor as to the 5 per cent paid to the auction purchaser.[2540]

The rule that covenant excludes subrogation was overlooked in some cases decided under section 74 in which a puisne mortgagee was subrogated to a prior mortgage he had covenanted to discharge.[2541] In a Calcutta case,[2542] property subject to three mortgages was sold on a false representation that it was subject only to the second and third mortgages. The purchaser covenanted to pay these, and retained part of the price for that purpose. However, when he discovered the first mortgage, he paid the first and second, but not the third mortgage. When the third mortgagee sued to enforce his mortgage, the purchaser was allowed to use the first mortgage as a shield, but not the second. In this case, the purchaser was allowed to use a prior mortgage as a shield against a later mortgage which he had covenanted to discharge, but this was an exceptional case, for the judgment shows that the third mortgagee was a privy to the fraud on the purchaser.

2536. *Bisseswar Prosad v Lala Sarnam Singh,* (1907) 6 Cal LJ 134, p 138.
2537. *Malireddi Ayyareddi v Gopalakrishnayya,* (1924) ILR 47 Mad 190 : 51 IA 140 : 79 IC 592 : AIR 1924 PC 36.
2538. *Muhammad Sadiq v Ghaus Muhammad,* (1911) ILR 33 All 101 : 7 IC 200; *Dalip Rai v Birnaik* (1909) 6 All LJ 549 : 2 IC 207; *Makkhan Lal v Natthi,* (1923) 21 All LJ 382 : 74 IC 640 : AIR 1923 All 509; *Maqsud Ali Khan v Abdullah Khan,* (1928) ILR 50 All 218 : 108 IC 728 : AIR 1928 All 77; *Tulsi Ram v Radha Kishan,* 146 IC 679 : AIR 1933 Lah 810.
2539. *Balbhaddra v Sheomangal,* 130 IC 301 : AIR 1931 All 347 : on app (1932) All LJ 413 : 136 IC 824.
2540. *Jag Mohan v Jugal Kishore,* (1932) 36 Cal WN 4 : 54 Cal LJ 407 : 137 IC 475 : AIR 1932 PC 99.
2541. *Mohanlal v Mahomed Sujat,* 144 IC 969 : AIR 1933 Nag 155; *Krishnamurthy Chettiar v Sathappa Chettiar,* (1933) ILR 56 Mad 517 : 64 Mad LJ 523 : 143 IC 780 : AIR 1933 Mad 398; *Jagdeo Sahu v Mahabir Prasad,* (1934) ILR 13 Pat 111 : 153 IC 602 : AIR 1934 Pat 127.
2542. *Har Shyam v Shyam Lal,* (1916) ILR 43 Cal 69 : 31 IC 22.

A purchaser at a court sale of property subject to a mortgage is not under an implied covenant to discharge the mortgage and when he pays it off, he is entitled to subrogation.[2543]

(19) Advance to Pay Off a Mortgage: Third Paragraph

This paragraph makes a very important alteration in the law. "A person who has advanced to a mortgagor money with which the mortgage has been redeemed" may come within one of three categories; namely, he may be (a) a simple money creditor; (b) a person who has an agreement with the mortgagor that the mortgage redeemed with the money will be kept alive for his benefit; or (c) a purchaser or puisne mortgagee by the same transaction. As will be seen presently, the rights of such a person are different accordingly as he comes within one or the other of the categories.

(a) Simple money creditor

The rule in India as stated by the Privy Council is that an officious, or voluntary payment carries with it no right of reimbursement, or subrogation.[2544] There is no law in India by which a creditor who had advanced money is entitled to a charge on the property acquired by the debtor with the money advanced.[2545] In *Ram Het v Pokhar,*[2546] the lender advanced money for the discharge of a mortgage decree. He made the advance on an agreement of mortgage, but accepted a promissory note in lieu of a mortgage. He was not entitled to subrogation, although two years later he made a fresh advance on a mortgage for the consolidated amount of the fresh note and the promissory note. The court held that the mere fact that money is borrowed, and is used for the purpose of paying a previous charge does not entitle the lender to the benefit of the discharged security. In such a case, the right to the benefit depends upon the existence of an agreement between the borrower and the lender.[2547]

Where there is no agreement, the ordinary rule is that a man having the right to act in either of the two ways, shall be assumed to have acted according to his interest. Where a tenant for life pays off a charge upon his inheritance, he is presumed to have intended to keep the charge alive.[2548] This presumption can, of course, be displaced by evidence to the contrary.[2549]

(b) A person who has an agreement with the mortgagor that the redeemed mortgage should be kept alive for his benefit

It was said in an English case,[2550] that very slight evidence is sufficient to establish an agreement that the lender is subrogated to the rights of the original creditor; and J Mookerji, in *Gurdeo Singh v Chandrikah Singh*[2551] spoke of conventional subrogation as arising by agreement, express or implied. Such an agreement was presumed in *Dinobundhu*

2543. *Ramamurthy v Bangaru,* (1934) Mad WN 218 : 148 IC 735 : AIR 1934 Mad 268; *Narayan v Parameshvarappa,* (1942) ILR Bom 169 : 44 Bom LR 20 : 199 IC 718 : AIR 1942 Bom 98.
2544. *Ram Tuhal Singh v Biseswar Lall,* (1875) 23 WR 305 : 2 IA 131; *Govinda v Lokanatha,* (1921) 40 Mad LJ 114 : 62 IC 291 : AIR 1921 Mad 51; *Adari Sanyasi v Nookalamma,* (1931) ILR 54 Mad 708 : 131 IC 487 : AIR 1931 Mad 592; *Lala Man Mohan Das v Janki Prasad,* 72 IA 39 : (1945) All LJ 51 : 47 Bom LR 250 : 49 Cal WN 195 : (1945) 1 Mad LJ 97 : 221 IC 408 : AIR 1945 PC 23.
2545. Re *Annapurna Co Ltd,* (1926) 24 All LJ 347 : 93 IC 33 : AIR 1926 All 397; *Ponnammal v Pichai,* (1927) 52 Mad LJ 33 : 99 IC 687 : AIR 1927 Mad 204.
2546. *Ram Het v Pokhar,* (1931) ILR 7 Luck 237 : 134 IC 1093 : AIR 1932 Oudh 54.
2547. *Gulzari Lal v Aziz Fatima,* (1919) ILR 41 All 372 : 50 IC 375.
2548. *Gokuldas v Puranmal,* 11 IA 126, pp 133–134.
2549. *Braham Prakash v Manbir Singh,* AIR 1963 SC 1607.
2550. Re *Wrexham Mold, etc,* (1899) 1 Ch 440, p 463.
2551. *Gurdeo Singh v Chandrikah Singh,* (1909) ILR 36 Cal 193 : 1 IC 913.

Shaw v Jogmaya Dasi[2552] and in *Dinobundhu Shaw v Jogmaya Dasi;*[2553] and seems also to have been presumed in a case[2554] from Punjab where TP Act was previously not in force. It has also been implied in cases where the money has been advanced under a contract of sale or mortgage,[2555] but not if the sale goes off for the purchaser's default.[2556] In a Patna case,[2557] an invalidly registered sale deed was admitted as evidence of a covenant to pay off a mortgage and subrogation was allowed, though if the deed had been validly registered, subrogation should have been refused on the ground that it was excluded by the purchaser's covenant. However, these cases so far as they refer to subrogation by agreement are no longer law, for under the third clause of the section, the agreement of subrogation must be express, and in writing and registered.[2558] In a Oudh case,[2559] subrogation was refused as there was no written and registered agreement. The old doctrine of conventional subrogation was opposed to section 54 of TP Act that a mere contract does not create any interest in or charge on property.

Three mortgages *X*, *Y* and *Z* were executed successively by the member of a joint Hindu family. Then there was a partition between the two brothers, *G* and *V* who were the coparceners at the time of the partition. At this partition a larger share was allotted to *G's* branch in consideration of his paying all the family debts, and relieving *V's* branch of all liability in respect of them. After this, *G* executed mortgages *P* and *Q* for paying off mortgages *X* and *Y* respectively. Both the mortgages *P* and *Q* contained covenants by *G* that the mortgages under them should be subrogated to the rights under *X* and *Y* respectively, *X* and *Y* were accordingly discharged. The mortgagee under *Z* then sued on his mortgage. The mortgagees under *P* and *Q* set up their right of subrogation under mortgages *X* and *Y*, and claimed priority over *Z*. It was held that the agreement inter se between *G* and *V* would not in any way affect the rights of the mortgagees under *P* and *Q*, as there was no personal obligation on "their" part to pay off the mortgage *Z*. It was held that the contention that where there are more than one mortgagor, the agreement under section 92, para 3, must be with all of them, is not tenable. Hence, the covenant by *G* alone in this case would give the right of subrogation though in regard to the mortgages redeemed, he was only a co-mortgagor.[2560]

(c) A purchaser or puisne mortgagee by the same transaction

Very often when a person advances money to a mortgagor to pay off an earlier mortgage, he secures the loan by a puisne mortgage or he becomes the purchaser. Usually in such cases, the purchaser or puisne mortgagee retains in his own hands out of the consideration money the sum required for redeeming the prior mortgage, and a covenant or acknowledgment is inserted in the deed of sale or puisne mortgage that the money so retained will be paid over to the prior mortgagee. When such a purchaser or puisne mortgagee pays the money either himself, or through the mortgagor to the prior mortgagee, the question arises whether he is

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2552. *Dinobundhu Shaw v Jogmaya Dasi,* (1902) ILR 29 Cal 154 : 29 IA 9 : 14 IC 496.
2553. *Dinobundhu Shaw v Jogmaya Dasi,* (1906) ILR 33 Cal 1133, p 1155.
2554. *Sita Ram v Kartar Singh,* 146 IC 239 : AIR 1933 Lah 416.
2555. *Tangya Fala v Trimbak,* (1916) ILR 40 Bom 646, p 652 : 35 IC 794; *Ponnammal v Pichai,* (1927) 52 Mad LJ 33 : 99 IC 687 : AIR 1927 Mad 204.
2556. *Ponnammal v Pichai,* AIR 1927 Mad 204; *Adari Sanyasi v Nookalamma,* (1931) ILR 54 Mad 708 : 131 IC 487 : AIR 1931 Mad 592.
2557. *Jagdeo Suhu v Mahabir Prasad,* (1934) ILR 13 Pat 111 : AIR 1934 Pat 127 : 153 IC 602.
2558. *Ram Het v Pokhar,* (1931) ILR 7 Luck 237 : 134 IC 1093 : AIR 1932 Oudh 54; *Vithaldas v Tukaram,* AIR 1941 Bom 153 : 43 Bom LR 225 : 194 IC 632.
2559. *Nawab Syed Mohammed Raza v Bilquis Jehan Begam,* (1934) ILR 9 Luck 717 : 149 IC 84 : AIR 1934 Oudh 213.
2560. *Shambatta v Narayana,* (1951) 1 Mad LJ 596 : AIR 1951 Mad 917.

entitled to the benefit of the prior mortgage. If there is an express writing and a registered agreement contained in the deed of sale or mortgage, or in a separate written and registered instrument, that he shall have the right of subrogation then clearly, he comes under the third para of the section. The difficulty arises where there is no such agreement in writing registered. The question arises whether such a person can claim to be entitled to subrogation as a purchaser of the equity of redemption or as a puisne mortgagee under the first paragraph of the section. Further question is, whether such a person can be said to have redeemed the mortgage at all. When money retained in the hands of such a person is paid to the prior mortgagee, is such payment made by such person on his own account or as agent of the mortgagor. Even before the new section came into force when a registered agreement was not necessary, many of these questions arose giving rise to a conflict of judicial opinion.

If the person advancing money to redeem a mortgage secures the loan by a puisne mortgage or if he is a purchaser and the money is part of the price, he is subrogated either as puisne mortgagee, or as purchaser of the equity of redemption.[2561] It does not matter if the puisne mortgage,[2562] or deed of sale was executed after the discharge of the prior mortgage with the money advanced, unless, of course, the person advancing the money was not aware of the prior mortgage, or the purpose for which the money was being utilized.[2563] However, in an Allahabad case,[2564] it was said that when a puisne mortgagee paid at the mortgagor's request, he paid as agent of the mortgagor and was not subrogated and there is a similar observation as to a purchaser advancing money to redeem a mortgage in a Calcutta case.[2565] This has been held to be incorrect in the some cases,[2566] for the object of the puisne mortgagee or purchaser in providing money to pay off a mortgage is to benefit himself, and not any mesne encumbrancer. Justice Seshagiri Ayyar, said that what must be taken into account is not the hand which pays the money, but the intention;[2567] and in *Dinobundhu's case*[2568] it was the mortgagor who paid the prior mortgagee the money provided by the puisne mortgagee.

(20) Allahabad High Court

In *Totaram v Ramlal,*[2569] a Full Bench of the Allahabad High Court consisting of three judges had held that a third mortgagee who had retained in his hand moneys to pay off the earlier mortgages, but had paid off only the first mortgage, was entitled to be subrogated to the first mortgagee as against the second. The court distinguished *Muhammad Sadiq v Ghaus Mahomed,*[2570] and *Mohesh Lal v Mohunt Bawan Das,*[2571] and rejected the argument that in such a case the third mortgagee was a mere agent of the mortgagor who, of course, is not

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2561. *Gangadhara v Sivarama,* (1884) ILR 8 Mad 246; *Rupabai v Audimulan,* (1887) ILR 11 Mad 345, p 353; *Seetharama v Venkatakrishna,* (1893) ILR 16 Mad 94; *Raoji v Narayan,* (1896) PJ 629; *Purnamal v Venkata,* (1897) ILR 20 Mad 486; *Har Narain v Har Prasad,* (1914) 12 All LJ 470 : 23 IC 827; *Chhotey Lal v Dharajit,* 96 IC 1054 : AIR 1926 All 744.
2562. *Abudai Ammal v Ramasami,* 82 IC 846 : AIR 1925 Mad 129; *Venkatachari v Karuppan Chetty,* (1934) 67 Mad LJ 91 :150 IC 126 : AIR 1934 Mad 256.
2563. *Jai Pragash v Rup Manjari,* 71 IC 940 : AIR 1923 Pat 199.
2564. *Tufail Fatma v Bitola,* (1905) ILR 27 All 400; following *Baijnath v Murlidhar,* (1907) 4 All LJ 349; but dissented from in *Gur Narain v Shadi Lal,* (1912) ILR 34 All 102 : 4 IC 607.
2565. *Lala Dilawar v Dewan Bolakiram,* (1885) ILR 11 Cal 258.
2566. *Ram Narayan Sah v Sahdeo Singh,* (1922) ILR 1 Pat 332 : 67 IC 221 : AIR 1922 Pat 181; *Narain Prasad v Narain Singh,* (1930) ILR 52 All 1037 : 131 IC 599 : AIR 1931 All 40.
2567. *Abarthoramankutti v Ittikaprambilas,* (1920) Mad WN 143 : 55 IC 658.
2568. (1902) ILR 29 Cal 154 : 29 IA 9 : 14 IC 49.
2569. *Totaram v Ramlal,* (1932) ILR 54 All 897 : 20 All LJ 627 : 139 IC 107 : AIR 1932 All 469.
2570. *Muhammad Sadiq v Ghaus Mahomed,* (1911) ILR 33 All 101 : 7 IC 200.
2571. *Mohesh Lal v Mohunt Bawan Das,* (1883) ILR 9 Cal 961 : 10 IA 162.

entitled to be subrogated. The court also observed that in any event the third mortgagee was a person entitled to the right under the amended section 92. A subsequent Full Bench of five judges in *Hira Singh v Jai Singh*[2572] disapproved of the reasoning in *Totaram's* case, and pointed out that section 92 itself demonstrated the difference between a person redeeming a mortgage, and a person advancing moneys by which the mortgage is redeemed:

> ... Where a person with whom money has been left for payment to a prior mortgagee pays it off, he is really not himself redeeming the mortgage but redeeming it as the agent of the mortgagor and has in substance advanced money to the mortgagor with which the mortgage has been redeemed. He cannot get the rights of subrogation unless there is a written and registered agreement to that effect. But where a person has had to pay off a prior mortgage out of his own funds and pays money in addition to any money that might have been left in his hand by the mortgagor or vendor, he himself has redeemed the mortgage, he comes under the first para of the section.

The court also held that the words "who has advanced to a mortgagor money..." in the third para were very wide, and included both a simple money creditor, and a mortgagee who took a mortgage of the property for his advance. This decision, and the distinction drawn in it between the first and the third para of the section, has been specifically approved by a later Full Bench of seven judges in *Lala Sita Ram v Sharda Narain,*[2573] a case in which it was held that a purchaser who was bound by a contract to pay off the mortgage with the money left with him by the mortgagor, and who does so, cannot claim to be subrogated to the rights of the mortgagee whom he has paid up.

In *Abdul Hamid v Ram Kumar,*[2574] a Full Bench of the Oudh Chief Court (J Bennett, dissenting) had held following *Totaram's* case,[2575] and certain earlier decisions, and dissenting from *Hira Singh's* case,[2576] and *Lakshmi Amma's* case,[2577] that a subsequent mortgagee who redeems a prior mortgage with money left with him for the purpose by the mortgagor is subrogated to the rights, even though there is no registered agreement to that effect. This view is not likely to be followed in view of the decision in *Lala Sita Ram's* case.[2578]

(21) Madras High Court

In *Lakshmi Amma v Shankara Narayan,*[2579] a Full Bench recognised the distinction between paras 1 and 3 of section 92, and held that a usufructuary mortgagee who had undertaken to pay off three prior mortgages, but had only paid off two, was not subrogated to the rights of the mortgagees in the first two mortgages, as against the third mortgagee. This decision has been followed, and clarified in *Subbarayudu v Lakshminarasamma.*[2580]

(22) Bombay High Court

In *Narayan v Parameshvarappa,*[2581] the court followed its own earlier judgment in *Vithaldas v Tukaram,*[2582] and the judgments of the Madras High Court in *Lakshmi Amma's*

2572. *Hira Singh v Jai Singh,* (1937) ILR All 880 : (1937) All LJ 659 : 171 IC 153 : AIR 1937 All 588.
2573. *Lala Sita Ram v Sharda Narain,* (1951) ILR 2 All 384 : (1950) All LJ 970 : AIR 1950 All 682.
2574. *Abdul Hamid v Ram Kumar,* (1942) ILR 17 Luck 755 : 200 IC 146 : AIR 1942 Oudh 200.
2575. (1932) ILR 54 All 897 : 20 All LJ 627 : 139 IC 107 : AIR 1932 All 489.
2576. (1937) ILR All 880 : AIR 1937 Lah 1 : 171 IC 153 : AIR 1937 All 588.
2577. (1935) ILR 59 Mad 359 : 160 IC 137 : 70 Mad LJ 1 : AIR 1936 Mad 171.
2578. (1951) ILR 2 All 384 : (1950) All LJ 970 : AIR 1950 All 682.
2579. *Lakshmi Amma v Shankara Narayan,* (1935) ILR 59 Mad 359 : 160 IC 137 : 70 Mad LJ 1 : AIR 1936 Mad 171.
2580. *Subbarayudu v Lakshminarasamma,* (1939) 2 Mad LJ 533 : 189 IC 435 : AIR 1939 Mad 949.
2581. *Narayan v Parameshvarappa,* (1942) ILR Bom 169 : 44 Bom LR 20 : 199 IC 718 : AIR 1942 Bom 98.
2582. *Vithaldas v Tukaram,* (1941) 43 Bom LR 225 : 194 IC 632 : AIR 1941 Bom 153.

case, and of the Allahabad High Court in *Hira Singh's* case, [2583] and held that a purchaser paying off a prior mortgage with money retained for the purpose is not entitled to be subrogated. The court disagreed with *Totaram's case.*[2584] This decision has been followed in *Bishnu Balkrishna v Sankarappa Wagarali.*[2585]

(23) Other Courts

The Calcutta High Court in *Mukaram Marwari v Muhammad Hosain,*[2586] the Patna High Court in *Rai Bahadur Bansidhar Dhandhania v Kairoo Mandar,*[2587] *Dhulin Kamlapati v Jageshar,*[2588] and *Tika Sao v Hari Lal,*[2589] the Nagpur High Court in *Taibai v Wasudeorao,*[2590] and the Gujarat High Court in *Laxmidas v Lohana Bai*[2591] have all accepted the same view as the Allahabad High Court in *Hira Singh's* case, and the Madras High Court in *Lakshmi Amma's* case.

(24) Privy Council

In *Lala Manmohan Das v Janki Prasad,*[2592] the Privy Council also recognised the same distinction between the first and third paras of section 92, the former dealing with persons having an existing interest in property, and the latter with strangers who acquire an interest in property.

The weight of authority clearly seems to be in favour of the view that the two paragraphs are mutually exclusive, and that the first paragraph deals with a person who having pre-existing interest in the property redeems a prior mortgage to protect his own interest, and that a person who acquires interest only by advancing money with which the prior mortgage is satisfied does not come within the first paragraph even though he secures his advance by a mortgage or becomes a purchaser. Such a person comes within the third para, and can only claim subrogation if there be an written and registered agreement between him and the mortgagor. The right of subrogation is denied to such a person on a variety of grounds, eg that such a person when he pays over the retained money either himself or through the mortgagor, does not pay his own money and cannot be said to redeem the prior mortgage himself, or that he only performs his own obligation under his covenant, and covenant includes subrogation, or that he pays the mortgagors money as his agent and the redemption is by the mortgagor. However, the real reason seems to be that such a person having no pre-existing interest does not come within the first para and that although he is a person who comes within the third para, he cannot claim subrogation because there is no registered agreement giving him that right as required by that section. Prior to the amendment, such a person could only claim not legal, but only conventional subrogation, ie, based on agreement express or implied and after the amendment, he cannot claim legal subrogation as laid down in the first para, but can only claim conventional subrogation as modified by the third para if he satisfies the requirements of that para. The third paragraph, by requiring the agreement to

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2583. (1937) ILR All 880 : (1937) All LJ 659 : 171 IC 153 : AIR 1937 All 588.
2584. (1932) ILR 54 All 897 : 20 All LJ 627 :139 IC 107 : AIR 1932 All 489.
2585. *Bishnu Balkrishna v Sankarappa Wagarali,* (1942) 44 Bom LR 415 : 202 IC 392 : AIR 1942 Bom 227.
2586. *Mukaram Marwari v Muhammad Hosain,* (1935) ILR 62 Cal 677 : 161 IC 48 : AIR 1936 Cal 42.
2587. *Rai Bahadur Bansidhar Dhandhania v Kairoo Mandar,* (1938) ILR 17 Pat 666 : AIR 1938 Rang 532.
2588. *Dhulin Kamlapati v Jageshar,* (1938) ILR 18 Pat 342, p 352.
2589. *Tika Sao v Hari Lal,* (1940) ILR 19 Pat 752 : 189 IC 513 : AIR 1940 Rang 385.
2590. *Taibai v Wasudeorao,* (1938) ILR Nag 206 : AIR 1937 Nag 372.
2591. *Laxmidas v Lohana Bai,* (1969) ILR Guj 323 : 11 Guj LR 108 : AIR 1970 Guj 73.
2592. *Lala Manmohan Das v Janki Prasad,* 72 IA 39 : (1945) All LJ 51 : 47 Bom LR 250 : 49 Cal WN 195 : (1945) 1 Mad LJ 97 : 221 IC 408 : AIR 1945 PC 23.

be written and registered, has restricted the application of the doctrine of equitable or conventional subrogation.

(25) Effects of Subrogation

The section gives the puisne mortgagee redeeming a prior mortgage the same rights as regards redemption, foreclosure, and sale as the prior mortgagee. In the old section 74, the same idea was expressed by the words "all the rights and powers of the mortgagee as such." The rights are the same rights as the prior mortgagee had at the time he was redeemed.[2593] He is entitled to the same rate of interest as the prior mortgagee;[2594] and if any part of the property mortgaged to the prior mortgagee has ceased to be subject to his mortgage, the subrogated mortgagee acquires only the prior mortgagee's rights in what is left.[2595] The case of *Delhi and London Bank v Bhikari*[2596] is an illustration of the section. Two properties *X* and *Y* were mortgaged to *A*, and then *Y* was mortgaged to *B*. *A* and *B* each sued for sale without making the other a party, and purchased at the sale. *B* then redeemed *A*. *B* having purchased *Y* and cleared off the mortgage, he is the owner of *Y*; but he has only the mortgagee rights of *A* in *X*, and not the rights of *A* as the purchaser of the equity of redemption of *X*. Therefore, *B* is liable to be redeemed by *A* as to *X*. When a puisne mortgagee redeems a prior mortgagee, he acquires the rights of the prior mortgagee qua mortgagee. If the prior mortgagee has granted a lease, the puisne mortgagee does not acquire by subrogation any rights as landlord. Any subsidiary rights such as leasehold rights created by the mortgagee come to an end *ipso facto* on redemption.[2597]

(26) Interest

The purchaser of the equity of redemption paying off a prior mortgage is subrogated not only as to the principal sum paid for redemption, but also as to interest on that sum. It has been said that the fact of his taking possession does not prejudice his right to interest.[2598] In other cases, it has been said that if he is in possession, his claim to interest is inadmissible,[2599] or only admissible to the extent the profits fall short of the interest.[2600]

(27) "Against the Mortgagor or Any Other Mortgagee"

The effect of these words is that a puisne mortgagee or a co-mortgagor redeeming is always subrogated, and a purchaser of the equity of redemption is subrogated if there is another mortgagee, while a purchaser of part of the equity of redemption is subrogated as against the mortgagor. This as explained above, bears the same result as is achieved in the case of a purchaser by the rule of intention enacted in the old section 101, and applied in the case of *Gokuldas v Puranmal*.[2601]

(28) Mortgages of a Different Class

In the case of a puisne mortgagee redeeming a prior mortgage of a different class, there was, under the repealed section 74, some difficulty in applying the doctrine of

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2593. *Ramamurthi v Bangaru*, (1934) Mad WN 218 : 148 IC 735 : AIR 1934 Mad 268; *Narayan v Parmeshvarappa*, (1942) ILR Bom 169 : 44 Bom LR 20 : 199 IC 718 : AIR 1942 Bom 98.
2594. *Narayan v Nathmal*, 65 IC 275 : AIR 1922 Nag 155.
2595. *Muhammad v Kalyan Das*, (1896) ILR 18 All 189.
2596. *Delhi and London Bank v Bhikari*, (1902) ILR 24 All 185.
2597. *Alagirisami Mudali v Akkrulu Naidu*, (1921) 41 Mad LJ 402 : 69 IC 651 : AIR 1921 Mad 393.
2598. *Malireddi Ayyareddi v Gopala Krishnayya*, 53 IC 493 : affd in 51 IA 140 : (1924) ILR 47 Mad 90 : 79 IC 592 : AIR 1921 PC 36; *Pichai Konai v Narasimha*, (1930) 58 Mad LJ 343 : 125 IC 247 : AIR 1930 Mad 471.
2599. *Buppu v Ventachalapathi Ayyar & Co*, (1934) 64 Mad LJ 606 :148 IC 311 : AIR 1934 Mad 227.
2600. *Ramchandra v Panalayammal*, (1935) 68 Mad LJ 717 : AIR 1935 Mad 360.
2601. *Gokuldas v Puranmal*, (1884) ILR 10 Cal 1035 : 11 IA 126 (PC).

subrogation. In an Allahabad case[2602] the puisne mortgagee was a usufructuary mortgagee who paid off a prior simple mortgage and the court dealt with the case under section 72, and held that having preserved the security he was entitled to tack the amount paid onto his usufructuary mortgage, and retain possession until the whole amount was discharged. Until this section he would have the rights both of simple and usufructuary mortgagee. He could enforce these rights separately, for, the remedies being different, section 67A would not apply. He could sue for sale on the simple mortgage, subject to his right of possession under the usufructuary mortgage.

In a Madras case,[2603] the court said that subrogation is not applicable when the mortgagor gives two successive usufructuary mortgages. However, it is submitted that the puisne usufructuary mortgagee can redeem the prior usufructuary mortgage and take possession until he is paid the amount due on both mortgages. In the case cited, however, the puisne mortgagee had covenanted to discharge the prior mortgage, and the court omitted to notice that he was excluded from subrogation by his own covenant.

(29) Partial Subrogation

Prior to the enactment of section 92, there was considerable divergence of decisions on the question as to whether the right of subrogation was available even though the mortgage liability was only partially discharged. In *Gurdeo Singh v Chandrikah,*[2604] J Mookerjee had held that there could be no subrogation unless the prior encumbrancer was fully satisfied. A contrary view had been taken by the Allahabad[2605], Madras,[2606] and Nagpur[2607] High Courts. Though in theory much can be said for the Allahabad view, it would in practice lead to much complication and difficulty in apportioning claims arising out of subrogation. The matter was put beyond doubt, however, by two decisions of the Privy Council[2608] in which the opinion of J Mookerjee was approved. The fourth para of section 92 now accepts that view, and makes a redemption in full of the prior mortgage a necessary condition which must be satisfied before the right to subrogation can be claimed.

In some cases, subrogation has been allowed when the prior mortgage has been discharged, but only a part of the money has been advanced by the subrogee.[2609] What is essential is that the whole debt must be paid up, and not that the whole debt must be paid up by one person. In such a case, all persons making the payment are entitled to the benefit of the right.[2610]

2602. *Abdul Qayyum v Sadruddin,* (1905) ILR 27 All 403.
2603. *Koopmia v Chidambaram,* (1896) ILR 19 Mad 105.
2604. *Gurdeo Singh v Chandrikah,* (1909) ILR 36 Cal 193 : 1 IC 913; foll in *Dulhin Sonakuer v Manail Ahmed,* 48 IC 779; *Lekhraj Mahton v Jang Bahadur,* 89 IC 822 : AIR 1926 Pat 23; *Ma Lon v Ma Nyo,* (1923) ILR 1 Rang 714 : 79 IC 766 : AIR 1924 Rang 204; *Kanhaiya Lal v Ikram Fatima,* (1933) ILR 8 Luck 103 : 9 Oudh WN 557 : 139 IC 358 : AIR 1932 Oudh 268.
2605. *Udit Narayan v Asharfi Lal,* (1916) ILR 38 All 502 : 35 IC 732.
2606. *Venkataramana v Rangiah,* (1922) 41 Mad LJ 399 : 70 IC 212 : AIR 1922 Mad 249.
2607. *Janardhan Sadashiv v Mandanlal Mangalal,* 183 IC 651 : AIR 1939 Nag 215.
2608. *Janaki Nath v Pramatha Nath Malia,* 67 IA 82 : (1940) All LJ 550 : 42 Bom LR 339 : 44 Cal WN 261 : (1940) 1 Mad LJ 446 : AIR 1940 PC 38; *Madhoram Sand v Kirtyanand,* (1944) ILR 24 Pat 89 : 47 Bom LR 603 : 49 Cal WN 75 : (1944) 2 Mad LJ 343 : 218 IC 244 : AIR 1944 PC 96.
2609. *Rupabai v Audimulam,* (1887) ILR 11 Mad 345; *Saminatha v Krishna,* (1915) ILR 38 Mad 548 : 28 IC 966; *Ram Sarup v Ram Richhpal,* (1929) ILR 51 All 920 : 119 IC 84 : AIR 1929 All 621; *Abdul Razak Rowther v Abdul Rahiman Sahib,* (1933) 65 Mad LJ 390 :149 IC 287 : AIR 1933 Mad 715.
2610. *Dulhin Kamlapati v Jageshar,* (1938) ILR 18 Pat 342; *Sinnaswami Gounden v Rama Gounden,* (1941) ILR Mad 924 : (1941) Mad WN 313 : (1941) 1 Mad LJ 519 : AIR 1941 Mad 563.

(30) Limitation

Under section 69 of the Indian Contract Act, 1872, a person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it, is entitled to be reimbursed by the other. Under the first para of section 92 of the TP Act, any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems, may have against the mortgagor or any other mortgagee. The third paragraph gives a right of subrogation to a person who advances to a mortgagor money with which the mortgage is redeemed, but subject to certain conditions. Two things are clearly noticeable, namely, (1) that section 69 gives only a right personally against another person, whereas section 92 gives a right against the mortgaged property; and (2) that the person making the payment gets, under section 69, a right of reimbursement in his own right and independently of anybody else's right, whereas the person paying up the prior mortgage is, under section 92, subrogated into the rights of the prior mortgagee. A person making the payment may well come under both sections, in which case he gets both rights. The time within which such a person may enforce his two rights is, however, different and it may well happen that at the time he takes proceedings, one of his rights is barred. The period of limitation for enforcing the right of reimbursement under section 69 is three years from the date of payment under Article 23 of the Act of 1963. No limitation would apply if the mortgage is not for a fixed period and such a mortgage can be redeemed under the provisions of "once a mortgage always a mortgage".[2611] e question of limitation for a suit to enforce the right of subrogation under section 92 is of some difficulty. This right of subrogation may arise at two distinct stages, namely, (i) when the prior mortgage is paid off before mortgagee has put the mortgage in suit and got a decree, thereon; and (ii) when after the prior mortgagee sued upon his mortgage and got his decree, the decretal amount is paid off. Although section 92 in terms refers to "mortgage", '"mortgagor", "mortgagee" and "mortgaged property", it is now well settled, since the decision of the Privy Council in *Gopi Narain Khanna v Bansidhar,*[2612] that the right of subrogation is available even after the prior mortgage has been put in suit, and a decree has been passed thereon. The question of limitation will, therefore, have to be considered in respect of the two situations, namely, when the prior mortgagee is paid up before suit, and when he is paid up after decree.

(31) Before Suit

The leading case is that of *Mahomed Ibrahim Hossein Khan v Ambika Persad Singh.*[2613] In that case, the last mortgagee paid off the first mortgage in 1888, the first mortgage also being due for redemption in that year. The successors in interest of the last mortgagee claimed priority as subrogees to the rights of the first mortgagee in a suit filed by the fifth mortgagee in 1900, more than 12 years after the date of redemption and after the paying off the first mortgage. The Privy Council held that the claim was barred by Article 132 of the Limitation Act, 1908, which corresponds to Article 62 of the Limitation Act, 1963. The Privy Council computed the period from the expiry of the first mortgage, and that date for the accrual of

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2611. *Shri Prakash Chand v Shri Amir Chand,* AIR 2011 HP 21 : (2011) 1 Shim LC 24.
2612. *Gopi Narain Khanna v Bansidhar,* (1905) ILR 27 All 325 : 32 IA 123.
2613. *Mahomed Ibrahim Hossein Khan v Ambika Persad Singh,* 39 IA 68 : (1912) ILR 39 Cal 527 :14 IC 496.

the cause of action has been accepted in some cases,[2614] as the correct starting point in cases where the prior mortgage has been paid off before suit. In *Munna Lal v Chuni Lal,*[2615] the majority of a Full Bench of Allahabad High Court held that limitation would run from the date of payment of the prior mortgage or the decretal amount. It is submitted that, so far at least as subrogation before decree is concerned, this statement of the law is contrary to principle, as well as weight of authority.

(32) After Decree

It is well settled that where a subsequent mortgagee pays up the amount of the decree obtained by a prior mortgagee on his prior mortgage, the subsequent mortgagee is subrogated to the rights of the prior mortgagee. The question is as to how, and within what time the subrogee is to enforce his rights.

In *Gopi Narain Khanna v Bansidhar,*[2616] the Privy Council laid down that a subrogee must file a separate suit to enforce his claims, and the decisions in earlier cases[2617] that the subrogee could continue the suit and execute the decree are no longer good law. The next question is that of limitation, and there has been considerable divergence of judicial decisions on this point. Three different views have been expressed:

(1) Time runs from the date of accrual of the cause of action on the mortgage deed itself, and not from the date of payment of the decretal amount;[2618]

(2) time runs from the date of payment of the decretal amount;[2619]

(3) time runs from the date fixed for payment by the decree which is paid up.[2620]

The first view was based on the observations of the Privy Council in *Gopi Narain Khanna's* case,[2621] viz that the decree is discharged on the payment of the decretal amount, and cannot be revived by section 92. In that case, the decree was in the form provided by section 86 (now O 34, rule 2 of the Code of Civil Procedure) and was a preliminary decree. It was never made absolute as the decretal amount was paid. There had, therefore, been no reconveyance of the property to the mortgagor. There are two things in a mortgage, the

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2614. *Sibanand v Jagmohan,* (1922) ILR 1 Pat 780 : 68 IC 707 : AIR 1922 Pat 499; *Bansidhar v Shiv Singh,* (1933) ILR 56 All 134; *Alam Ali v Beni Charon,* (1936) ILR 58 All 602 : 160 IC 541 : AIR 1936 All 33; *Totaram v Harischandra,* AIR 1937 Nag 402; *Dulhin Kamalapati v Jagesar,* (1938) ILR 18 Pat 342; *Babu Lal Roy v Bindhyachal Rai,* (1942) ILR 22 Pat 187 : AIR 1943 Pat 305.

2615. *Munna Lal v Chuni Lal,* (1945) ILR All 733 : AIR 1945 All 239.

2616. *Gopi Narain Khanna v Bansidhar,* (1905) ILR 27 All 325 : 32 IA 123.

2617. *Bavanna v Balagurivi,* (1899) 9 Mad LJ 177; *Bansidhar v Gaya Prasad,* (1901) ILR 24 All 179.

2618. *Sibanand v Jagmohan,* (1922) ILR 1 Pat 780 : 68 IC 707 : AIR 1922 Pat 499; *Kotappa v Raghavayya,* (1926) ILR 50 Mad 626 : 52 Mad LJ 532 : 102 IC 316 : AIR 1977 Mad 631; *Bansidhar v Shiv Singh,* (1933) ILR 56 All 134 : (1933) All LJ 1564 : 147 IC 575 : AIR 1933 Mad 908; *Halsanad Madappya v Mahabala Rao,* AIR 1937 Mad 826; *Balchand v Ratanchand,* (1942) ILR Nag 393 : AIR 1942 Nag 111; *Radha Kishan v Hazarilal,* (1944) ILR Nag 383 : AIR 1944 Nag 163; *Perumal Reddiar v Suppiah Thevar,* AIR 1945 Mad 500; *Sheosaran v Amla Co-operative Credit Society,* (1944) ILR 23 Pat 953 : AIR 1945 Pat 192.

2619. *Shib Lal v Munni Lal,* (1921) ILR 44 All 67 : 19 All LJ 84 : 63 IC 604 : AIR 1922 All 153; doubted in *Aziz Ahmad v Chhote Lal,* (1928) ILR 50 All 569, p 575 : 109 IC 38 : AIR 1928 All 241; *Bansidhar v Shiv Singh* AIR 1933 Mad 908; *Alam Ali v Beni Charan,* (1935) ILR 58 All 602 : 160 IC 541 : AIR 1936 All 33; *Dulhin Kamlapati v Jagesar,* (1938) ILR 18 Pat 342; *Munna Lal v Chuni Lal,* (1945) ILR All 733 : AIR 1945 All 239.

2620. *Parvati Ammal v Venkatarama Iyer,* (1925) 47 Mad LJ 316 : 81 IC 771 : AIR 1975 Mad 80; *Babu Lal Ray v Bindhyachal Rai,* (1942) ILR 22 Pat 187 : AIR 1943 Pat 305; *Shyamisuddin v Asadulla,* (1945) 49 Cal WN 104 : AIR 1945 Cal 194.

2621. (1905) ILR 27 All 325 : 32 IA 123.

mortgage debt, and the mortgage security. The debt may be satisfied, but the security would be kept alive, and that is the very foundation of the doctrine of subrogation. This distinction has been recognised by the Privy Council in *Janaki Nath Roy v Pramatha Nath Malia.*[2622] Similarly, in *Batey Krishna v Parsotamdas,*[2623] the Privy Council recognised that the rights of the subrogee had merged in the decree in the suit. It is submitted that on the same principle the right of the original mortgagee merges in the mortgage decree, and the person who is subrogated is subrogated to the rights of the mortgagee in the form they have assumed when the subrogation takes place. When the mortgage decree is passed, the mortgage charge is thus transformed and assumes a new garb and a new life as regards its enforceability. If the decretal debt is paid up, the debt is discharged, but what has been called the decretal charge does not perish with it, for if it does, there will be no shoe into which the puisne mortgagee paying up the decretal debt, can get into. The payment of the decretal debt can on no sound principle revive the mortgage which has merged into the decree, and has become extinct as a mortgage. What has been stated above is in accordance with the views of J Wallace in *Parvati Ammal v Venkatarama Iyer,*[2624] J Chatterji in *Babu Lal v Bindhyachal Rai,*[2625] and J Mukherjee in *Shyamisuddin v Asadulla.*[2626] It is true that J Wallace changed his view in *Kotappa v Raghavayya,*[2627] but the reasons for the change do not appear convincing. A further factor which lends support to the view expressed above is the distinction to be borne in mind between the substantive right to subrogation conferred by section 92, and the procedural or adjectival provisions of the laws of limitation. The latter may in some cases bar the remedy, but do not generally extinguish the right. If this distinction is kept in mind, there can be no difficulty in giving full effect to the doctrine of subrogation, namely, that if at the time of payment the mortgage is alive as a mortgage, the subrogee's right is on the mortgage, and his remedy is a suit brought within 12 years of the accrual of the cause of action on the mortgage. If, however, at the time of payment the mortgage, had merged in a decree, the subrogee gets the mortgagee decree-holder's right and his remedy if the decree is not in form 9 of appendix D of the Code of Civil Procedure, is by way of a suit which must be brought, under Article 62 of the Limitation Act, 1963, within 12 years from when the money due under the decree becomes payable.

The second view is based on the theory of a fresh charge or a statutory right giving the subrogee a charge. This has been accepted in *Shib Lal v Munni Lal,*[2628] *Alam Ali v Beni Charan,*[2629] and *Munna Lal v Chuni Lal,*[2630] and it has been held that time runs from the date of payment. The acceptance of this view may well result in the subrogee having better rights than the mortgagee decree-holder, for he may be able to file a suit even before the date of payment under the decree. In *Sheosaran v Amia Co-operative Credit Society,*[2631] and *Brij Bhukhan v Bhagwan Dutt,*[2632] the Patna High Court and Oudh Chief Court have taken the view that on subrogation the subrogee has a charge in addition to his rights of subrogation,

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2622. *Janaki Nath Roy v Pramatha Nath Malia,* 67 IA 82 : (1940) All LJ 550 : 42 Bom LR 339 : 44 Cal WN 261 : (1940) 1 Mad LJ 446 : AIR 1940 PC 38.
2623. *Batey Krishna v Parsotamdas,* 71 IA 153 : AIR 1944 PC 85.
2624. *Parvati Ammal v Venkatarama Iyer,* (1925) 47 Mad LJ 316 : 81 IC 771 : AIR 1925 Mad 80.
2625. *Babu Lal v Bindhyachal Rai,* (1942) ILR 22 Pat 187 : AIR 1943 Pat 305.
2626. *Shyamisuddin v Asadulla,* (1945) 49 Cal WN 104 : AIR 1945 Cal 194.
2627. *Kotappa v Raghavayya,* (1927) ILR 50 Mad 626 : 102 IC 316 : AIR 1927 Mad 631.
2628. *Shib Lal v Munni Lal,* (1921) ILR 44 All 67 : 19 All LJ 84 : 63 IC 604 : AIR 1922 All 153.
2629. *Alam Ali v Beni Charan,* (1935) ILR 58 All 602 : 160 IC 541 : AIR 1936 All 33.
2630. *Munna Lal v Chuni Lal,* (1945) ILR All 733 : AIR 1945 All 239.
2631. *Sheosaran v Amia Co-operative Credit Society,* (1944) ILR 23 Pat 953 : AIR 1945 Pat 192.
2632. *Brij Bhukhan v Bhagwan Dutt,* (1943) ILR 19 Luck 70 : 203 IC 285 : AIR 1942 Oudh 449.

and that even if his rights as a subrogee are barred, his rights to enforce the charge will remain alive for 12 years after the date of payment.

It is submitted that the third view is, as stated above, the correct view. If that view is accepted, it will be unnecessary to have recourse to the theory of a fresh or statutory charge, or to extract, as done in Patna and Oudh, a statutory charge in addition to the right of subrogation, by a process of interpretation of the provisions of the TP Act on the basis of the supposed intention of the legislature.

A suit for specific performance was instituted by the purchaser in respect of a mortgage property. The suit was decreed and purchaser was directed to pay consideration amount to the owner/mortgagor. The purchaser failed to pay the amount as per the directions in the judgement, the purchaser continued to remain in adverse possession of property for over 12 years. It was held that the purchaser had no interest in equity; and redemption cannot be subrogated to the right of mortgage.[2633]

93. Prohibition of tacking.—No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security of such subsequent advance.

Synopsis

(1) Amendment 777
(2) Tacking 777
(3) With or Without Notice 778
(4) Salvage Payments 778
(5) Mortgagor Not Affected 778

(1) Amendment

This is the same as section 80 before the amending Act of 1929. The section has been renumbered 93, and placed after section 92, as the principle of tacking is closely allied to that of subrogation.

(2) Tacking

If there are successive mortgages thus:

A mortgages to ..... *B*

A mortgages to ..... *C*

And *A* mortgages to ..... *D*

D may redeem *B* and be subrogated to the rights of *B;* but he only takes priority over *C* in respect of *B*'s mortgage, and not in respect of his own mortgage.[2634]

The section was considered in *Mittu Lal v Kishan Lal*[2635] with reference to a question of ratable distribution under section 295 of the Code of Civil Procedure 1882, corresponding tosection 73 of the Code of 1908. The first and third mortgages were to *B,* and the second to *C. B* obtained

2633. *Sona Devi v Nagina Singh,* AIR 1997 Pat 67.
2634. *Chhotey Lal v Dharajit,* 96 IC 1054 : AIR 1926 All 744.
2635. *Mittu Lal v Kishan Lal,* (1890) ILR 12 All 546.

two decrees for sale on his mortgages and received payment of the sale proceeds. *C* obtained a decree for sale and claimed that, after deducting the amount due on the first mortgage only, the balance of the sale proceeds should be paid to him. *C*'s claim was allowed on the ground that neither the rule of rateable distribution under the Code of Civil Procedure, nor section 80 (now section 93) of TP Act gave priority to a subsequent encumbrancer.

(3) With or Without Notice

It does not matter whether the mortgagee making the subsequent advance has notice of the intermediate mortgage.[2636]

(4) Salvage Payments

When a prior mortgagee makes payments of arrears of government revenue to protect the property from forfeiture and sale, such payments are in the nature of salvage payment on behalf of all persons interested, and are added to the prior mortgage either under section 72 of TP Act or section 9 of the Bengal Revenue Sales Act, 1859, and have priority over puisne encumbrances.[2637]

(5) Mortgagor Not Affected

The section refers to the rights of successive mortgagees inter se, and has no bearing on the question which may arise between the mortgagor and mortgagee with reference to consolidation, or tacking or adding expenses to the mortgage debt under sections 61 or 72. In a case where the mortgagor had been in possession and a suit was compromised on terms that the mortgagor should pay the arrears of rent with the mortgage debt, it was held that a transferee of the equity of redemption was not bound to pay the arrears, as the rent could not be tacked on to the mortgage debt.[2638]

94. Rights of *mesne* mortgagee.—Where a property is mortgaged for successive debts to successive mortgagees, a *mesne* mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

Synopsis

(1) Amendment 778
(2) Redeem Up, Foreclose Down 779
(3) Effect of Prior Mortgagee's Decree on Puisne Mortgagee 779
(4) Rights of Auction Purchaser at Sale in Execution of Mortgagee's Decree 780
(5) Rights of Auction Purchaser at Sale in Execution of Mortgagee's Decree if Puisne Mortgagee not a Party 780
(6) Omission to Implead Puisne Mortgagee Does not Affect his Rights 781
(7) Possession as between Auction Purchasers at Sales of Prior and Puisne Mortgagees Who Have Not Made Each Other a Party 783
(8) Priority of Rights of Redemption 784
(9) Prior Mortgagee not Necessary Party to Puisne Mortgagee's Suit 785

(1) Amendment

This section corresponds partly to the repealed section 75 and the repealed O 34, rule 11 of the Code of Civil Procedure 1908, as originally enacted.

2636. *Imperial Bank of India v U Rai Gyaw,* (1923) ILR 1 Rang 637 : 50 IA 283 : (1924) ILR 51 Cal 86 : 76 IC 910 : AIR 1923 PC 211.
2637. *Monohar Das v Hazarimull,* (1931) 35 Cal WN 1040 : 58 IA 341 : 134 IC 645 : AIR 1931 PC 226 : reversing on this point; *Hazarimull v Manohar,* (1930) ILR 57 Cal 298 : 126 IC 125 : AIR 1930 Cal 151.
2638. *Unni v Nagammal,* (1895) ILR 18 Mad 368.

(2) Redeem Up, Foreclose Down

This familiar rule was expressed in the repealed section 75. In the TP Act as amended, it is divided between sections 91 (a) and 94. Section 91 (a) gives a puisne mortgagee a right to redeem a prior mortgage, and this section gives a prior mortgagee a right to foreclose a puisne mortgagee. It is not easy to understand why the section refers to a *mesne* mortgagee, as it does not refer to rights against anterior mortgagees. The word "prior" would have been more appropriate and possibly the word "mesne" is a survival of the repealed O 34, rule 11 of the Code of Civil Procedure 1908.

The rule arises in the case of successive mortgages, and is best explained by an example. Thus if there are three successive mortgages—

A mortgages to ..... *B*

A mortgages to ..... *C*

A mortgages to ..... *D*

C as assignee of part of the equity of redemption of *A*, has the right to redeem *B*. For the same reason *D* can redeem *C* or *B*. On the other hand, *B* can foreclose *A*, and as portions of *A*'s equity of redemption have been transferred to *C* and to *D*, *B* can foreclose *C* or *D* or both.

It is recognized in Indian cases that the puisne mortgagee's right to redeem a prior mortgagee is ancillary to his right to work out his remedy by sale of the property.[2639] For this reason, the Madras High Court has held that the limitation for a puisne mortgagee's suit to redeem a prior mortgage is not 60 years under Article 148, but 12 years under Article 132,[2640] although the other High Courts applied the 60 years' period under Article 148 of the Limitation Act, 1908.[2641] Under the Limitation Act, 1963, Article 61 (a) corresponds to Article 148, and provides a period of 30 and not 60 years, and Article 62 corresponds to Article 132, the period continuing to be 12 years.

(3) Effect of Prior Mortgagee's Decree on Puisne Mortgagee

If the prior mortgagee forecloses his mortgage, and makes the puisne mortgagees parties to the suit, liberty is given under the decree to the puisne mortgagees to redeem the prior mortgagee and foreclose or bring to sale the mortgagor, though the decree does not operate as res judicata between the mortgagor and the pusine mortgagee.[2642] In a case where the decree was not in proper form and did not give this liberty, the Privy Council held that the puisne mortgagee could not pay off the prior mortgagee and adopt the decree as his own.[2643] This was on the ground that payment satisfied the decree and there was nothing left to execute, and so

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2639. *Muhammad Usan v Abdulla,* (1898) ILR 24 Mad 171; *Goverdhana Doss v Veerasami Chetty,* (1900) ILR 26 Mad 537.

2640. *Lakshamanan Chettiar v Sella Muthu,* (1925) 47 Mad LJ 602 : 84 IC 301 : AIR 1925 Mad 76; *Appayya v Venkataramayya,* 82 IC 864 : AIR 1925 Mad 150.

2641. *Sayamali v Anisuddin,* (1929) ILR 57 Cal 704 : 33 Cal WN 1067 : 119 IC 135 : AIR 1929 Cal 609; distinguishing *Nidhiram v Sarbessur,* (1910) 14 Cal WN 439 : 5 IC 877; *Priya Lal v Bohra Champa,* (1923) ILR 45 All 268 : 79 IC 498 : AIR 1923 All 271; *Nathmal v Nilkanth,* (1932) 34 Bom LR 1519 : 141 IC 811 : AIR 1933 Bom 25; *Sundar Das v Beli Ram,* (1933) ILR 14 Lah 596 : 142 IC 805 : AIR 1933 Lah 503; *Ramjhari Kuar v Lala Kashinath,* (1926) ILR 5 Pat 513 : 94 IC 284 : AIR 1926 Rang 337. But *see Kuran Chandra v Mohan Lal,* (1955) 59 Cal WN 947.

2642. *Vedayyasa v Madura Hindu Sabha,* (1919) ILR 42 Mad 90 : 49 IC 36.

2643. *Gopi Narain Khanna v Bansidhar,* (1905) ILR 27 All 325 : 32 IA 123; which in effect overrules *Bavanna v Balagurivi,* (1899) 9 Mad LJ 177; cf *Sundara Reddiar v Subbiah,* (1913) 24 Mad LJ 28 : 18 IC 010.

the puisne mortgagee's remedy was by another suit.[2644] When the decree is in a proper form and gives the puisne mortgagee a right to redeem which he exercises and the mortgagor makes default in payment, the court may substitute the puisne mortgagee as decree holder, and pass a preliminary decree in his favour.[2645] However, if the puisne does not exercise his right to redeem, the property after sale passes to the auction purchaser free from encumbrances, and the rights of the puisne mortgagee are transferred to the surplus sale proceeds.[2646] In a case where the prior mortgage was of property in Calcutta and the puisne mortgage of that property and another property in the *mofussil*, the prior mortgagee sued for sale and the sale proceeds were not enough to satisfy the puisne mortgage—yet the puisne mortgagee was not allowed to bring to sale the *mofussil* property which was not in suit.[2647]

(4) Rights of Auction Purchaser at Sale in Execution of Mortgagee's Decree

In this connection, it is important to note that a purchaser at a sale in execution of a mortgage decree is in a much stronger position than a purchaser at a sale in execution of a money decree against the mortgagor. The sale in execution of the mortgagee's decree passes the rights of the mortgagee as well as of the mortgagor as they existed at the date of the mortgage.[2648] If the mortgagor has no title so that the equity of redemption is not represented in the mortgagee's suit, the mortgage decree is so far as the property is concerned, a nullity.[2649]

(5) Rights of Auction Purchaser at Sale in Execution of Mortgagee's Decree if Puisne Mortgagee not a Party

If the prior mortgagee suing to enforce his mortgage does not make the puisne mortgagee a party to the suit and brings the property to sale, it has been held that the auction purchaser acquires the rights both of the mortgagee and mortgagor. As assignee of the mortgagor, he may sue to redeem the puisne mortgage,[2650] or as assignee of the mortgagee's rights, he may sue to enforce the puisne mortgage.[2651] It has been held that the purchaser acquires the rights of the mortgagor and mortgagee free from subsequent encumbrances, but is still liable to be redeemed by the puisne mortgagee,[2652] or by an assignee of the equity of redemption who has not been made a party.[2653] In a suit to redeem

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2644. *Soli Pestonji v Gangadhar,* [1969] 3 SCR 33 : AIR 1969 SC 600 : [1969] 2 SCJ 93 : [1969] 2 SCA 118 : (1969) 1 SCC 200.
2645. *Yamunabai v Maroti,* 146 IC 514 : AIR 1933 Nag 163. See also Code of Civil Procedure 1908, appendix D, form 9, para 5(a).
2646. *Barhamdeo Prasad v Tara Chand,* (1906) ILR 33 Cal 92; on app *Barhamdeo v Tara Chand,* (1914) ILR 41 Cal 654 : 21 IC 961 (PC); *Ramasami Pillai v Narayanasami,* (1925) 48 Mad LJ 100 : 86 IC 548 : AIR 1925 Mad 483.
2647. *Sarat Chandra v Nahapiet,* (1910) ILR 37 Cal 907 : 8 IC 1142.
2648. *Sheshgiri Shanbog v Salvador,* (1881) ILR 5 Bom 5; *Shaik Abdulla v Haji Abdulla,* (1881) ILR 5 Bom 8; *Dadoba Arjun v Damodar,* (1882) ILR 16 Bom 486; *Perumal v Kaveri,* (1893) ILR 16 Mad 121; *Desai Lallubhai v Mundas,* (1896) ILR 20 Bom 390; *Maganlal v Shakra Girdhar,* (1898) ILR 22 Bom 945; *Dhanwanti v Hargobind,* (1924) ILR 3 Pat 435 : 78 IC 614 : AIR 1924 Pat 484; *Ma Kin Kyaw v R C Dey,* (1926) ILR 4 Rang 96 : 97 IC 243 : AIR 1926 Rang 183.
2649. *Surendralal Kundu v Ahmmad Ali,* (1933) ILR 60 Cal 1193 : 147 IC 808 : AIR 1933 Cal 912.
2650. *Hassanbhai v Umaji,* (1904) ILR 28 Bom 153; *Sarvothama v Raja Rao,* (1921) Mad WN 603 : AIR 1921 Mad 648.
2651. *Sham Dei v Baljit Singh,* (1910) ILR 32 All 119 : 5 IC 451.
2652. *Mohan Manohar v Togu Uka,* (1886) ILR 10 Bom 224; *Gajadhar v Mul Chand,* (1888) ILR 10 All 520; *Maganlal v Shakra,* (1898) ILR 22 Bom 945, p 948; *Kudratullah v Kubra,* (1910) ILR 23 All 25; *Goverdhana Das v Veerasami Chetty,* (1904) ILR 26 Mad 537; *Dina Nath v Lachmi Narain,* (1903) ILR 25 All 446; *Pandurang v Sakharchand,* (1907) ILR 31 Bom 112
2653. *Ram Prasad v Bhikari Das,* (1904) ILR 26 All 464; *Venkata Reddy v Kunjappa Goundan,* (1924) ILR 47 Mad 551 : 83 IC 1022 : AIR 1924 Mad 650; *Badar-ud-din v Karim Baksh,* 135 IC 200 : AIR 1931 Lah 438.

the auction purchaser, the decree is ignored and the auction purchaser is entitled to the interest upto redemption.[2654] The auction purchaser cannot sue for possession, but may sue for sale to compel redemption.[2655]

(6) Omission to Implead Puisne Mortgagee Does not Affect his Rights

The omission to implead a puisne mortgagee does not in any way affect his rights,[2656] although the first mortgagee may obtain a decree on his mortgage, and the property may be sold in execution of such decree.[2657] Not only has the puisne mortgagee the right to redeem the prior mortgagee after he has brought the property to sale,[2658] but his right to sue for sale, subject of course to the first mortgage, is not affected.[2659] Even if the puisne mortgage is of a part, yet the puisne mortgagee has a right to redeem the prior mortgage of the whole.[2660] The puisne mortgagee may redeem the prior mortgage although a suit to enforce the puisne mortgage is barred by limitation. This is because limitation for a suit for redemption is 30 years under Article 61(a) of the Limitation Act, 1963, while limitation for a suit to enforce a mortgage is 12 years under Article 62 of the Act of 1963.

Redemption of the prior mortgage will not give the puisne mortgagee a right to possession if the prior mortgage is not usufructuary.[2661] In a Nagpur case,[2662] a puisne mortgagee was not made a party to the prior mortgagee's suit. After the decree, but before the equity of redemption was extinguished by the sale, the mortgagor sold the equity of redemption and his vendee redeemed the puisne mortgage. The vendee, standing in the shoes of the puisne mortgagee, was entitled to redeem the prior mortgagee's auction purchaser. The Privy Council have repeatedly said that the proceedings in the prior mortgagee's suit are not binding on the puisne so as to affect his right under the puisne mortgage.[2663] In *Sukhi v Ghulam Safdar Khan,*[2664] the Judicial Committee said:

> The general principle is stated rightly by the High Court. It is this: The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the court to give the plaintiff the opportunity of occupying the position she would have occupied if she had been a party to the former suit.

2654. 62. *Mathra Das v Amichand,* 141 IC 252 : AIR 1933 Lah 75.
2655. *Radha Pershad v Monohur,* (1881) ILR 6 Cal 317; *Ma-Kin Kyaw v R C Dey,* (1926) ILR 4 Rang 96 : 97 IC 243 : AIR 1926 Rang 183; *Reoti Singh v Ram Lal,* (1934) All LJ 188 : 147 IC 380 : AIR 1934 All 73; *Nagu Tukaram v Gopal Ganesh,* AIR 1950 Bom 408.
2656. *Ram Prasad v Bhikari Das,* (1904) ILR 26 All 464, p 467; *Hukum Singh v Lallanji,* (1921) ILR 43 All 204 : 61 IC 942; *Jageswar Mandal v Sridhar Lal,* (1929) ILR 8 Pat 216 : 114 IC 216 : AIR 1928 Pat 589; *Maung Shwe v Karambu,* (1928) ILR 6 Rang 122 : 110 IC 701 : AIR 1928 Rang 127; *SKARST Chettyar Firm v ALAR Chettyar Firm,* (1931) ILR 9 Rang 1 : 132 IC 281 : AIR 1931 Rang 105; *Kaisar Khan v Abdul Ghani,* AIR 1942 Cal 138 : 74 Cal LJ 1 : 45 Cal WN 705 : 202 IC 308.
2657. *Murugappa v Pallaniappa,* AIR 1948 Mad 412.
2658. *Mallikarjunadu v Linga Murti,* (1903) ILR 26 Mad 332; *Mohan Manohar v Togu Uka,* (1886) ILR 10 Bom 224; *Kudrat-ullah v Kubra,* (1901) ILR 23 All 25.
2659. *Debendra Narain v Ramtaran,* (1903) ILR 30 Cal 599.
2660. *Bank of Chettinad v CTA C E Firm,* 150 IC 692 : AIR 1933 Rang 392.
2661. *Nathmal v Nilkanth,* (1932) 34 Bom LR 1519 : 141 IC 811 : AIR 1933 Bom 25.
2662. *Lakmi Chand v Janardhan,* 141 IC 144 : AIR 1932 Nag 154.
2663. *Umes Chunder v Zahoor Fatima,* (1889) ILR 18 Cal 164 : 17 IA 201; *Het Ram v Shadi Lal,* 45 IA 130, p 133 : 45 IC 798 : AIR 1918 PC 34; *Matru v Durga Kunwar,* (1920) ILR 42 All 364 : 47 IA 71 : 55 IC 969 : 18 All LJ 396 : 22 Bom LR 553 : 38 Mad LJ 419; *Gobind Lal Roy v Ramjanam Misser,* (1894) ILR 21 Cal 70 : 20 IA 165; *Sukhi v Ghulam Safdar,* (1921) ILR 43 All 469 : 48 IA 465 : 65 IC 151 : AIR 1922 PC 11.
2664. *Sukhi v Ghulam Safdar Khan,* (1921) ILR 43 All 409 : 48 IA 465, p 473 : 65 IC 151 : AIR 1922 Cal 11.

Chief Justice Willis in a Madras case,[2665] said that the mortgagee has a right to sell the mortgagor's interest as it stood at the date of the mortgage subject to this, that he must make all subsequent mortgagees parties if he wishes the sale to be free of their encumbrances. This, it is submitted, is a correct statement of the law, but in an earlier case from Allahabad,[2666] J Turner said:

> Of course such subsequent encumbrancers, if they are not made parties, might at any time before the sale may come in and redeem, and they will not be bound by the decree, but if they do not redeem and a sale takes place, their liens will be defeated unless they can show something more than the existence of their subsequent encumbrances, some fraud or collusion which entitled them to defeat the first encumbrance or to have it postponed to their own.

It is submitted that this is not a correct statement of the law. It is difficult to see how the lien can be defeated if the puisne mortgagee was not a party to the suit, or how property can be said to be taken by the purchaser free from encumbrances if the puisne mortgagee still has a right to redeem him.

This difference of opinion as to the precise effect of a prior mortgagee's sale without impleading the puisne has led to many conflicting decisions, when the right of possession of the property has been in issue. It has been held in some cases that a puisne mortgagee in possession, though not impleaded in the prior mortgagee's suit, may be evicted by the auction purchaser at the prior mortgagee's sale, and that the puisne mortgagee must redeem him or give up possession.[2667] The same rule has also been applied to an assignee of part of the equity of redemption who has been in possession,[2668] though in some cases it has been held that if the mortgagee's omission to join the purchaser of part of the equity of redemption was intentional, his suit for possession should be dismissed[2669] It is submitted that the right of redemption is a right, and not a liability, and a person holding such right cannot be compelled to enforce it on pain of eviction. Again, these cases offend against the principle that a puisne mortgagee should not be prejudiced by the omission of the prior mortgagee to join him as a party. In other cases, however, it has been held that the prior mortgagee's auction purchaser cannot dispossess the puisne mortgagee,[2670] or a sharer in the equity of redemption[2671] who has not been joined, unless as assignee of the equity of redemption he

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2665. *Chinnu Pillai v Venkatasami,* (1917) ILR 40 Mad 77 : 34 IC 507.
2666. *Khub Chand v Kalian Das,* (1870) ILR 1 All 240, p 245.
2667. *Dadoba Arjunji v Damodar,* (1892) ILR 16 Bom 486; *Desai Lallabhai v Mundas,* (1896) ILR 20 Bom 390; *Baldeo Singh v Jaggu Rama,* (1901) ILR 23 All 1 (suit for foreclosure and puisne mortgage usufructuary); *Krishnan v Chadayan,* (1894) ILR 17 Mad 17 (but the case is complicated by an interlocutory order which has not been challenged); *Bahu Lal v Jalakia,* (1916) 14 All LJ 1146 : 37 IC 343; but see the criticism of this case in *Lachmi Narain v Hirdey Narain,* (1926) 24 All LJ 661 : 97 IC 4 : AIR 1926 All 480.
2668. *Niharmala Debee v Sarojbandhu Battacharjya,* (1933) ILR 60 Cal 948 : 37 Cal WN 897 : 148 IC 42 : AIR 1933 Cal 728; *Birinchi Singh v Sarado Prasad,* (1924) ILR 3 Pat 114 : 75 IC 942 : AIR 1924 Pat 452; *Gangadas v Jogendra,* (1906) 11 Cal WN 403; *Jugdeo Singh v Habibulla,* (1908) 12 Cal WN 107.
2669. *Kristopada Roy v Chaitanya Charan,* (1923) ILR 49 Cal 1048 : 69 IC 530 : AIR 1923 Cal 274; *Aghore Nath Banerji v Deb Narain,* (1906) 11 Cal WN 314.
2670. *Makhan Lal v Sohan Lal,* (1930) ILR 52 All 471 : 126 IC 817 : AIR 1930 All 355; *Reoti Singh v Ram Lal,* 147 IC 380 : (1934) All LJ 188 : AIR 1934 All 73; *Venkata Sourayazulu v Kannan Dhora,* (1882) ILR 5 Mad 184; *Perumal v Kaveri,* (1893) ILR 16 Mad 121; *Rangasamy Naiken v Komarammal,* (1903) ILR 26 Mad 484; *Mulla Vittie v Achuthan,* (1911) 21 Mad LJ 213 : 9 IC 513.
2671. *Badri Prasad v Sri Thakurji,* 105 IC 909 : AIR 1927 All 638; *Chandramma v Seethan,* (1931) 61 Mad LJ 316 : 133 IC 497 : AIR 1931 Mad 542.

redeems him; and the auction purchaser is not entitled to evict a lessee of a lease subsequently granted by the mortgagor if the lessee had not been made a party to the suit.[2672]

Conversely, an assignee of a part of the equity of redemption was held entitled to recover possession from the auction purchaser at the mortgagee's sale.[2673] However, these cases have been dissented from on the ground that his only right is that of redemption.[2674]

(7) Possession as between Auction Purchasers at Sales of Prior and Puisne Mortgagees Who Have Not Made Each Other a Party

Again, the dispute for possession may arise between the auction purchaser of the prior, and that of the puisne mortgagee who have each brought the property to sale without making the other a party. Many cases proceeded on the view that after the sale by one mortgagee there was nothing left for the other mortgagee to sell, and the right of possession was decided according to priority of sale.[2675] In some cases, the right of possession was determined according to the priority of the mortgages.[2676] In one case, the prior mortgagee's auction purchaser sued the puisne auction purchaser for possession, and the court gave him a decree for sale in default of redemption.[2677] In a Madras case, the court said that the prior mortgagee not having joined the puisne mortgagee, the right of the purchaser to be treated as the owner of the equity of redemption, which is an estate of ownership, is imperfect, and the puisne mortgagee who represents the ultimate equity of redemption is entitled to retain possession.[2678] But in another case,[2679] the Madras High Court held that although the prior mortgagee not having joined the puisne, his suit was imperfectly constituted, yet he was entitled to use the prior mortgage as a shield, and that the puisne mortgagee's purchaser is not entitled to dispossess him, unless he pays him off. The Allahabad High Court holds that if the prior mortgage is not usufructuary, the prior mortgagee's auction purchaser gets no right of possession. A qualified decree for possession unless redeemed, is in effect a decree for foreclosure, and the prior mortgagee's auction purchaser is not entitled to such a decree either against the auction purchaser of a puisne

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2672. *Radha Pershad v Monohur,* (1881) ILR 6 Cal 317; *Jugal Kissore v Kartic Chunder,* (1894) ILR 21 Cal 116.
2673. *Grish Chundra v Ishwar,* (1898) 4 Cal WN 452; *Habibullah v Jugdeo,* (1908) 6 Cal LJ 609 : 12 Cal WN 107.
2674. *Sheikh Kalu Sharup v Akhoy Charan,* (1921) 25 Cal WN 253 : 62 IC 445 : AIR 1921 Cal 157; *Bhagaban Chandra v Tarak Chandra,* (1927) 45 Cal LJ 4 : 100 IC 420 : AIR 1927 Cal 259; *Bhodai Shaik v Lakshminarayan Dutt,* (1928) ILR 55 Cal 602 : 107 IC 355 : AIR 1928 Cal 116; *Jagatchandra De v Abdul Rashid,* (1935) ILR 62 Cal 75 : 38 Cal WN 1178 : 154 IC 868 : AIR 1935 Cal 139.
2675. *Venkatanarasammah v Ramiah,* (1879) ILR 2 Mad 108; *Ramanandhan Chetti v Alkonda,* (1895) ILR 18 Mad 500; *Muhammed Usan v Abdulla,* (1901) ILR 24 Mad 171; *Aakatty Moidin Katty v Chiragil,* (1903) ILR 26 Mad 486; *Kutti Chettiar v Subramania Chettiar,* (1909) ILR 32 Mad 485 : 4 IC 1077; *Ram Narain v Bandi Pershad,* (1904) ILR 31 Cal 737; *Venkatagiri v Sadagopu,* (1912) 22 Mad LJ 129 : 10 IC 83; *Chinnaswamy v Darmalinga,* (1932) Mad WN 742 : 63 Mad LJ 394 : 139 IC 309 : AIR 1932 Mad 566; *Nanack Chand v Teluckdye Koer,* (1880) ILR 5 Cal 265; *Dirgopal Lal v Bolakee,* (1880) ILR 5 Cal 269; *Nagendra Chettiar v Lakshni Ammal,* (1933) ILR 56 Mad 846 : 65 Mad LJ 108 : 144 IC 833 : AIR 1933 Mad 583; *Ram Kinkar v Hariram Hazra,* 145 IC 175 : AIR 1933 Cal 181; *Suramma Nayuralu v Suraiyya,* (1934) 67 Mad LJ 312 : 152 IC 612 : AIR 1934 Mad 585; *Mahomed Juman Mia v Akali Mudiani,* AIR 1943 Cal 577 : 77 Cal LJ 162 : 47 Cal WN 682 : 210 IC 67; *Bogi Arijisah v Kanniappa,* (1953) 2 Mad LJ 477 : AIR 1954 Mad 266.
2676. *Bunwari v Ramjee,* (1902) 7 Cal WN 11; *Har Pershad Lal v Dalmardan Singh,* (1905) ILR 32 Cal 891; *Gangadhar v Lakshman,* (1930) 32 Bom LR 431 : 125 IC 905 : AIR 1930 Bom 221; *Afsar Jehan Begum v Mahomed Ahmed,* 171 IC 56 : AIR 1937 Dhaka 478.
2677. *Bhekdhari Mahton v Radhika Koer,* (1934) ILR 13 Pat 364 : 155 IC 635 : AIR 1934 Pat 648.
2678. *Chinnu Pillai v Venkatasamy,* (1917) ILR 40 Mad 77, 86 : 34 IC 507.
2679. *Chinnaswami v Darmalinga,* AIR 1932 Mad 566; *Varki Chacko v Ouseph Pramena,* (1957) ILR Ker 35 : AIR 1957 Ker 48.

mortgagee who has not been made a party,[2680] or against an assignee of part of the equity redemption who has not been joined.[2681] On the other hand, the right of foreclosur recognized in the following passage from Jones,[2682] which is approved by Ghose,[2683] which has been followed in many cases:

> When a party in interest other than the owner of the equity of redemption, is not ma party to the bill, the foreclosure is not generally for this reason wholly void. It is effectua against those persons interested in the equity of redemption who are made parties. The sale v the estate in the purchaser subject to redemption by the person interested in it who was made a party to the proceedings. His only remedy, however, is to redeem. He cannot main ejectment against the purchaser. He cannot have the sale set aside by petition in the foreclo suit. His only right is the right of redemption. The sale, though it fails to be effectual in e other respect, operates as an assignment of the mortgage and all the mortgagee's rights to purchaser, who may proceed *de novo* to foreclose.

It would follow that an assignee of part of the equity of redemption or a puisne mortga who has not been made a party cannot dispossess a prior mortgagee's auction purchaser.[268

The question, however, is one which seems to admit of a simple solution. If either of mortgage is usufructuary, the auction purchaser at that mortgagee's sale is entitled possession. If neither mortgage is usufructuary, each auction purchaser is equally entitle possession, and he who secures possession is entitled to keep it until redeemed, and if b are willing to redeem, the auction purchaser from the prior mortgagee has the prior righ redeem. This subject is discussed in a Full Bench decision of the Allahabad High Cour where the conclusion is partly based on the doctrine of *lis pendens.* However, as pointed by J Mukerji in the same case and by the Madras High Court in a subsequent case,[2686] th an incorrect application of the rule of *lis pendens,* for the puisne mortgagee's title relates b to the date of the mortgage.

(8) Priority of Rights of Redemption

When a prior mortgagee has brought the property to sale and has himself purchased i is entitled as assignee of the equity of redemption to redeem the puisne.[2687] If the two ri to redeem, viz the right of the puisne mortgagee to redeem the prior, and the right of prior mortgagee to redeem, the puisne takes priority.[2688] In a Calcutta case,[2689] there w first mortgage to *A* of 33 *bighas* and then a second mortgage to *B* of 8 of these 33 *bighas* 4 other *bighas*. *A* obtained a decree for sale on his mortgage without making *B* a party, purchased the 33 *bighas* himself. *B* then sued to redeem *A* and he had the right to redeem 33 *bighas*, but if this had been allowed, *A* as assignee of the equity of redemption could

redeemed the eight and the four *bighas* of the puisne mortgage. The court to avoid plications allowed *B* to redeem only the eight *bighas*. Similar decrees were made in some cases.[2690] In *Amba Prasad v Wahidullah,*[2691] the puisne mortgage was of two-thirds of the erty in the prior mortgage, and each mortgagee had sued for sale, and purchased without ng the other. The prior mortgagee was in possession, but the court allowed the puisne gagee to redeem two-thirds of the property for a proportionate amount of the mortgage ey. The court said:

> Where the rights of the mortgagors have vested, as in this case, partly in a prior mortgagee and partly in a subsequent mortgagee, after a suit had been brought by each of them to enforce his mortgage, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired.

Prior Mortgagee not Necessary Party to Puisne Mortgagee's Suit

sne mortgagee may sue for foreclosure or sale on his own mortgage only. In that case, rior mortgagee is not a necessary party—O 34, rule 1 of the Code of Civil Procedure —and the property will be sold subject to the prior mortgage.[2692] He may do so even he prior mortgagee has brought the property to sale and purchased it without making party,[2693] and in such a case, he should make the prior mortgagee's auction purchaser a [2694]

ne merely joins the prior mortgagee in a suit on his own puisne mortgage and claims no against him, the position of the prior mortgagee will be that of a paramount title holder e the controversy, and he will not be affected by the decree which the puisne obtains. ccurred in the Privy Council case of *Radha Kishun v Khurshed Hossein.*[2695] The prior age was of 1892 to *A* whose interest devolved on *B,* who assigned it in September 1906 plaintiff. The puisne mortgage was of 1894 to *C,* who sued for sale in August 1906 g *B* a party, but claiming no relief against him. After *C* had obtained the decree for ne plaintiff sued on his prior mortgage and was met by the plea of *res judicata* on the d that this predecessor *B* might and ought to have enforced the security in the former he defence failed as *C* had not in his suit sought to displace *B*'s title, and to postpone it own.

e prior mortgagee may consent to the property being sold free from his prior mortgage him the same interest in the sale proceeds as he had in the property—Code of Civil ure, O 34, rule 12. In such a case it is not open to the mortgagee to contend that the rate of

Ram Shankar v Ganesh Prasad;[2698] and in the next year section 85 was replaced by O 34, rule 1 of the Code of Civil Procedure 1908. *Mata Din's* case was in conflict with previous decisions of the same High Court,[2699] and with those of other High Courts.[2700] It involved an obvious hardship to the puisne mortgagee, for his period of redemption might be shorter than that of the prior mortgagee.[2701] About the same time that *Mata Din's* case was decided the Privy Council, *Umesh Chunder v Zahoor Fatima*[2702] upheld an order for sale in a case where the puisne mortgagee had sued in the alternative for sale subject to a prior mortgage, or for redemption of the prior mortgage. The Allahabad High Court has since held that even if the puisne mortgagee makes the prior mortgagee a party, he may sell the property subject to the prior mortgage, and is not bound to redeem him;[2703] though it may sometimes be convenient to direct redemption of the prior mortgage as tending to prevent multiplicity of actions.[2704]

The puisne mortgagee may redeem up mortgages prior to his own and foreclose the mortgagor. The form of decree is that in form 10, appendix D of the Code of Civil Procedure 1908. He may also foreclose down mortgages subsequent to his own.

If the puisne redeems a prior mortgagee who has brought the property to sale without joining him as a party, he acquires the rights of the prior mortgagee, and steps into his shoes by subrogation. In that case, it has been held that the mortgagor's right to redeem revives.[2705] This is because the redemption of the prior mortgage discharges that mortgage, and vacates the sale so that the equity of redemption comes again into the hands of the mortgagor.[2706]

These observations have, however, been fully considered and disapproved in a judgment by the Kerala High Court,[2707] where it was observed that the Patna judgment overlooks the effect of O 34 of the Code of Civil Procedure.

[2708][**95. Right of redeeming co-mortgagor to expenses.**—Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.]

Synopsis

(1) Amendment 786
(2) Defects in the Old Section 787
(3) Subrogation 787
(4) Expenses 787
(5) Mortgage Decree 788
(6) Mortgagors 788
(7) Redeems 788

2698. *Ram Shankar v Ganesh Prasad*, (1907) ILR 29 All 385.
2699. *Khub Chand v Kalian Das*, (1876) ILR 1 All 240; *Sirbadh Rai v Raghunath*, (1885) ILR 7 All 568, p 574; *Raghunath Prasad v Jurawan Rai*, (1886) ILR 8 All 105.
2700. *Venkatachella v Panjanadien*, (1882) ILR 4 Mad 213, p 215; *Kanti Ram v Kutubuddin*, (1895) ILR 22 Cal 33; *Surjiram v Barhamdeo*, (1905) 1 Cal LJ 337 : 2 Cal LJ 202; *Keshavram v Ranchod*, (1906) ILR 30 Bom 156; *Srinivasa v Yamunabai*, (1906) ILR 29 Mad 84 (point treated as doubtful).
2701. *Sirbadh Rai v Raghunath*, (1885) ILR 7 All 568.
2702. *Umesh Chunder v Zahoor Fatima*, (1891) ILR 18 Cal 164 : 17 IA 201.
2703. *Sarju Kumar v Dwarka Prasad*, (1929) 27 All LJ 499 : 119 IC 507 : AIR 1929 All 296.
2704. *Manohar Lal v Ram Babu*, (1912) ILR 34 All 323 : 14 IC 674; *Venkataramana v Gomaperty*, (1908) ILR 31 Mad 425.
2705. *Dhana Koeri v Ram Kewal*, 129 IC 664 : AIR 1930 Pat 570 citing *Lockhart v Hardy*, (1845) 9 Beav 349; and *Kinnaird v Trollope*, (1889) 39 Ch D 636; *Delhi and London Bank v Bhikari*, (1902) ILR 24 All 185.
2706. *Dhana Koeri v Ram Kewal*, AIR 1930 Pat 570.
2707. *Kurumpakochika v Narayana*, (1958) ILR Ker 1133 : AIR 1959 Ker 56.
2708. Subs. by Act 20 of 1929, sec. 48, for section 95.

(1) Amendment

This section was substituted for the original section by the amending Act 20 of 1929.

(2) Defects in the Old Section

The old section led to much confusion, for it had the effect of repealing the doctrine of subrogation and giving the redeeming co-mortgagor not the same rights as the mortgagee, but a mere charge which, however, was not available against bona fide purchasers for value without notice.[2709]

(3) Subrogation

All the defects of old section now disappear, and under the combined effect of sections 91 and 92, the case of one co-mortgagor redeeming is merely an instance of subrogation.[2710] The redeeming mortgagor has not merely a charge, but the mortgage as to his share is extinguished, and, as to the shares of the other mortgagors, he stands in the shoes of the mortgagee. He may stand on the mortgage he has redeemed, if he can and, if he cannot, may rely on his charge;[2711] limitation to enforce his right of contribution against the co-mortgagor, and for the co-mortgagor's suit to redeem him, is the same as in a suit to enforce or to redeem the mortgage.[2712] Where a co- mortgagor redeems the entire mortgage, his right as a mortgagee relates back to the date of the mortgage which he has redeemed, while considering the benefit of priority over subsequent mortgages.[2713]

(4) Expenses

As the right of subrogation is provided for by sections 91 and 92, this section is limited to the costs of redemption. For this purpose the word "expenses" which excludes the mortgage debt and items which the mortgagee is entitled to tack on the mortgage debt under section 72, is more appropriate than it was in the old section. The mortgagee's costs are tacked on to the mortgage debt, and are covered by the doctrine of subrogation. This section allows the redeeming mortgagor to tack a proportionate share of his costs also to the mortgage debt as against the co-mortgagor. Under the old section, interest from date of redemption has been allowed,[2714] but at the discretion of the court.[2715] It has also been said that the redeeming mortgagor is not entitled to interest, unless he has given express notice claiming it.[2716] When the sale of the mortgage property is set aside, the fee chargeable for poundage, so also compensation payable to the auction purchaser, do not form part of the expenses.[2717]

2709. For detailed discussion on the subject, see pp 535-536 of the 8th edn of this book.
2710. See note "Co-mortgagor redeems" under section 92; *Abdul Gafur Khan v Mangat Rai,* AIR 1938 Lah 184 : (1938) ILR Lah 103 : 40 Pat LR 546 : 178 IC 778.
2711. *Sheosaran v Amla Co-operative Credit Society,* (1945) ILR 23 Pat 953 : AIR 1945 Pat 192.
2712. *Rameshwar v Ramnath,* (1948) ILR 28 Pat 955 : AIR 1950 Pat 174.
2713. *Brij Bhukan v Bhagwan Dutt,* AIR 1944 0udh 114. See note "Limitation" under section 92.
2714. *Rani v Amir Baksh,* (1898) All WN 39; *Raushan Ali v Kali Mohan,* (1906) 4 Cal LJ 79; *Jago v Arjun,* 49 IC 230.
2715. *Digambar Das v Harendra Narayon,* (1910) 14 Cal WN 617, p 624 : 5 IC 165; *Birendra Keshri Prasad v Bahuria Saraswati Kuer,* (1934) ILR 13 Pat 356 : 155 IC 756 : AIR 1934 Pat 612.
2716. *Gafur Imam v Amir Isab,* (1925) ILR 49 Bom 591 : 88 IC 658 : AIR 1925 Bom 484.
2717. *Damodarasami v Govindrajulu,* (1943) ILR Mad 531 : (1943) 1 Mad LJ 291 : 56 Mad LW 194 : 208 IC 370 : AIR 1943 Mad 429.

(5) Mortgage Decree

This section applies when one mortgagor discharges a mortgage decree.[2718]

(6) Mortgagors

Even before the enactment of section 59A, it was held that the word "mortgagors" included successors in title to the mortgagor, assignees of parts of the equity of redemption, and representatives of the original mortgagor.[2719] A Calcutta case[2720] doubted whether representatives of the mortgagor were included in the term. Another Calcutta case[2721] refused to admit to the benefit of the section an assignee of a leasehold interest created by one of themortgagors. But a *benamidar* who has executed a mortgage with authority of the real owner and paid it off with his own money, was allowed a charge under the old section.[2722]

Mahomed Fariduddin v Nand Ram[2723] is an interesting instance of the application of the section to an assignee of part of the equity of redemption. A gave a usufructuary mortgage to *B* and then seven years later, a simple mortgage also to *B*. *B* got a decree for sale on the simple mortgage, and during execution proceedings, *A* got a decree for redemption of the usufructuary mortgage and paid the amount in full. *B* sold three-fourth of the property in realization of his simple mortgage and purchased it himself. *B* thus became assignee of three-fourth of the equity of redemption of the usufructuary mortgage. He was treated as co-mortgagor of *A* in respect of the usufructuary mortgage, and *A* was entitled to recover three-fourth of the mortgage money from him. In a Madras case,[2724] *A* mortgaged two properties *X* and *Y* to *B*, and then mortgaged *Y* to *C*. *C* obtained a decree for sale on his mortgage and himself purchased *Y*. He then obtained an assignment of the first mortgage from *B* and sued to enforce that mortgage. The court held that such a suit was not maintainable, and that he was only entitled to contribution against *A* as co-mortgagor of the first mortgage. It is submitted that when *C* took the assignment of the first mortgage, he became full owner of *Y*, and was entitled to recover the proportion of the mortgage debt on *X* from *A*. In *Jagan Nath v Abdulla*,[2725] there was a first mortgage by *A* and *B* of two houses *X* and *Y* to *C*; and then a second mortgage of *Y* to *B* also to *C*. *C* obtained a decree for sale on the first mortgage which *A* paid off. *A* was subrogated to the rights of *C* as first mortgagee as against his co-mortgagor *B*. *C* sued for sale on the second mortgage and purchased *Y*. But as assignee of *B*, *C* was still subject to the rights of *A* as first mortgagee. The fact that the decree on the second mortgage was passed before the decree on the first mortgage did not affect *A*'s priority, for subrogation is to the mortgage, and not to the decree. The debt merges in the judgment, but not the security.

(7) Redeems

A mortgage is redeemed when the balance due on it is paid. If the redeeming mortgagor has done that, he is within the section, even though part has been previously paid.[2726]

2718. *Dhakeswar Prasad v Harihar*, (1915) 21 Cal LJ 104 : 27 IC 780; dissenting from *Nawab Jahan v Mirza Shujauddin*, (1904) 9 Cal WN 865. See also *Danappa v Yamnappa*, (1902) ILR 26 Bom 379; *Suwabai v Krishna Ravji*, (1947) ILR Nag 668 : AIR 1948 Nag 259.
2719. *Nainappa v Chidambaram*, (1898) ILR 21 Mad 18; *Danappa v Yamnappa*, (1902) ILR 26 Bom 379.
2720. *Nawab Jahan v Mirza Shuja-ud-din*, (1904) 9 Cal WN 865.
2721. *Raushan Ali v Kali Mohan*, (1906) 4 Cal LJ 79.
2722. *Subbamal v Muthu*, (1903) 13 Mad LJ 228.
2723. *Mahomed Fariduddin v Nand Ram*, 103 IC 84 : AIR 1927 All 626.
2724. *Ramchandra Dikshitar v Narayanswami*, (1928) ILR 51 Mad 810 : 112 IC 6 : AIR 1928 Mad 950.
2725. *Jagan Nath v Abdulla*, (1934) ILR 15 Lah 746 : 150 IC 366 : AIR 1934 Lah 248.
2726. *Hira Kuer v Palku*, (1918) 3 Pat LJ 490 : 46 IC 479.

[2727][**96. Mortgage by deposit of title-deeds.**—The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title deeds.]

(1) Mortgage by Deposit of Title-deeds

This section was inserted by the amending Act 20 of 1929.

A mortgage by deposit of title-deeds have been put on the same footing as a mortgage by deed by section 58 of TP Act as explained in the Privy Council decision in *Imperial Bank of India v U Rai Gyaw Thu.*[2728] The right transferred by such a mortgage is the same right that is transferred by a simple mortgage, ie, a right of sale. Such mortgage might be deemed to be a mortgage in which the mortgagor binds himself personally to pay the mortgage money.[2729] In a suit of mortgage by deposit of title deeds, a decree as may be passed in a suit of a simple mortgage can only be passed. A decree for foreclosure cannot be passed in a suit of mortgage by deposit of title deeds. Thus, an amendment seeking to add a relief for debarring the defendants "from all rights to redeem the mortgaged property" was disallowed on the ground that it amounted to a relief of foreclosure which clearly was an affront to sections 76 and 96 of the TP Act.[2730]

[[2731]**97. Application of proceeds.**—[*Rep. by the Code of Civil Procedure, 1908 (5 of 1908), sec. 156 and Sch. V.*]

Anomalous Mortgages

98. Rights and liabilities of parties to anomalous mortgages.—In the case of [2732][an anomalous mortgage,] the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage.

Synopsis

(1) Amendment 789
(2) Rights and Liabilities 790
(3) Kanom 791
(4) *Otti* 791

(1) Amendment

The above section was amended by Act 20 of 1929.

The definition of anomalous mortgages is now given in section 58. In this connection note

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2727. Subs. by Act 20 of 1929, sec. 48, for section 96. Earlier section 96 was repealed byAct 5 of 1908, sec. 156 and Sch. V.
2728. *Imperial Bank of India v U Rai Gyaw Thu,* (1923) ILR 1 Rang 637 : 50 IA 283 : 76 IC 910 : AIR 1923 PC 211.
2729. *Nityanand Ghose v Rajput Chaya Bani Cinema, Ltd* AIR 1950 Cal 208. See also *Rosy George v State Bank of India,* AIR 1993 Ker 184, p 189.
2730. *Arjees Wool & Fur Industries Pvt Ltd v Allahabad Bank,* AIR 1992 All 111, p 119.
2731. For the repealed provisions as re-enacted, see the Code of Civil Procedure, 1908 (5 of1908), Sch. I, Order XXXIV, rules 12 and 13.
2732. Subs. by Act 20 of 1929, sec. 49, for "a mortgage, not being a simple mortgage, amortgage by conditional sale, an usufructuary mortgage or an English mortgage or acombination of the first and third, or the second and third, of such forms".

'"Anomalous mortgages" under section 58may be referred.

(2) Rights and Liabilities

The rights and liabilities of the parties are governed by the contract as evidenced by the terms of the mortgage-deed.[2733] However, the section does not altogether exclude the operation of the other relevant provisions of the TP Act in so far as they are not embodied in the deed.[2734] This was at one time thought to imply that a condition which would be invalid as a clog on redemption would be enforced in an anomalous mortgage.[2735] But the Privy Council has settled this point in *Mohammed Sher Khan v Seth Swami Dayal,*[2736] holding that section 98 is subject to section 60, for the provisions of one section cannot be used to defeat those of another, unless it is impossible to effect a reconciliation between them. Indeed this must be so, for if there were no right of redemption there would be no mortgage, and this was recognized in a case decided on an anomalous mortgage executed before the TP Act.[2737]

Section 67 enacts rights and liabilities in the absence of a contract to the contrary. Therefore, if the terms of an anomalous mortgage show that the parties never contemplated a sale, the anomalous mortgagee has no right of sale.[2738] Section 67 is applicable to simple mortgages usufructuary, and to mortgages usufructuary by conditional sale, and the inclusion of these mortgages in the definition of anomalous mortgages makes no difference in this respect. In a simple mortgage usufructuary there is a time limit and a personal covenant which imports a power of sale. In a mortgage usufructuary by conditional sale, the condition imports a power of foreclosure. This is recognized in proviso (i) to section 67. A decree for redemption of an anomalous mortgage of the class simple mortgage usufructuary may provide that in default of payment, the mortgagor is debarred from all right to redeem.[2739]

Section 68 is not subject to a contract to the contrary, and it is submitted that it does not conflict with section 98. There would of course be no remedy under section 68(a) if there were no personal covenant, but this would be the same in the standard type of mortgage. Before anomalous mortgages were included in section 58, it was held that section 98 excluded the application of section 68(d), and that an anomalous mortgagee who is entitled to possession is not entitled to sue for the mortgage money when the mortgagor fails to give him possession.[2740] It is submitted that this is erroneous, for the suit under the section is in the nature of a suit to obtain compensation. On the other hand, the Oudh Court has held[2741] that in these circumstances an anomalous mortgagee is not only entitled to sue for the mortgage money, but is also entitled under a decision of the Privy Council,[2742] to a decree for

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2733. *Chhathi Lal v Bindeshwari Prasad,* (1929) ILR 8 Pat 16 : 120 IC 32 : AIR 1929 Pat 605; *Hundaldas v Balukhan,* (1942) ILR Kant 452 : 204 IC 574 : AIR 1943 Sau 59.
2734. *Jagdeo v Rambilash Singh,* (1949) ILR 28 Pat 531 : AIR 1950 Pat 13.
2735. *Srinivasa v Radhakrishnam Pillai,* (1915) ILR 38 Mad 667 : 22 IC 54; *Hakeem Patte Muhammad v Shaik Davood,* (1916) ILR 39 Mad 1010 : 30 IC 569; *Kandula Venkiah v Donga Pallaya,* (1920) ILR 43 Mad 589 : 57 IC 724; *Kuttikatt v Kunhikavamma,* (1918) Mad WN 235 : 43 IC 989.
2736. *Mohammed Sher Khan v Seth Swami Dayal,* (1922) ILR 44 All 185 : 49 IA 60 : 66 IC 853 : AIR 1922 PC 17.
2737. *Neelakandhan v Ananthakrishna,* (1907) ILR 30 Mad 61.
2738. *Madho Rao v Gulam Mohiuddin,* (1920) 15 Nag LR 134 : 56 IC 717 : AIR 1919 PC 121; *Gajadhar v Sibananda,* (1924) 28 Cal WN 532 : 81 IC 768 : AIR 1924 Cal 592.
2739. *Atma Ram v Surjan,* (1928) 10 Lah LJ 198 : 110 IC 81 : AIR 1928 Lah 355. See Code of Civil Procedure 1908, O 34, rule 8 (3).
2740. *Gajadhar v Sibananda,* (1924) 28 Cal WN 532 : 81 IC 768 : AIR 1924 Cal 592; *Ram Sarup v Gaya Prasad,* 139 IC 61 : AIR 1932 Oudh 178.
2741. *Mahabir Singh v Kishori* , 154 IC 674 : AIR 1935 Oudh 254; *Shivajee Prasad v Darsan Das,* AIR 1963 Pat 87.
2742. *Mohammad Narsing Partab v Yakub,* 56 IA 299 : (1929) ILR 4 Luck 363 : 116 IC 414 : AIR 1929 PC 139.

sale. This is because the right to sue for the mortgage money imports a right of sale. He is also entitled to sue for possession.[2743] In *Chand Bihari v Shyam Nandan,*[2744] the Patna High Court held that the absence of a stipulation in an anomalous mortgage could not deprive the mortgagee of the statutory right conferred by section 68(l)(b).

The principle of substitution of some other property for the mortgaged property as in the case of a mortgage of an undivided share by a member of a joint Hindu family, being a general principle of law, is not provided by the TP Act, and is not affected by section 98.[2745]

A document styled as a possessory mortgage was held to be in effect anomalous mortgage, the mortgagee having been given the right to realise the mortgage money by bringing the right, title and interest of the mortgagor to sale.[2746]

Under the terms of an anomalous mortgage, a separate suit for the recovery of interest may be maintainable.[2747]

(3) *Kanom*

This is a form of anomalous mortgage customary in Madras. In this connection note "'*Kanom*" under section 65A may be referred.

(4) *Otti*

Otti is a customary form of mortgage prevalent in Kerala. A person borrowing money under it is under a personal obligation to repay the amount, even if no express provision is made for the same. A suit for recovery of the mortgage money by sale of the property is enforceable.[2748]

Attachment of mortgaged property

[2749][**99. Attachment of mortgaged property.**—[*Rep. by the Code of Civil Procedure, 1908 (5 of 1908), sec. 156 and Sch. V.*]

Charges

100. Charges.—Where immovable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained [2750][which apply to a simple mortgage shall, so far as may be, apply to such charge].

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, [2751][and,

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2743. *Kiranswaroop v Raghunath Prasad,* AIR 1956 Madh Bh 110.
2744. *Chand Bihari v Shyam Nandan,* (1959) ILR 38 Pat 35 : AIR 1959 Pat 235.
2745. *Ganga Prasad Sao v Dulan Saran Singh,* 170 IC 134 : AIR 1937 Pat 345.
2746. *Hathika v Puthiyapurayil Padmanabhan,* AIR 1994 Ker 141, p 144.
2747. *Chan Yin Sein v Mg Aung Thein,* 152 IC 494 : AIR 1934 Rang 159.
2748. *Mathew Mathew v Alexander Mathalati,* AIR 1973 Ker 270.
2749. For the repealed provisions as re-enacted, see the Code of Civil Procedure, 1908 (5 of1908), Sch. I, Order XXXIV, rule 14.
2750. Subs. by Act 20 of 1929, sec. 50, for "as to a mortgagor shall, so far as may be, applyto the owner of such property, and the provisions of sections 81 and 82 shall, so far asmay be, apply to the person having such charge".
2751. Added by Act 20 of 1929, sec. 50.

save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge].

Synopsis

(1) Charge 792
(2) Immovable Property of One Person 794
(3) Does not Amount to a Mortgage 794
(4) Kinds of Charges Dealt with in the Section 795
(5) Charge by Act of Parties 796
(6) Contingent Charge 798
(7) Floating Charge 799
(8) Specified Property 799
(9) Attestation 800
(10) Registration 800
(11) Instances of Charges by Act of Parties 800
(12) Charge by Operation of Law 801
(13) Save as Otherwise Provided 803
(14) Notice of Charge 803
(15) So far as may be 804
(16) Decretal Charge 805
(17) Trustee's Charge 805
(18) Transferee for Consideration and Without Notice 806
(19) Integrity of Charge 806
(20) Electricity Dues 806

(1) Charge

The difference between a mortgage and a charge has already been explained in note "'Transfer of an interest" under section 58. In a charge there is no transfer of an interest in the property, but the creation of a right of payment out of property specified,[2752] and as such it cannot be enforced against a bona fide purchaser for value.[2753] The Supreme Court in *JK (Bombay) Private Ltd v New Kaiser-I-Hind Spinning and Weaving Co Ltd*[2754] while pointing out the distinction between charge and mortgage made it clear that:

> While in the case of a charge, there is no transfer of interest of property or any interest therein, but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein. No particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money in praesenti.

Justice Das in a Patna case[2755] said:

> The broad distinction between a mortgage and a charge is this that whereas a charge only gives a right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property. A mortgage is a *jus in rem*, a charge, *a jus ad rem* and the practical distinction is that a mortgage is good against subsequent transferees and a charge is only good against subsequent transferees with notice.[2756] A charge is a "transfer" within the meaning of section 9(2) of the Electricity
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> Act.[2757] A clause in a compromise decree by which the judgment debtor was prevented from disposing off his stock-in-trade until the entire decretal amount was paid was not held as

2752. *Gobinda Chandra v Dwarka Nath,* (1908) ILR 35 Cal 837, p 843; *Jawahir Mal v Indomati,* (1941) ILR 36 All 201 : 22 IC 973.
2753. *Chanduram v Municipal Commissioner,* AIR 1951 Cal 398.
2754. *JK (Bombay) Private Ltd v New Kaiser-I-Hind Spinning and Weaving Co Ltd,* AIR 1970 SC 1041 : [1969]2 SCR 866.
2755. *Raja Sri Shiva Prasad v Beni Madhab,* (1922) ILR 1 Pat 387, p 392 : 70 IC 24 : AIR 1922 Pat 529.
2756. *Kishan Lal v Ganga Ram,* (1891) ILR 13 All 28, p 44; *Royzuddi v Kali Nath* (1906) ILR 33 Cal 985, p 993; *Gur Dayal v Karam Singh,* (1916) ILR 38 All 254 : 35 IC 289; *Jawahir Mal v Indomati,* (1914) ILR 36 All 201 : 22 IC 973; *Benaras Bank v Har Prasad,* AIR 1936 Lah 482.
2757. *Uttar Pradesh Government v Manmohan Das,* (1941) ILR All 691.

creating a charge.[2758] A charge created in favour of a creditor continued to subsist until it was extinguished or abandoned by an express view to that effect.[2759] A charge on future property is valid and operates on such property when it comes into existence.[2760]

Several questions relating to charge came up for consideration in a Supreme Court case.[2761]

The Datar's (one of the parties) became indebted to the Mote's. In a compromise decree in a suit filed by the Mote's, three sets of the properties of the Datar's were made subject to a charge. The decree was registered, but, by inadvertence, the charge on one property (K mansion) was not shown in the index. Sale of the other two properties did not satisfy the claim of the Mote's, and the Mote's filed an application for execution for recovery of the remaining amount. In the meantime, the third property (K mansion), had been made subject to two simple mortgages to one of the respondents who had no notice of the charge created in favour of the Mote's on that mansion. The issue was whether the charge had priority over the subsequent simple mortgagee. The principal legal question was—

Does the protection given by the proviso to section 100 against the enforcement of a charge extend to a simple mortgagee as a transferee for consideration without notice of the charge?

The following propositions were laid down by the majority judgment of the Supreme Court—

(i) A compromise decree is an act of parties within section 100. It is not the result of a decision of a court, but is an acceptance by the court, of something to which the parties have agreed.

(ii) A charge does not amount to a mortgage. In every mortgage there is a charge, but every charge is not a mortgage. The declaration in section 100that the provisions applicable to a simple mortgage apply as far as may be to a charge does not have the effect of changing the nature of the charge to one of an interest in property.

(iii) The expression "transfer of property" in section 100 connotes a transfer of the whole property and not a mere interest in, or over, the property, such as mortgage.

(iv) The expression "property in the hands of a person..." in section 100also does not cover a mortgage. It is confined to a case where the person has sufficient control over the property, so as to enable that person to do whatever he can do with the property as far as the nature of the subject matter would admit.

(v) The proviso to section 100 does not apply to a mortgage. Since a charge is not a '"transfer of an interest", the charge-holder gets no security as against the subsequent mortgagee, unless the subsequent mortgagee had notice of the existence of the prior charge. In this particular case, the finding was that the respondent had no notice of the charge. Hence, the charge could not have priority over the subsequent mortgage without notice. On this ground, the appeal was dismissed.

The ratio decidendi of this judgment seems to be that priority between a charge and a subsequent mortgage is determined not by section 100, but by general principles, and that according to those general principles, the charge-holder has no priority if there is no notice

2758. *Mukheya v Radha Mohan,* AIR 1949 All 539.
2759. *Azheekkal Sree Varaha Devaswami v Ummer Sait,* AIR 1951 Tr & Coch 17.
2760. *Fatechand v Parasram,* AIR 1953 Bom 101.
2761. *Dattatraya Mote v Anand Datar,* (1974) 2 SCC 799 : [1975] 2 SCR 224.

on the part of a subsequent simple mortgagee. Thus, the same result is reached as would have been reached by applying section 100, though on a different reasoning.

Charge can be created in respect of immovable property, and charge can be created in respect of movable property. A charge is nothing but a devise to create security which is enforceable in a court of law. In order to create a charge in respect of immovable property, it is necessary that the same is required to be embodied in a document. However, in order to create a charge, relating to movables, it need not be in writing. Further, in order to create a charge, it is not necessary to employ any technical, or any particular form of expression. All that is required is that there should be a clear intention to make a particular property as a security for the payment of money. In other words, creation of enforceable security is the essence of charge either in respect of immovable property, or in respect of movables.[2762]

A charge created as a result of collusion over a third person's property , that too without his consent would be illegal and even a decree creating such a charge would not be binding on the owner of the property.[2763]

(2) Immovable Property of One Person

No charge can be created if the immovable property is not owned by the person from whom payment of money is due. Where the wife sought for a charge on a house property in a maintenance suit and it was found that the husband had neither any contribution in the purchase and construction of the house, nor was the property in his name, the Madras High Court declined to create any charge on the said property.[2764]

(3) Does not Amount to a Mortgage

The words indicate that in the case of a charge there is no transfer of the property, or of any right in the property. A mortgage which is invalid for want of attestation cannot take effect as a charge.[2765] A sale deed invalid for want of registration will not operate as a charge.[2766] A sale deed which is not intended to operate until the vendee executes an agreement of reconveyance, does not, on the vendee's default, become effective as a charge.[2767] A transaction intended to be a mortgage, but not reduced to writing and registered so that it cannot operate as a mortgage, will not be effective as a charge.[2768] In a Calcutta case,[2769] J Mookerjee said:

> If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but

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2762. *Hindustan Machine Tools Ltd v Nedungadi Bank Ltd,* AIR 1995 Kant 185.
2763. *Balakrishnan v V P Mohanan,* AIR 1998 Ker 257.
2764. *Vasantha v Chandran,* AIR 2002 Mad 214, p 216.
2765. *Pran Nath v Jadu Nath,* (1905) ILR 32 Cal 729; *Tofaluddi v Mahar Ali,* (1899) ILR 26 Cal 78, p 81; *Royzuddi v Kali Nath,* (1906) ILR 33 Cal 985; *Govinda Chandra Pal v Dwarka Nath Pal,* (1908) 35 Cal 837, p 844; *Samoo Patter v Abdul Sammad,* (1908) ILR 31 Mad 337; *Anantarama v Yussuffi,* (1916) 31 Mad LJ 133 : 36 IC 903; disapproving *Neelakantam v Madasami,* (1907) 17 Mad LJ 39; *Param Hans v Randhir Singh,* (1916) ILR 38 All 461 : 35 IC 748; *Collector of Mirzapur v Bhagwan Prasad,* (1913) ILR 35 All 164 : 18 IC 311; *Narayan v Lakshmandas,* (1905) 7 Bom LR 934; *Debendra v Behari,* (1911) 16 Cal WN 1075 : 15 IC 666; *Sreemutty Rani v Rajah Sri Nath,* (1896) 1 Cal WN 81; *Khemchand v Malloo,* (1915) 10 Nag LR 81 : 26 IC 601.
2766. *Maung Tun Ya v Maung Aung,* (1924) ILR 2 Rang 313 : 84 IC 1023 : AIR 1925 Rang 1; *PR Somasundram Chettiar v YPN Nachiappa Chettiar,* (1924) ILR 2 Rang 429 : 84 IC 302 : AIR 1925 Rang 55.
2767. *Phattechand v Uma,* (1933) 35 Bom LR 1138 : 149 IC 241 : AIR 1934 Bom 24.
2768. *P R Somasundram v Y P N Nachiapa,* (1924) ILR 2 Rang 429 : 84 IC 302 : AIR 1925 Rang 55.
2769. *Gobinda Chandra v Dwarka Nath,* (1908) ILR 35 Cal 837.

simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge.

However, in a case where a judgment-debtor bought back his property at a court auction in the name of a *benamidar*, and the *benamidar* raised the purchase money by himself giving a mortgage of the property, it was held that the mortgagee was entitled to a charge.[2770] The Supreme Court in *R M Arunachalam v CIT*,[2771] Madras, held that the creation of a charge under section 74(1) of the Estate Duty Act cannot be construed as creation of an interest in property that is the subject matter of the charge. The creation of the charge under section 74(1) only means that in the matter of recovery of estate duty which is the subject matter of the charge, the amount recoverable by way of estate duty would have priority over other liabilities of the accountable person. In that sense, the claim in respect of the estate duty would have a precedence over the claim of the mortgagee because a mortgage is also a charge. A security bond to the court will not operate as a mortgage as the court is not a juridical person;[2772] and for the same reason, it will not create a charge under this section.[2773] However, the security bond creates an encumbrance and a purchaser of the property subject to the encumbrance, must indemnify the judgment debtor if the liability is enforced against him. This was so held in a Madras case[2774] in which the bond was said to create a "charge", but no reference was made to section 100.

It is apparent from the provisions of the above section that a charge does not amount to a mortgage, though all the provisions which apply to a simple mortgage contained the preceding provisions shall, so far as may be, apply to such charge. While a charge can be created either by act of parties or by the operation of law, a mortgage can only be created by act of parties. A charge is thus a wider term as it includes also a mortgage, in that every mortgage is a charge, but every charge is not mortgage. The legislature while defining a charge in section 100 indicated specifically that it does not amount to a mortgage. It may be incongruous and in terms even appear to be an antithesis to say on the one hand that a charge does not amount to a mortgage, and yet apply the provisions applicable to a simple mortgage to it as if it has been equated to a simple mortgage, both in respect of the nature and efficacy of the security.[2775]

(4) Kinds of Charges Dealt with in the Section

The charges that have been dealt with in the section are:—

(1) Charges created by act of parties.

(2) Charges arising by operation of law.

The Nagpur High Court had held that a charge which is created by a decree is not created by acts of parties, nor can it be said to have been created by the operation of law. Such charge does not fall under the section, nor does the principle underlying it apply to it.[2776] But in a later decision, the same High Court has held that a charge created by a compromise of a

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2770. *Sarju Parshad v Bir Bhaddar*, (1893) ILR 15 All 304 : 20 IA 108.
2771. *R M Arunachalam v CIT*, AIR 1997 SC 2905.
2772. *Raghubar Singh v Jai Indra Bahadur Singh*, (1919) ILR 42 All 158 : 46 IA 228 : 55 IC 550 : AIR 1949 PC 55.
2773. *Syed Mehdi Ali v Chunni Lal*, (1929) 27 All LJ 902 : 119 IC 81 : AIR 1929 All 834.
2774. *Rama Rayanimgar v Venkatalingam*, (1934) ILR 57 Mad 218 : 66 Mad LJ 4 : 149 IC 379 : AIR 1934 Mad 1.
2775. *Dattatraya Mate v Anand Datar*, [1975] 2 SCR 224.
2776. *Ghasiram v Kundanbai*, (1941) ILR Nag 513 : AIR 1940 Nag 163.

money decree is a charge created by the act of parties, and is thereof governed by this section.[2777] The Patna High Court has, however, held that where a charge is created by a decree which was passed in pursuance of an agreement between the parties, it is a charge by act of parties and consequently, one contemplated by section 100.[2778] The point raised by the Nagpur High Court above was held not to arise in that case. The Calcutta High Court held that a charge created by a consent decree over certain property of the husband for maintenance of the deserted wife for his life was in the nature of a charge contemplated by section 100 of the TP Act, and will not lapse by death of the husband.[2779] But a charge created by an ordinary decree would not be a charge created by the acts of parties, and the provisions of section 100 would not apply.[2780] The Bombay and Oudh Courts have held that a charge created by a decree of a competent court is created by the operation of law.[2781] The Madras High Court had taken the same view,[2782] but in *Thangavelu v Thirumalswami*,[2783] a contrary view was expressed; and a Full Bench of the Andhra Pradesh High Court has also held that a such a charge is not by the operation of law.[2784] A Full Bench of the Allahabad High Court held that a charge created by a decree was not a charge created by the operation of law,[2785] and the same view has been expressed by the Calcutta,[2786] Patna,[2787] Madras[2788] and the Punjab[2789] High Courts. In an earlier Calcutta case, it was held that a charge on immovable property created by a decree could be enforced against the transferee of such property, even though the transferee had no notice of the charge. This legal position follows from the law of estoppel.[2790]

The Supreme Court has held that a compromise decree creating a charge is an "act of the parties" within the meaning of section 100. It is not the result of a decision of the court, but is an acceptance by the court of something to which the parties have agreed.[2791]

(5) Charge by Act of Parties

No particular form of words is necessary for the creation of a charge.[2792] It is sufficient, if, having regard to all the circumstances of the transaction, the document shows an intention to

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2777. *Bapurao v Narayan*, (1949) ILR Nag 802; *Goswami Mahashpuri v Ramchandra Sitaramji*, AIR 1944 Nag 1.
2778. *Basumati Koer v Harbansi Koer*, (1940) ILR 20 Pat 86 : 192 IC 866 : AIR 1941 Pat 95; *Sheo Narain v Lakhan* (1945) ILR 24 Pat 345 : AIR 1945 Pat 434.
2779. *Rundibala Roy v Putubala*, AIR 1985 Cal 47, p 51.
2780. *Debendranath v Trinayani*, (1945) ILR 24 Pat 245 : AIR 1945 Pat 278; *Safiul Alam v Aminul Alam*, AIR 1969 Pat 162.
2781. *Rustamali v Aftab Khan*, AIR 1943 Bom 414; *Abdul Guffar v Ishiaz Ali*, (1943) ILR 19 Luck 1 : 210 IC 326 : AIR 1943 Oudh 354; see *Bela Dibya v Ramkishore*, (1968) ILR Cut 788 : AIR 1969 Ori 114.
2782. *Venkatacha v Rajagopala*, AIR 1946 Mad 51.
2783. (1956) ILR Mad 697 : (1955) 2 Mad LJ 618 : AIR 1956 Mad 67; *Seethalakshmi Ammal v Srinivasa*, AIR 1958 Mad 23.
2784. *Naganna Naidu v Janardhana Krishna Rangarao*, AIR 1959 AP 622.
2785. *HC Mukherji v Radha Mohan*, (1949) ILR All 790 : AIR 1949 All 339; *Mahesh Prasad v Mundar*, (1953) ILR 1 All 284 : (1951) All LJ 39 : AIR 1951 All 141.
2786. *Jata Bahadur v Krishna Bhamini*, (1956) 60 Cal WN 1080 : AIR 1957 Cal 204; *Dhirendra Nath v Santa Shila Devi*, (1968) 72 Cal WN 86 : AIR 1968 Cal 336.
2787. *Prem Kuer v Ram Lagan Rai*, AIR 1948 Pat 199; *Gangamani Devi v Kumar Chandra*, AIR 1950 Pat 478; *Shyam Narain v Klublal Mehto*, AIR 1968 Pat 238. And see *Basumati Kuer v Mt Harbans Kuer*, (1940) ILR 20 Pat 86 : AIR 1941 Pat 95.
2788. *Batcha Sahib v Periyanayagammal*, AIR 1952 Mad 165.
2789. *Radhe Lal v Ladli Parshad*, (1957) ILR Punj 938 : AIR 1957 Punj 92.
2790. *Chandra Nath v Hema Nalini Dasi*, (1949) ILR 1 Cal 392.
2791. *Dattatraya Mote v Anand Datar*, (1974) 2 SCC 799.
2792. *JK (Bombay) Private Ltd v New Kaiser-I-Hind Spinning and Weaving Co Ltd*, AIR 1970 SC 1041 : [1969] 2 SCR 866.

make the land as security for the payment of the money mentioned therein.[2793] However, there must be a clear intention to make a property security for money *in praesenti*. If there is an intention to create a charge *in praesenti*, an agreement to mortgage may amount to a charge.[2794] A mere undertaking to discharge an obligation or liability is not enough if the intention to make a specified property or fund liable, is absent.[2795] An encumbrance is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land.[2796] Mere execution of an MOU, agreeing to enter into an agreement to sell the property does not amount to encumbering the property. Nor does a mere undertaking that a person would not dispose of properties mentioned, during currency of loan, confer any charge on the immoveable properties mentioned therein.[2797] Receiving advances or amounts in pursuance of an MOU would also not amount to creating an encumbrance.[2798] An agreement which gives immovable property as security for the satisfaction of a debt,[2799] or for the payment of a maintenance allowance in perpetuity,[2800] without transferring any interest in the property or an agreement by which an owner of a share in a village receives in lieu of his share a lump sum out of the income,[2801] constitutes a charge on the property, and is not a mortgage. A provision in a partition deed that a common family debt should be proportionately discharged by the respective sharers and that if any sharer defaults, his share shall be liable constitutes a charge on the defaulting share in favour of the sharer who has paid in excess.[2802] But a creditor who is not a party to the partition cannot avail himself of this charge.[2803] Mortgages by some classes of agriculturists are forbidden by the Punjab Alienation of Land Act, 1901, but when a mortgagor took a further advance after TP Act on the same terms as a mortgage before the TP Act, the fresh transaction was construed as a charge.[2804] When a charge is created by act of parties, the specification of the particular fund or property negatives a personal liability. The remedy of the holder of the charge is against the property charged only. Where there is in addition a personal covenant, the security becomes collateral to that personal covenant. In such cases, the transaction is generally but not necessarily a mortgage. A mortgage is for a fixed term and redeemable, while a charge may create a liability in perpetuity not capable of redemption.[2805] The right of reimbursement of a power of attorney holder does not amount to creation of interest in the property which is sine qua non to make the power of attorney an irrevocable

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2793. *Janardan v Anant* (1908) ILR 32 Bom 386; *Narain Das v Murli Dhar,* 121 IC 81 : AIR 1929 Oudh 529; *Bholanath v Sarba Mangal,* AIR 1940 Cal 93 : (1940) 44 Cal WN 221 : 186 IC 843; *Ali Mohammed v Ramnivas,* AIR 1967 Raj 258.
2794. *JK (By) P Ltd v New K-I-Hind Spg & Wvg Co,* [1969] 2 SCR 866 : AIR 1970 SC 1041 : [1970] 1 SCJ 487.
2795. *Chacko MC v State Bank of Travancore,* [1970] 1 SCR 658 : AIR 1970 SC 504 : (1969) 2 SCC 343.
2796. *National Textiles Corporation v State of Maharashtra,* AIR 1977 SC 1566 : (1977) 3 SCC 4.
2797. *Haryana Financial Corporation v Gurcharan Singh,* JT 2014 (1) SC 289 : 2013 (15) SCALE 296 : 2014 (3) SCJ 125 : 2014 (1) ShimLC 534.
2798. *State of HP v Tarsem Singh,* 2001 (8) SCC 104; AIR 2001SC 3431; 2001 AIR SCW 3284.
2799. *Sher Singh v Daya Ram,* (1932) ILR 13 Lah 660 : 139 IC 49 : AIR 1932 Lah 465; *Bank of India v Rustom,* AIR 1955 Bom 419.
2800. *Hunter, Liquidator Bank of Upper India v Nisar Ahmed Chaudhari,* (1932) ILR 8 Luck 168 : 143 IC 692 : AIR 1932 Oudh 336; *Matlub Hasan v Kalawati,* 147 IC 302 : AIR 1933 All 934; *Khatun v Tahira Khatun,* 19 IC 661.
2801. *Rustamali v Aftab Khan,* AIR 1943 Bom 414.
2802. *Sesha Ayyar v Sreenivasa,* (1921) 41 Mad LJ 282 : 70 IC 362 : AIR 1921 Mad 459; *Abdul Razak Rowther v Abdul Rahiman Sahib,* (1933) 65 Mad LJ 390 : 149 IC 287 : AIR 1933 Mad 715.
2803. *Suryanarayan Rao v Basivireddy,* (1932) ILR 55 Mad 436 : 62 Mad LJ 533 : 139 IC 135 : AIR 1932 Mad 457.
2804. *Remal Das v Jannat,* (1921) ILR 2 Lah 202 : 62 IC 789 : AIR 1921 Lah 136; *Sher Singh v Daya Ram,* (1932) ILR 13 Lah 660 : 139 IC 49 : AIR 1932 Lah 465.
2805. *Matlub Hasan v Kalawati,* 147 IC 302 : AIR 1933 All 934.

one. It only creates a right incidental to the agency to get reimbursement of the expenses incurred in managing and improving of the property.[2806] Where a mortgage is created on the property of an insolvent, the amount recoverable by the mortgagee will be above the priority contemplated under section 61 of the Insolvency Act.[2807]

By the joint operation of this section and of O 34, rule 15 of the Code of Civil Procedure, both the substantive and the adjective law as to simple mortgages applies, so far as may be, to a charge. A charge-holder has, therefore, a power of sale, but that power is only exercisable "so far as may be". It is not exercisable against a transferee for value without notice. The power of sale is merely a matter of procedure, ie, the mode in which the court enforces the charge.

A charge is different from the word "detained".[2808] An encumbrance or a burden caused by an act or omission of man and not that created by nature is the requirement for a charge. It means charge or burden upon property or a claim or lien on the land which is a legal liability and constitutes a burden on title which diminishes value of the land. Hence, encumbrance must be a charge on property and must run with the property.[2809] Mere undertaking that the party will not dispose of the properties mentioned in an undertaking, during the currency of the loan, will not create any charge over those properties, unless charge is created by deposit of title deeds or through a registered document. Even if the purpose of the decree obtained in between the respondents was fraudulent and collusive, that would not confer any charge over the properties, unless the undertaking is registered.[2810]

(6) Contingent Charge

Some cases distinguish a charge from the possibility of a charge. Thus, the words "If I do not pay the money according to the stipulation, then I declare in writing that I shall lose my right to one bhiga seven cottas of guzashta land," were held to create not a charge, but a possibility of a charge.[2811] But these cases have been dissented from,[2812] and the proposition is obviously incorrect, for, as soon as the promise is made, the promisee is entitled to look to the land as security for the performance of the promise. Section 5 recognizes a future transfer as a transfer, and future crops may be the subject of a mortgage or of a charge. Again, a charge may be given in the present to secure an indemnity, or other contingent liability.[2813] A charge may be created on the property which is to come into existence in future and may be

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2806. *Dalumbi Devi v Raghu Raj,* AIR 2002 HP 99, p 102.
2807. *Patel Dahyabhai Ramjibhai v Manager Ranuj Nagrik Sahakari Bank,* AIR 2010 Guj 54 : 2010 GLH 1 (2).
2808. *Rana Girders Ltd v UOI,* JT 2013 (11) SC 226; *State of Karnataka v Shreyash Papers (P) Ltd,* JT 2006 (1) SC 180) : LNIND 2006 SC 16 : AIR 2006 SC 865.
2809. *Sulochana Chandrakant Galande v Pune Municipal Transport,* (2010) 8 SCC 467: LNIND 2010 SC 698 : 2010 AIR SCW 4784 : JT 2010 (8) SC 298 : 2010 (7) SCALE 571.
2810. *Haryana Financial Corporation v Gurcharan Singh,* 2014 (1) CTC 98 : JT 2014 (1) SC 289 : 2013 (15) SCALE 296.
2811. *Madho Misser v Sidh Binaik,* (1887) ILR 14 Cal 687, p 690; *Rajeshwar Swami v Behari,* (1905) 2 All LJ 754; *Harjas Rai v Naurang* (1906) 3 All LJ 220; *Abdul Samad v Municipal Committee,* 67 IC 939; *Raja Ram v Jagannath,* 91 IC 507 : AIR 1926 Oudh 209; *Mohini Debi v Puma Sashi,* (1932) 36 Cal WN 153 : 55 Cal LJ 198 : 138 IC 24 : AIR 1932 Cal 451.
2812. *Kesri Mal Umrao Singh v Tansukh Rai Kedar Nath,* (1934) ILR 16 Lah 137 : 153 IC 1064 : AIR 1934 Lah 765.
2813. *Balasubramania v Sivaguru,* (1911) 21 Mad LJ 562 : 11 IC 629; *Imbiohi v Achampat Ayukoya Haji,* (1917) 33 Mad LJ 58 : 39 IC 867; *Murat Singh v Pheku Singh,* (1928) ILR 7 Pat 584 : 110 IC 526 : AIR 1928 Pat 587; *Harnam Singh v Mahomed Akbar Khan,* (1937) ILR AP 76; *Sriniwas v Jamnadas,* AIR 1952 MB 16.

enforced when it comes into existence. The charge holder in whose favour it is created will be entitled to priority over a person who attaches the property after that date.[2814]

(7) Floating Charge

A floating charge on a company's assets is a present charge, although it does not finally attach or crystallize upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of its business.[2815]

It is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done, which causes it to crystallize into a fixed security.[2816] The most familiar example is to be found in the debentures of companies. Such a debenture is a floating security reaching over all the trade assets of the mortgagor company for the time being, but intended to fasten upon and bind the assets in existence when the mortgagee intervenes.[2817] The governing idea of a floating charge is that the mortgagor should carry on his business in the ordinary way. Therefore, if the assets are not fluctuating or if no act or intervention of the mortgagee is necessary for the charge to crystallize, the charge is not floating, but specific. A charge on the leasehold property, the plant and machinery of a coal mine imposed to secure the payment of royalties to the lessor, is not a floating but a specific charge.[2818] If the charge holder is entitled to possession and control of the assets of the company, the charge, even though it includes future movables, is not a floating charge.[2819] The question whether a floating charge over immovable property requires registration was raised before the Privy Council, but not decided.[2820]

(8) Specified Property

The property to which the charge attaches must be specified; otherwise the charge would be void for uncertainty.[2821] A provision in a partition deed that the parties should pay certain debts and that the parties in default should pay the others twice the loss from their shares of the property, was held to create a valid charge because the shares of the properties concerned were described in the schedules to the deed.[2822] An undertaking in a deed to segregate certain property so that it would be answerable to another person, should the executant of the deed fail to give a charge bond, has the effect of making the property a security for the payment and creating a charge.[2823] A charge created by a Mahomedan on the unknown and uncertain share which one of his heirs may succeed to is not only invalid as a charge, but void as an attempt to defeat the Mahomedan law of inheritance, as it burdens one share while keeping

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2814. *Alkash Ali v Nath Bank,* AIR 1951 Assam 56.
2815. *Imperial Bank of India v Bengal National Bank,* (1931) ILR 58 Cal 136 : 131 IC 689 : AIR 1931 Cal 223; *G Bhor & Co v United Bank of India,* AIR 1961 Cal 308.
2816. *Evans v Rival Granite Quarries Ltd,* (1910) 2 KB 979; *Ilingworth v Houldsworth,* AIR 1904 Cal 355.
2817. *Tailby v Official Receiver,* (1888) 13 App Cas 523.
2818. *HV Low & Co Ltd v Pulin Beharilal Sinha,* (1932) ILR 59 Cal 1372 : 143 IC 193 : AIR 1933 Cal 514.
2819. *JD Jones & Co Ltd v Ranjit Roy,* (1927) ILR 54 Cal 513 : 103 IC 748 : AIR 1927 Cal 682.
2820. *Imperial Bank of India v Bengal National Bank,* 58 IA 323 : (1932) ILR 59 Cal 377 : 35 Cal WN 1034 : 54 Cal LJ 117 : (1931) All LJ 804 : 61 Mad LJ 589 : 33 Bom LR 1388 : 134 IC 651 : AIR 1931 PC 245.
2821. *Mohini Debi v Purna Sashi,* (1932) 36 Cal WN 153 : 138 IC 24 : AIR 1932 Cal 451.
2822. *Manickam Pillai v Audinarayana,* (1910) ILR 34 Mad 47 : 5 IC 917.
2823. *Dau Bhairoprasad v Jugalprasad,* AIR 1941 Nag 162 : (1940) Nag LJ 651 : 194 IC 761.

the other shares free.[2824] A charge created by a decree over "'all the property of the judgment debtor both movable and immovable" cannot be said to be void for uncertainty.[2825]

(9) Attestation

A charge does not require to be attested, and proved in the same way as a mortgage.[2826]

(10) Registration

The section does not lay down any particular mode of creating a charge, and it need not be in writing.[2827] But if it is reduced to writing, registration is necessary in the case of a non-testamentary instrument of the value of ₹ 100 or upwards, under section 17(l)(b) of the Registration Act, which applies to rights not only in, but also to, immovable property.[2828] As a charge in writing requires registration if of the value of ₹ 100 or upwards, the assignment of such a charge would also need to be registered. In *Shiva Rao v Official Liquidator,*[2829] the Madras High Court held that a deed assigning a mortgage decree required registration, and in the absence of registration would not create a charge. The words "so far as may be" in the section do not exclude section 59, for there is no incompatibility between the two sections.[2830]

(11) Instances of Charges by Act of Parties

The following are illustrations of charges by act of parties:

ILLUSTRATIONS

(1) *A* inherited an estate from his maternal grandmother and executed an agreement to pay his sister *B* a fixed annual sum out of the rents of the estate. *B* has a charge on the estate.[2831]

(2) *A* sued *B* for a sum of money, and the compromise decree directed that the immovable property specified herein shall be hypothecated for the realization of the said money and *B* shall not be able to create any encumbrance on the same. *A* has a charge on the property for the amount decree.[2832]

(3) *A* sued to recover certain immovable property. The suit ended in a compromise decree under which the property was awarded to *A* with a provision that *A* should pay *B* a monthly sum for maintenance and that if *A* should fail to pay the aforesaid monthly sum at the end of each

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2824. *Matlub Hasan v Kalawati,* 147 IC 302 : AIR 1933 All 934.
2825. *Narsinhamurthi v Satyanandan,* (1941) 2 Mad LJ 386 : 54 Mad LW 213 : (1941) Mad WN 751 : 197 IC 259 : AIR 1941 Mad 794; see also *Sris Chundra Nandey v Rakhalananda,* 68 IA 34 : (1941) ILR 1 Cal 468 : 45 Cal WN 435 : (1941) 1 Mad LJ 746 : 193 IC 220 : AIR 1941 PC 16.
2826. *Rama Sami Iyengar v Kuppusami,* (1921) Mad WN 472 : 61 IC 554 : AIR 1921 Mad 514; *Sikandar Ara Amina Begum v Hasan Ara Begum,* 165 IC 70 : AIR 1936 Oudh 196; but see *Shiva Rao v Official Liquidator,* AIR 1940 Mad 140.
2827. *Abdul Jabbar v Venkata Sastri,* [1969] 3 SCR 513 : AIR 1969 SC 1147 : [1969] 2 SCJ 784 : [1969] 2 SCA 129 : (1969) 1 SCC 573.
2828. *Abdul Jabbar v Venkata Sastri,* AIR 1969 SC 1147; *Bengal Banking Corporation v Mackertich,* (1884) ILR 10 Cal 315; *Maina v Bachchi,* (1906) ILR 28 All 655, p 659; *Amratlal v Keshavlal,* (1926) 28 Bom LR 939 : 98 IC 696 : AIR 1926 Bom 495; *Imperial Bank v Bengal National Bank,* (1931) ILR 58 Cal 136 : 131 IC 689 : AIR 1931 Cal 223; *Rangampudi v Venkateswarlu,* 152 IC 772 : AIR 1934 Mad 713; *Vishwanadhan v Menon,* AIR 1939 Mad 202 : (1939) ILR Mad 199 : (1939) 1 Mad LJ 185 : 48 Mad LW 952 : (1938) Mad WN 1286 : 183 IC 639.
2829. *Shiva Rao v Official Liquidator,* AIR 1940 Mad 140 : (1940) ILR Mad 306 : (1940) 1 Mad LJ 922 : 50 Mad LW 844 : (1940) Mad WN 313 : 187 IC 243.
2830. *Shiva Rao v Official Liquidator,* AIR 1940 Mad 140 following *Vishwanadhan v Menon,* (1939) ILR Mad 199 : (1939) 1 Mad LJ 185 : 183 IC 639 : AIR 1939 Mad 202; *Illahi Bux v Jamila Bai,* (1959) ILR 9 Raj 331 : AIR 1959 Raj 143; *Krishna Deva v Official Liquidator,* (1962) ILR All 101.
2831. *Chalamanna v Subbamma,* (1884) ILR 7 Mad 23.
2832. *Gobinda Chandra v Dwarka Nath,* (1908) ILR 35 Cal 837.

month, *B* shall have power to recover the monthly sum with interest at 1 per cent per mensem from the property decreed. *B* has a charge for maintenance on the property decreed.[2833]

(4) An arbitrator was appointed by *A* and *B* to make a partition of their properties and to do all that was necessary to secure their rights. The arbitrator allotted some properties to *A* and some to *B*, as those of *A* were of greater value, directed *A* to pay *B* ₹ 1,400 to make up the difference within a month, and further directed that if such payment was not made, *B* should have a charge on *A*'s properties for that sum and interest at 10 annas per month. Held that a valid charge was created.[2834]

(5) *A* sued *B* on a promissory note. The compromise decree directed the payment of the money and further directed that *B* shall not dispose of his share in a factory until satisfaction of the entire decretal amount. Held that *A* had a charge on the property specified.[2835]

A creditor advancing money does not, apart from special arrangement, acquire a charge over property purchased with the money.[2836] A covenant in a lease empowering the lessee to retain part of the rent in satisfaction of a previous loan to the lessor, has been held to constitute a charge on the lessor's interest.[2837] In *Hakam Chand v Radha Kishan*,[2838] the Privy Council has observed that an agreement between *A* and *B* providing that the executant *A* should give a regular mortgage of his immovable property for money advanced by *B*, cannot constitute a mortgage or charge upon such property.

Passing of an arbitral award on consent would not result in the annulment of hypothecation and the party would retain its character as a secured creditor in a case where there is a hypothecation of movable property as the principles applicable to movable and immovable property are distinct.[2839] Where goods were hypothecated to bank by borrower without delivery of possession and were subsequently transferred by him, the legal rights of Bank continue to survive and charge of Bank remains binding on transferee.[2840] A secured creditor may choose to realise its securities outside of winding up of the concern in liquidation. In creating a charge, such immovable asset must be identified to discharge liabilities.[2841]

(12) Charge by Operation of Law

The inclusion, in the definition, of charges by the operation of law has been criticised as inconsistent with the scheme of the TP Act which relates to transfers by act of parties.[2842] But, as the Supreme Court observed in *Laxmi Devi v Mukand Munwar*,[2843] a plain reading of section 2(d) leaves no doubt that the provisions of chapter IV of the TP Act, and, therefore, of this section, govern charges created by operation of law. The TP Act, however, itself creates such charges, for a charge by the operation of law arises in TP Act under section 55(4)(b) in the case of an unpaid vendor, under section 55(6)(b) for purchase money paid in advance; and under

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2833. *Maina v Bachchi*, (1906) ILR 28 All 655.
2834. *Kanhaiya Lal v Jangi*, (1926) 24 All LJ 649 : AIR 1926 All 527.
2835. *Narain Das v Murli Dhar*, 121 IC 81 : AIR 1929 Oudh 539; *Jawahir Mal v Indomati*, (1914) ILR 36 All 201 : 22 IC 973.
2836. Re *Annapuma Co Ltd*,(1926) 24 All LJ 347 : 93 IC 33 : AIR 1926 All 397.
2837. *Nathan Lal v Durga Das*, (1930) ILR 52 All 985 : 130 IC 489 : AIR 1931 All 62.
2838. *Hakam Chand v Radha Kishan*, (1930) 34 Cal WN 506 : 123 IC 157 : AIR 1930 PC 76; *Ram Het v Pokhar*, (1932) ILR 7 Luck 237 : 134 IC 1093 : AIR 1932 Oudh 54. And see *JK (By) P Ltd v K-I-Hind Spg & Wvg Co*, [1969] 2 SCR 866 : AIR 1970 SC 1041 : [1970] 1 SCJ 487.
2839. *Infrastructure Leasing & Financial Services v BPL Ltd*, (2015) 3 SCC 363 : LNIND 2015 SC 13 : AIR 2015 SC (Supp) 104 : 2015 (1) SCALE 186.
2840. *Eureka Forbes Ltd v Allahabad Bank*, (2010) 6 SCC 193.
2841. *ONGC Ltd v Official Liquidator of Ambica Mills Co Ltd*, (2015) 5 SCC 300.
2842. *Corporation of Calcutta v Arunchandra Singha*, (1934) ILR 61 Cal 1047 : 38 Cal WN 917 : 60 Cal LJ 312 : 153 IC 972 : AIR 1934 Cal 862 : reversing (1933) ILR 60 Cal 1470.
2843. *Laxmi Devi v Mukand Munwar*, AIR 1965 SC 834; *Manna Singh v Wasti Ram*, AIR 1960 Punj 296.

section 73 in favour of a mortgagee on surplus sale proceeds of a revenue sale. Arrears of government revenue are a paramount charge on the land,[2844] but nevertheless a co-sharer who pays assessment to avert a sale does not get a charge on the other shares according to High Courts of Calcutta, Allahabad, Bombay, Patna and Rangoon,[2845] although he does in Madras.[2846] The charge given by the decisions of Madras High Court is on the other shares as they stood at the time of the payment, and is subject to mortgages then existing on those shares.[2847]

The charge for arrears of rent under section 65 of the Bengal Tenancy Act has been held not to be a charge under TP Act;[2848] so also *kattubadi* which is a rent payable by the tenant in Madras.[2849]

However, the courts in Madhya Pradesh treat the word "charge" in their Revenue Acts as the equivalent to a charge under the TP Act.[2850] The decisions in Madras are conflicting as to whether the charge for rent under section 5 of the Madras Estates Land Act, 1908, is not a charge under this section.[2851]

Section 228 of the Calcutta Municipal Act makes the consolidated rate as it becomes due from time to time a first charge on the property, subject to the payment of land revenue.[2852]

It had been held that the saving clause did not apply to an auction purchaser as he was not a transferee within the meaning of section 5;[2853] but a contrary view was taken by the Allahabad and Patna High Courts.[2854] In *Laxmi Devi v S M Kanwar,*[2855] the Supreme Court has expressly approved of the latter view, holding that the provisions of section 2(d) prevail over the definition contained in section 5.

2844. *Chatraput Singh v Grindra Chunder,* (1881) ILR 6 Cal 389.
2845. *Kinnu Ram v Mozaffer,* (1887) ILR 14 Cal 809; *Seth Chitor Mal v Shib Lal,* (1892) ILR 14 All 273; *Shivrao v Pundlik,* (1902) ILR 26 Bom 437; *Bhuneshwari Kuer v Manir Khan,* (1928) ILR 7 Pat 613 : 111 IC 84 : AIR 1928 Pat 641; *U Shwe Bwa v Maung Thank,* (1928) ILR 6 Rang 500 : 113 IC 801 : AIR 1928 Rang 278.
2846. *Seshagiri v Pichu,* (1887) ILR 11 Mad 452; *Srinivasa v Rama,* (1893) ILR 17 Mad 247; *Rajah of Vizianagram v Raja Setrucherla,* (1902) ILR 26 Mad 686; *Alayakammal v Subbarayya,* (1905) ILR 28 Mad 493; *Amman Pariyayi v Pakran,* (1913) ILR 36 Mad 493 : 15 IC 262; *Kotayya v Kotappa,* (1926) 49 Mad LJ 117 : 90 IC 551 AIR 1926 Mad 141; *Swaminath Iyer v Ramnath Iyer,* (1944) ILR Mad 44 : (1943) 2 Mad LJ 24 : 56 Mad LW 289 : AIR 1943 Mad 573. See note "Equitable charge" under section 92.
2847. *Vyraperumal v Alagappa,* (1932) ILR 55 Mad 468 : 62 Mad LJ 31 : 135 IC 609 : AIR 1932 Mad 189.
2848. *Fotick Chunder v Foley,* (1888) ILR 15 Cal 492; *Royzuddi v Kali Nath* (1906) ILR 33 Cal 985; *Gopi Nath v Ishur Chundra,* (1895) ILR 22 Cal 800.
2849. *Lingam Krishna v Vikrama,* (1900) 10 Mad LJ 256; *Mullapudi v Venkatanarasimha,* (1896) ILR 19 Mad 329; *Gajapati v Suryanarayana,* (1899) ILR 22 Mad 11.
2850. *Mangal Prasad v Chandra,* (1905) 1 Nag LR 117; *Singai Murlidhar v Lala* (1907) 3 Nag LR 40; *Manoharlal v Kanhailal,* 140 IC 532 : AIR 1932 Nag 171.
2851. *Saramma v Suriyanarayana,* (1918) ILR 42 Mad 114 : 48 IC 794; *Sri Rajah Bollapragada Venkata v Menda Seetayya,* (1920) ILR 43 Mad 786 : 57 IC 764; *Ramkati Suryanarayana v Ramchandrudu,* 139 IC 452 : AIR 1932 Mad 716; and see *Harish Chandra v Qasim Gani,* AIR 1961 Pat 291.
2852. *Akhoy Kumar v Corpn of Calcutta,* (1915) ILR 42 Cal 625 : 27 IC 621; *Corpn of Calcutta v Arunchandra Singh,* (1934) ILR 61 Cal 1047 : 38 Cal WN 917 : 60 Cal LJ 312 : 153 IC 972 : AIR 1934 Cal 862.
2853. *Indra Narain v Mohammad Ismail,* AIR 1939 All 687; *Surayya v Venkataraman,* (1940) 1 Mad LJ 831 : 192 IC 47 : AIR 1940 Mad 701.
2854. *Nawal Kishore v Agra Municipality,* (1943) ILR All 453 : (1943) All LJ 53 : 205 IC 539 : AIR 1943 All 115; *Sheo Narain v Lakhan,* (1945) ILR 24 Pat 345 : AIR 1945 Pat 434.
2855. *Laxmi Devi v S M Kanwar,* [1965] 1 SCR 726 : AIR 1965 SC 834 : [1965] 2 SCJ 656 : [1965] 2 SCA 521.

(13) Save as Otherwise Provided

A charge can be enforced against a purchaser without notice if any law expressly so provides; a law which merely makes municipal taxes a first charge on the property, but does not expressly provide for the priority of such charges over transferees for consideration without notice is not saved, and such a charge would not prevail over a transferee for consideration without notice.[2856] Earlier decisions[2857] which did not note this distinction are no longer good law.

(14) Notice of Charge

Charges as already explained, are not enforceable against transferees for consideration without notice or a volunteer with or without notice.[2858]

An oral non- possessory charge would, therefore, not have priority over a subsequent mortgage, if the mortgagee did not have notice of it. Irrespective of this section, this would also be the effect of section 48 of the Registration Act.[2859] There are some cases in which it was held that a charge created by a decree was enforceable against a transferee for consideration without notice.[2860] They are based on a misconception of the nature of a charge which was erroneously supposed to be an interest in property, and to reduce full ownership to limited ownership.[2861] These decisions have been superseded by the express provisions of this section.

In case of a decree for payment of money against an industrial unit, though it contained a stipulation that the judgement debtor should not create a charge on machinery of unit, it did not say that a charge was created in favour of the plaintiff, or that the decretal amount could be realised by sale of machinery. It was held under these circumstances, that the decree does not create a charge on the machineries of the industrial unit.[2862] Where the property was purchased by an auction-purchaser in a public auction in execution of mortgage decree obtained by state financial corporation against the owner-mortgagor, and the said purchaser had notice of property tax due in respect of property purchased by him, the first charge of the municipal corporation in respect of the property purchased by the purchaser with prior notice of the property tax dues, can be enforced against him by initiating the recovery proceedings permissible under the law, namely, by attaching and putting to auction the property on which the first charge was created.[2863] Where the property was auctioned on "as is where is basis", but the purchaser, despite being the lowest bidder, did not buy it at the auction but did so by private negotiations and only after satisfying himself regarding assets and liabilities incurred on the property, he would be deemed to have constructive notice of

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2856. *Ahmedabad Municipality v Haji Abdul,* AIR 1971 SC 1201.
2857. *Lakshman v Secretary of State,* (1939) 41 Bom LR 257 : 182 IC 635 : AIR 1939 Bom 183; *Lucknow Municipal Board v Ramjilal,* AIR 1941 Oudh 305.
2858. *Kishan Lal v Ganga Ram,* (1891) ILR 13 All 28, p 44; *Royzuddi v Kali Nath,* (1906) ILR 33 Cal 985, p 993; *Gur Dayal v Karam Singh,* (1916) ILR 38 All 254 : 35 IC 289; *Akhoy Kumar v Corpn of Calcutta,* (1915) ILR 42 Cal 625 : 27 IC 621; *Hunter, Liquidator of Bank of Upper India v Nisar Ahmad Chaudhari,* (1932) ILR 8 Luck 168 : 143 IC 692 : AIR 1932 Oudh 336; *Ahmedabad Municipal Corporation v Saurashtra Paints Pvt Ltd,* AIR 2002 Guj 221, p 226.
2859. *Chhaganlal v Chunilal,* (1934) 36 Bom LR 277 : 152 IC 267 : AIR 1934 Bom 189.
2860. *Maina v Bachchi,* (1906) ILR 28 All 655; *Bhoje Mahadev v Ganga Bai,* (1913) ILR 37 Bom 621 : 21 IC 54; *Mahadeo Prasad v Anandi Lal,* (1925) ILR 47 All 90 : 92 IC 348 : AIR 1925 All 60; *Srinivasa v Ranganatha,* (1919) 36 Mad LJ 618 : 51 IC 963; *Mollaya v Krishnaswami,* (1925) 47 Mad LJ 622 : 85 IC 855 : AIR 1925 Mad 95; *Kallapa v Balwant,* (1925) 27 Bom LR 434 : 87 IC 951 : AIR 1925 Bom 343; *Chaudhri v Gobardhan,* (1930) ILR 5 Luck 172 : 117 IC 405 : AIR 1929 Oudh 316; *Kuloda Prasad v Jogeshwar,* (1900) ILR 27 Cal 194.
2861. *Kallappa v Balwant,* (1925) 27 Bom LR 434 : 87 IC 951 : AIR 1925 Bom 343.
2862. *Hindustan Machine Tools Ltd v Nedungadi Bank Ltd,* AIR 1995 Kant 185.
2863. *Ahmedabad Municipal Corporation v Saurashtra Paints Pvt Ltd,* AIR 2002 Guj 221.

the fact that the property was charged to commercial tax dues and therefore such a purchaser cannot wriggle out of the liability expressly owned by him.[2864]

A charge is enforced by sale[2865] as in the case of a simple mortgage under this section and O 34, rule 15 of the Code of Civil Procedure, and if the charge carries with it a personal liability (as in the case of the seller's charge for price not paid) the charge holder is entitled under O 34, rule 6 to a personal decree.[2866] A charge given in a security bond under the Code of Civil Procedure is enforced by order of sale under the procedure adopted by the Allahabad High Court in *Janki Kuar v Sarup Rani*[2867] approved by the Privy Council in *Raghubar Singh v Jai Indra Bahadur Singh*,[2868] and section 67 is not applicable.[2869] A person who purchases a portion of a property which is subject to charge with notice of the charge is liable to pay the whole amount. He may sue for contribution.[2870]

A charge is an obligation to make payment out of the property specified. In the present case, in the security bond given to vacate attachment before judgement, there is no clear recital in the document of having created an obligation to make payment of the decretal amount out of the property in question. All that it states is that in the event of the decree being passed against alienation of the property till the decree is discharged, is a mere undertaking without creating a charge.[2871]

(15) So far as may be

These words also occur in O 34, rule 15 of the Code of Civil Procedure which applies to charges, the provisions of O 34 apply as to the enforcement of simple mortgages. A charge is not exactly identical with a mortgage and a suit for the enforcement of a charge is not necessarily the same as a suit for sale on the basis of a mortgage deed. Thus, in the case of a recurring charge, a charge is not extinguished by a decree for sale.[2872] The principle of O 34 of the Code of Civil Procedure may be applied to the execution of a decree which created a charge.[2873] In a suit for the enforcement of a charge, the Privy Council observed that under section 100 read with O 34, rule 15, a preliminary decree for sale, as in a suit on a mortgage, should have been parted.[2874] Limitation for the enforcement of a charge is, under Article 132 (g), the Act of 1908, 12 years from the time when the money is due. If the suit is for the enforcement of the charge by sale, the words "so far as may be" in this section and in O 34, rule 15 indicate that the property cannot be sold if in the hands of a transferee without notice. It has been held that a charge declared in a decree must be enforced under section 67

2864. *Swagita Impex Pvt Ltd v UCO Bank*, AIR 2012 MP 132.
2865. *Gajraj Jain v State of Bihar*, AIR 2006 Kant 25; *Lalitha Kariappa v Sanjeevi*, AIR 2006 Kant 25 : (2006) 2 MPHT 313 : (2006) 2 MPJR 24.
2866. *Babu Ram v Imam Ullah*, (1935) All LJ 279 : 157 IC 533 : AIR 1935 All 411; *Raghukul Tilak v Pitam Singh*, (1931) ILR 52 All 901 : 130 IC 198 : AIR 1931 All 99.
2867. *Janki Kuar v Sarup Rani*, (1895) ILR 17 All 99.
2868. *Raghubar Singh v Jai Indra Bahadur Singh*, (1919) ILR 42 All 158 : 46 IA 228 : 55 IC 550 : AIR 1919 PC 55; *Beti Mahalakshmi v Badan Singh*, (1923) ILR 45 All 649 : 74 IC 927 : AIR 1924 All 105; *Sukumari v Mugneeram*, (1927) ILR 54 Cal 1 : 95 IC 908 : AIR 1926 Cal 889; *Daw v U Bah*, (1929) ILR 7 Rang 352 : 118 IC 632 : AIR 1929 Rang 26.
2869. *Jyoti Prakash v Mukti Prakash*, (1924) ILR 51 Cal 150 : 81 IC 734 : AIR 1924 Cal 485; *Subramanian v Raja of Ramnad*, (1918) ILR 41 Mad 327 : 43 IC 187.
2870. *Shariff Ahmed v H Hunter*, 167 IC 52 : AIR 1937 Oudh 420; *Parshair Lal v Brij Mohan Lal*, (1935) ILR 11 Luck 575 : 159 IC 117 : AIR 1936 Oudh 52.
2871. *K Muthuswami Gounder v N Paloniappa Gounder*, AIR 1998 SC 3118.
2872. *Jnanendra Nath v Sashi Mulch*, AIR 1940 Cal 60 : (1940) 44 Cal WN 240 : 186 IC 333.
2873. *Ray Chand v Basappa*, AIR 1941 Bom 71.
2874. *Ram Raghubir Singh Lal v United Refineries*, 60 IA 183 : (1933) ILR 11 Rang 186 : 37 Cal WN 633 : 57 Cal LJ 308 : 64 Mad LJ 655 : (1933) All LJ 541 : 35 Bom LR 753 : 142 IC 788 : AIR 1933 PC 143.

by a suit.[2875] Again, the doctrine of subrogation has been applied to a charge. A puisne mortgagee paid off a decretal charge anterior to the prior mortgage, and he was subrogated to the charge and had priority over the prior mortgagee, and as the prior mortgage was affected by lis pendens (having been effected while execution of the decree was pending) it did not matter that the prior mortgagee had no notice of the charge.[2876] Other provisions of the TP Act are not applicable to charges except those of sections 81 and 82 as to marshalling and contribution; and a charge holder cannot avail himself of section 68;[2877] nor does the principle of consolidation of securities enacted in section 67A apply to charges.[2878] Where a portion of the property charged has been relieved thereof without the consent of the holder of the charge, the charge-holder can proceed against the whole property for the enforcement of the charge, and the principle of rateable distribution is inapplicable.[2879] Again, a charge may be in perpetuity, and then it cannot be redeemed.[2880] An agreement providing that in default of a certain payment for the maintenance by one party to the other, the latter would be at liberty to cultivate the field and maintain herself, clearly created a charge. Such a provision does not affect the effect of the agreement as a charge, although it cannot be enforced by sale of the land.[2881]

So also when two properties are burdened with a charge and one of the properties is relieved of the liability of paying the charge as a result of its transfer by the owner to a person for consideration and without notice of the charge, the charge holder can recover the entire amount from the remaining property.[2882]

(16) Decretal Charge

If a decree is executory, a charge created by it can be enforced in execution. This has been dealt with in the note "Charge" under section 67.

(17) Trustee's Charge

A trustee is entitled to a charge on the income as well as the corpus of the trust estate for all moneys properly expended in performing the obligations of the trust.[2883] This charge has priority over the returns of the beneficiaries.[2884] However, as long as he is a trustee, his remedy for enforcing his charge is limited by section 32 of the Indian Trusts Act, 1882. He may, therefore, only reimburse himself for such expenses and interests out of the income and profits of the trust estate, and prohibit any disposition of the trust property without previous payment of his expenses. While he is a trustee he cannot destroy the trust by bringing it to

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2875. *Aubhoyessury Dobee v Gour Sunkar,* (1895) ILR 22 Cal 859; *Matangini Dassi v Chooneymoney,* (1895) ILR 22 Cal 903; *Venkata Lakshmamma v Seetayya,* (1920) ILR 43 Mad 786 : 57 IC 764; *Rajkumar Lal v Jai Karan Das,* (1920) 5 Pat LJ 248 : 57 IC 653.
2876. *Aravamudhu Ayyangar v Zamindarini Srinath Abiramvalli Ayah,* (1934) 66 Mad LJ 566 : 150 IC 930 : AIR 1934 Mad 353.
2877. *Fotick Chunder v Foley,* (1888) ILR 15 Cal 492; *Nand Keolyur v Sultan Jehan,* (1952) ILR 31 Pat 722 : (1955) ILR AP 58.
2878. *Corpn of Calcutta v Arunachandra Singha,* (1934) ILR 61 Cal 1047 : (1934) 38 Cal WN 917 : 60 Cal LJ 312 : 153 IC 972 : AIR 1934 Cal 862 : reversing (1933) ILR 60 Cal 1470.
2879. *Hussein Mirza v Raghubir Dayal,* AIR 1947 Oudh 122.
2880. *Matlub Hasan v Mt Kalawati* ,147 IC 302 : AIR 1933 All 934.
2881. *Renukabai v Bhavan,* 185 IC 33 : AIR 1939 Nag 132.
2882. *Raghubir Dayal v Hussain Mirza,* (1948) ILR Luck 18 : AIR 1948 Oudh 147.
2883. Re *Pumfrey,* (1882) 22 Ch D 261.
2884. *Dodds v Tuke,* (1884) 25 Ch D 617; *Peary Mohun Mukerjee v Narendra Nath,* (1910) ILR 37 Cal 229, p 234 : 37 IA 27 : 5 IC 404.

sale. But after he has ceased to be a trustee, or after he has lost possession of the trust property, he may enforce his charge by sale.[2885]

(18) Transferee for Consideration and Without Notice

A purchaser at an auction is a transferee within this clause. It has been held in Madras[2886] that a simple mortgagee cannot be a transferee within this clause as the property cannot be said to be "in the hands" of such a person. The contrary view has been expressed in a Division Bench judgment of the Bombay High Court,[2887] in which it was held that a mortgagee with or without possession is a transferee within the clause.

(19) Integrity of Charge

Just as the integrity of a mortgage cannot be broken, so the charge cannot ordinarily be split up by apportioning liability amongst various persons.[2888]

(20) Electricity Dues

The auction purchaser of a premise is not liable to make payment of outstanding dues for consumption of electricity supplied to that premises prior to such auction sale. There is no charge over the property for such electricity dues. The Supreme Court has held that where the premises came to be owned or occupied by the auction-purchaser, when such purchaser seeks supply of electricity energy, he cannot be called upon to clear the past arrears as a condition precedent to supply. What matters is the contract entered into by the erstwhile consumer with the electricity Board. The Board cannot seek the enforcement of contractual liability against the third party.[2889] The provisions of the Indian Electricity Act or the Electric Supply Act, 1948 also nowhere make the outstanding dues of the licensee for the energy supplied to a person, a charge on the premises, or the property to which the electricity was supplied.[2890]

[2891][**101. No merger in case of subsequent encumbrance.**—Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.]

2885. *Abkan Sahib v Soran Bibi,* (1915) ILR 38 Mad 260 : 28 IC 290; *Peary Mohun Mukerjee v Narendra Nath,* (1910) ILR 37 Cal 229 : 37 IA 27 : 5 IC 404.
2886. *Surayya v Venkataraman,* (1940) 1 Mad LJ 831 : 192 IC 47 : AIR 1940 Mad 701.
2887. *Raichand v Dattatraya,* (1963) ILR Bom 509 : 65 Bom LR 510 : AIR 1964 Bom 1.
2888. *Har Charan Lal v Agra Municipal Board Agra,* AIR 1952 All 315.
2889. *Isha Marbles v Bihar State Electricity Board,* (1995) 2 SCC 648; *Haryana State Electricity Board v Hanuman Rice Mills, Dhanauri,* AIR 2010 SC 3835 : (2010) 9 SCC 145.
2890. *Subendu Banerjee v CESC Ltd,* AIR 2002 Cal 242, p 246.
2891. Subs. by Act 20 of 1929, sec. 51, for section 101.

Synopsis

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(1) Amendment

This original section was substituted by the amending Act 20 of 1929.

(2) Extinction of Mortgage Security

Merger is only one of the several ways in which a mortgage security may be extinguished. For the security may be extinguished:

(i) By a decree for foreclosure, or by a decree for sale after the sale is confirmed (note under section 60 "By order of a court").

(ii) By payment of the mortgage debt by the mortgagor or by a person under covenant to pay. Such a payment extinguishes the mortgage and does not operate as an assignment (notes under section 92 "Mortgagor not subrogated", "Covenant to pay excludes subrogation").

When the mortgage debt is paid by one of the several co-mortgagors, it is extinguished as to his share, and assigned to him as to the shares of the other co- mortgagors (section 95).

When the mortgage debt is paid by a puisne mortgagee, the mortgage is not extinguished, but assigned to the puisne mortgagee (section 92).

When the mortgage debt is paid by a purchaser of the equity of redemption the question of extinction of the mortgage depends upon the existence of a subsequent encumbrancer (section 92).

(iii) By release by the mortgagee of the debt or of the security. If the mortgagee releases the debt, the mortgage is extinguished. If the mortgagee releases the security the mortgage is extinguished, but the debt subsists and the mortgagee becomes an unsecured creditor. (note under section 82 "Release by mortgagee").

(iv) By merger. (v) By novation.

The first three modes of extinction have already been discussed. The last two will be dealt with in the commentary under this section.

(3) Merger

A security may be extinguished by merger. This occurs— (i) by the merger of a lower in a higher security; and (ii) by the merger of a lesser estate in a greater estate.

The section only deals with the second head of merger. A merger of estates takes place when two estates held in the same legal right become united in the same person. Where the capacity in which a person in possession of the mortgagee's rights is something quite different from the capacity in which he is in possession of the equity of redemption, the mere

fact that the two capacities are united in the same physical person, cannot result in a merger.[2892]

Merger of lower in higher security

The acquisition by a person of a security of a superior nature in law to the one he has, merges or extinguishes his legal remedies on the inferior security. So when a person recovers judgment on a contract debt, the debt is extinguished being merged in the judgment.[2893] An equitable mortgage by deposit of title deeds is extinguished when a formal mortgage is executed for the debt;[2894] such merger is, however, excluded by express words indicating a contrary intention, eg by a recital that the subsequent security is given by way of further or additional security.[2895] Again, there is no merger if the remedies on the two securities are not co-extensive.[2896] Thus, a promissory note enforceable by summary procedure will not merge in a mortgage for the same debt.[2897] However, though a debt merges in a judgment, yet if it is secured by a mortgage, the collateral security of the mortgage does not merge.[2898] The Calcutta High Court held that a mortgagor can redeem even after decree for sale under the repealed section 89 has been passed, and this he may do at any time until confirmation of the sale,[2899] for the mortgage security is not merged, in the judgment, and subsists until satisfaction of the decree.[2900] Therefore, if the mortgage decree for sale is not executed and the mortgagee is in possession, the mortgagor and the mortgagor's purchasers cannot dispossess him except by suit for redemption.[2901] The fact that the mortgagee had sued on a prior mortgage and obtained a decree does not show that he did not intend to keep that mortgage alive,[2902] unless of course satisfaction of the decree is certified to the court, and a second mortgage is taken afterwards for the balance.[2903] It is in recognition of this principle that the clause providing for the extinction of the right of redemption in decrees absolute for sale has been omitted from sections 89 and 93 of the TP Act when re-enacted as O 34, rules 5 and 8 of the Code of Civil Procedure 1908.[2904]

If the higher security fails, the lower revives. If the mortgagee purchases the property mortgaged and the sale deed fails for want of registration,[2905] or because the property was under attachment,[2906] or if the sale is avoided as a fraud on creditors,[2907] he can still fall back on the mortgage. A mortgagee in possession under an invalid sale is still a mortgagee, and may bring the property to sale,[2908] or may be sued for redemption.[2909] On the other hand, if

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2892. *Mahomed Abdul Samad v Girdhari Lal,* (1942) ILR All 259 : (1942) All LJ 174 : 200 IC 269 : AIR 1942 All 175.
2893. *Owen v Homan,* (1851) 3 Mac & G 378, p 407.
2894. Re *Annesley, Vaughan v Vanderstegen,* (1854) 2 Eq Rep 1257.
2895. *Twopenny v Young,* (1824) 3 B & C 208.
2896. *Venkata v Ranga,* (1887) ILR 10 Mad 160, p 163.
2897. *Ramgopal v Richard Blaquiere,* (1868) 1 Beng LR 35.
2898. *Economic Life Assurance Society v Osborne,* (1902) AC 147; *Ramshanker v Gulab Shanker,* 144 IC 736 : AIR 1933 Nag 241.
2899. *Bibijan v Sachi,* (1904) ILR 31 Cal 863.
2900. *Surjiram v Barhamdeo,* (1905) 2 Cal LJ 202; contra *Shadi Ram v Het Ram,* (1912) 11 All LJ 634 : 20 IC 59 (incorrect on this point).
2901. *Purnamal v Venkata* (1897) ILR 20 Mad 486; *Latchmiput Singh v Land Mortgage Bank of India,* (1887) ILR 14 Cal 464.
2902. *Purnamal v Venkata,* (1897) ILR 20 Mad 486.
2903. *Ram Krishna v Chotmal,* (1889) ILR 13 Bom 348.
2904. Code of Civil Procedure 1908, O 34, rules 5 and 8.
2905. *Hirachand Babaji v Bhaskar,* (1864) 2 Bom HC 198.
2906. *Gopal Sahoo v Gunga,* (1882) ILR 8 Cal 530.
2907. *Appalaraju v Krishnamurthy,* 135 IC 582 : AIR 1932 Mad 182.
2908. *Rama Charan v Nimai Nandal,* (1922) 35 Cal LJ 58 : 64 IC 903 : AIR 1922 Cal 114.
2909. *Ariyaputhira v Muthukomaraswami,* (1914) ILR 37 Mad 423 : 15 IC 343; *Raj Kishore Lall v Sultan Jehan,* (1952) ILR 31 Pat 722 : AIR 1953 Pat 58.

the later security is inoperative, there can be no merger. Thus, an oral agreement before the Registration Act, 1864 is not merged in a subsequent written agreement which fails for want of registration.[2910] Nor is there a merger if there is no subsisting prior encumbrance at the relevant time.[2911] In a Madras case, the defendant had obtained a registered mortgage on 7 May 1963, and subsequently purchased the equity of redemption in a court auction on 15 February 1967. On that date, two encumbrances were subsisting, namely, the mortgage deed of the defendant, and a registered security bond obtained by the plaintiff in July 1963. In view of the intervening charge in favour of the plaintiff (subsequent to the mortgage), there could be no merger of equity of redemption.[2912]

When after the mortgage, there is sale of the equity of redemption or purchase of the property by the mortgagee himself, the mortgage merges with the sale, and is extinguished, unless contrary intention is proved.[2913] The doctrine of merger does not apply in the case of a lease followed by a mortgage to the lessee.[2914]

Merger of lesser estate in greater estate

In *Tharne v Cann,*[2915] Lord Macnaghten said:—

> Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot.

The Privy Council seemed to put this construction on the section in *Malireddi Ayyareddi v Gopala Krishnayya,*[2916] for they said:

> It is further to be presumed, and indeed the statute so enacts (Transfer of Property Act, section 101), that if there is no indication to the contrary, the owner has intended to have kept alive the previous charge if it would be for his benefit.

(4) Rule of Intention

The fact that the mortgage deed was retained by the mortgagee after the purchase of the equity of redemption was held to indicate an intention to keep the mortgage alive,[2917] but in these cases there was a puisne mortgage. If the purchasing mortgagee has granted a sub-mortgage, that also is evidence that he intended to keep the mortgage alive.[2918] On the other hand, the fact that the mortgagee purchased in the name of the other son was held not to be evidence of an intention to keep the mortgage alive, because there was no puisne mortgage.[2919]

When a mortgagee purchased the equity of redemption at a sale in execution of a money decree, he did not lose priority over a puisne mortgage, although by mistake no mention was

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2910. *Jivandas v Framji,* (1870) 7 Bom HCR 45.
2911. *Bashirunnisan v Habib Ahmed,* AIR 1960 Pat 264.
2912. *PMAR Adaikkappa Chettiar v Kumbakanam City Union Bank Ltd,* AIR 1975 Mad 223.
2913. *B T Kempanna v T Krishnappa,* AIR 1973 Mys 58.
2914. *Malegowda v Gaibusab,* AIR 1978 Kant 71; (1978) ILR 1 Kant 423.
2915. *Tharne v Cann,* (1895) AC 11, p 18.
2916. *Malireddi Ayyareddi v Gopala Krishnayya,* 51 IA 140 : 79 IC 592 : AIR 1924 PC 36.
2917. *Shantappa v Balapa,* (1882) ILR 6 Bom 561; *Prayag Narain v Chedi Rai,* (1909) 14 Cal WN 1093; *Gauri Shankar v Bahadur Singh,* 88 IC 340 : AIR 1925 Pat 605.
2918. *Radha Kishan v Fakharuddin,* 154 IC 695 : AIR 1934 Lah 143.
2919. *Gobind Sarup v Kaldup Singh,* 73 IC 764 : AIR 1924 Lah 377; *Lala Lakhmichand v Partab Singh,* (1930) 12 Lah LJ 56 : 128 IC 296 : AIR 1930 Lah 620.

made of it in the sale proclamation.[2920] It has been held that a contract which operates to deprive the prior mortgagee of his charge upon the property when he became the owner of it under a sale, must be clear one.[2921]

The presumption has been held to be a rebuttable presumption,[2922] and no doubt, even under the present section, the purchasing mortgagee may by express declaration extinguish the mortgage despite the existence of a puisne mortgage. A mere mention in a sale deed of the amount due upon a prior mortgage is not sufficient to justify the conclusion that the merger was intended.[2923] In *Chanda Bibi v Mohanram Sahu,*[2924] there was a mortgage of 1899. The mortgagee died in 1905, and his widow purchased the equity of redemption in 1908. Her son succeeded to the property in 1909 and the court held on the evidence, that the presumption of an intention to keep the mortgage alive and so have priority over a charge of 1905, was not rebutted. The presumption is, of course, rebuttable, but this is a question of fact and evidence must be led.[2925]

The benefit which gives rise to the presumption must be a benefit accruing to the vendee on the date of the sale, and not a possible benefit which may arise in future on the happening of a possible contingency. This logic has been followed in cases in which the mortgagee after the purchase has been sued by a pre-emptor.[2926] The conclusion would be the same under the present section which refers only to a puisne mortgage or charge in existence at the date of the purchase. The Privy Council has laid down the rule in *Gokuldas v Puranmal.*[2927] In *Bhawani Kumar v Mathura Prasad,*[2928] the mortgagee purchased the property on 19 March 1900 and nine days later, a charge for arrears of land revenue arose for non-payment of which the land was sold by the Collector. The revenue sale purchaser sued to recover possession, and the mortgagee set up his mortgage as a defence. The Privy Council held that the mortgage was extinguished by merger, for on 19 March, the crucial date in question, there were no interest of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such. In this case, there was a merger, for the charge was not in existence on the date of the purchase. On the other hand, the words of the old section "or such continuance as would be for his benefit" do not limit the benefit to a benefit accruing at the time of the sale. It has, therefore, been held under that section that if the continuance is for the benefit of the purchaser, no question of intention need be

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2920. *Ram Sarup v Bharat Singh,* (1921) ILR 43 All 703 : 64 IC 765 : AIR 1921 All 113; *Gurdit Singh v Hakumat Rai,* 135 IC 201 : AIR 1932 Lah 56.
2921. *Madan Mohan v Nand Ram,* (1943) ILR All 444 : (1943) All LJ 62 : 206 IC 142 : AIR 1943 All 156.
2922. *Goya Prasad v Salik Prasad,* (1631) ILR 3 All 682, p 687; *Mata Din v Kazim Husain,* (1891) ILR 13 All 432 (head note); *Shan Mhan Mull v Madras Building Co,* (1892) ILR 15 Mad 263, p 280; *Rai Reva v Vali Mahomed,* (1932) ILR 46 Mad 1009 : 70 IC 912 : AIR 1922 Bom 211; *Triuvengadam v Sabapathi,* (1925) 49 Mad LJ 361 : 90 IC 767 : AIR 1925 Mad 1217; *Mahl Singh v Amar Nath,* (1926) ILR 7 Lah 212 : 94 IC 152 : AIR 1926 Lah 430.
2923. *Madan Mohan v Nand Ram,* (1943) ILR All 444 : (1943) All LJ 62 : 206 IC 142 : AIR 1943 All 156.
2924. *Chanda Bibi v Mohanram Sahu,* (1934) ILR 13 Pat 200 : 153 IC 412 : AIR 1934 Pat 134.
2925. *Brahm Prakash v Manbir Singh,* [1964] 2 SCR 324 : AIR 1963 SC 1607.
2926. *Jugal Kishore v Ram Narain,* (1912) ILR 34 All 268 : 13 IC 619; *Durshan Singh v Arjun Singh,* (1936) ILR 1 Luck 560 : 98 IC 28 : AIR 1926 Oudh 606.
2927. *Gokuldas v Puranmal,* (1884) ILR 10 Cal 1035 : 11 IA 126; *Mahalakshmammal v Sriman Madhawa,* (1912) ILR 35 Mad 642 : 11 IC 865; *Shankar v Sadashiv,* (1914) ILR 38 Bom 24, p 31 : 21 IC 39; *N V N Natchiappa Chettyar v Ko Tha Zan,* (1928) ILR 6 Rang 488 : 113 IC 809 : AIR 1928 Rang 287.
2928. (1913) ILR 40 Cal 89 : 39 IA 228 : 16 IC 210; followed in *Sabjan Mandal v Haripada Saha,* (1920) 25 Cal WN 424 : 66 IC 103 : AIR 1921 Cal 599; and *Indra Narayan v Tarini Prosad,* 90 IC 746 : AIR 1926 Cal 165.

considered.[2929] When the charge for rent is in existence at the date of the mortgagee's sale, the mortgage is not extinguished by merger.[2930]

The rule of intention was applied in many cases before the TP Act as in the case of a mortgagee purchasing the equity of redemption.[2931] But the application of this rule must depend on the circumstances present at the time of the mortgagee's acquisition of full ownership.[2932] There are instances in which, on a mortgagee purchasing, the security was held to be merged under the rule of intention;[2933] and in all these cases there was no puisne mortgage. In some cases, it has been held that section 101 is not applicable and the equitable rule of intention to keep alive the mortgage should be applied, even though there is no puisne encumbrance.[2934]

If the mortgagee after filing a suit on his mortgage, purchases the equity of redemption at a sale in execution of a simple money decree, the mortgage is extinguished by merger, and the suit must be dismissed.[2935] The case of *Lachman Prasad v Lachmeshwar*[2936] was a case of the purchase of the equity of redemption by a mortgagee. There was a mortgage in 1908 to a son, and then a sale of the equity of redemption in 1914 to the father of a joint and undivided family who was for all intents and purposes, the mortgagee himself. The father retained part of the price to pay off the mortgage, but a few days before his purchase, a part of the equity of redemption was sold in execution of a money decree to the defendant. The father's purchase as to this part of the property failed, and the court held that the father could not enforce any part of the mortgage against the defendant on the ground that he had redeemed the mortgage at the time of his purchase. In other words, the mortgage as to part was extinguished by merger and as to the part sold in execution ,the father's covenant to pay off the mortgage excluded his right of subrogation. The principle of this decision was followed by the Patna High Court in *Kedar Nath v Bhagwat Prasad* in which it was held that a partial failure of consideration did not avoid the sale and the sale extinguished the mortgage

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2929. *NVN Natchiappa Chettyar v Ko Tha Zan,* AIR 1928 Rang 287; *Ko Po Kun v CAMLAL Firm,* (1932) ILR 10 Rang 465 : 140 IC 156 : AIR 1932 Rang 197.

2930. *Bidumukhi Dasi v Babha Sundari,* (1919) 24 Cal WN 961 : 59 IC 868; *Sita Chandra v Parbati Charan,* (1922) 35 Cal LJ 1 : 69 IC 841 : AIR 1922 Cal 32.

2931. *Ramu v Subbaraya,* (1875) 7 Mad HC 229; *Lachmin Narain v Koteshar Nath,* (1880) ILR 2 All 826; *Bissen Das v Sheo Prasad,* (1880) 5 Cal LR 29; *Gaya Prasad v Salik Prasad,* (1881) ILR 3 All 682; *Har Prasad v Bhagwan Das,* (1882) ILR 4 All 196; *Ali Hasan v Dhirja,* (1882) ILR 4 All 518; *Shantappa v Balapa,* (1882) ILR 6 Bom 561; *Goluk Nath Misser v LaIla Prem Lal,* (1878) ILR 3 Cal 307 (renewal of mortgage).

2932. *Damodara Sami v Govindarajalu,* (1943) ILR Mad 531 : (1943) 1 Mad LJ 291 : 56 Mad LW 194 : 208 IC 370 : AIR 1943 Mad 429.

2933. *Mastulla Mandal v Jan Mamud,* (1901) ILR 28 Cal 12 (mortgagee purchasing in execution of a rent decree); *Ahmad Shah v Walidad Khan,* (1906) PR 98; *Sri Ram v Ramji Das,* 59 IC 949; *Bapu v Mahadaji* (1894) ILR 18 Bom 348, p 354; *Baldeo Prasad v Mahabir,* 18 IC 99; *Arumagasundara v Narsimha,* (1915) 29 Mad LJ 583 : 29 IC 916; *Raja of Kalahasti v Sree Mahant Prayag,* (1916) 30 Mad LJ 391 : 35 IC 224; *Jawahir Mal v Udai Ram,* 31 IC 891 (usufructuary mortgagee purchasing in execution of his own decree on a simple mortgage); *Rai Rewa v Vali Mahomed,* (1922) ILR 46 Bom 1009 : 70 IC 912 : AIR 1972 Bom 211; *Ram Sahai v Mahabir Singh,* (1943) Oudh WN 320 : 209 IC 23 : AIR 1943 Oudh 407.

2934. *Ram Sahai v Mahabir Singh,* (1943) Oudh WN 320 : 209 IC 23 : AIR 1943 Oudh 407; *Mahalakshmi v Somaraju,* (1939) ILR Mad 600 : (1939) 2 Mad LJ 72 : 49 Mad LW 280 : (1939) Mad WN 189 : AIR 1939 Mad 398; but see *Baswanewa v Dadgowda,* (1942) 44 Bom LR 15 : 199 IC 723 : AIR 1942 Bom 95; following *Kedar Nath v Bhagwat Prasad,* (1936) ILR 15 Pat 120 : 163 IC 301 : AIR 1936 Pat 404 and diss from *Mahalaxmi v Somaraju.*

2935. *Balamani Ammal v Rama Aiyar,* (1925) 48 Mad LJ 273 : 87 IC 57 : AIR 1925 Mad 786.

2936. *Lachman Prasad v Lachmeshwar,* (1922) 20 All LJ 151 : 66 IC 203 : AIR 1922 All 76.

security.[2937] *Daso Pillai v Narayan Patro*[2938] was a case in which a mortgage was extinguished by merger in a sale which could not be enforced.

There was a mortgage by *A* to *B*. *C* obtained a money decree against *A*, but before execution, *B* purchased the equity of redemption. When C attached the property, B objected that he had purchased it. *B*'s objection was dismissed and the property was sold, and purchased by *C*. *B* omitted to sue under O 21, rule 63 of the Code of Civil Procedure 1908 for a declaration of his title; but sought to enforce his mortgage against *C*. The court held that the mortgage was extinguished by merger in the sale. *B*'s omission to file a suit for a declaration of his title was disastrous, for he lost his remedy both under the sale and the mortgage. It should be noticed that at the time of B's purchase, there was no encumbrance outstanding.

Instances in which on the mortgagee purchasing the equity of redemption, the security has been held not to be merged under the rule of intention,[2939] and in all these cases, there was a puisne mortgage.

ILLUSTRATIONS

(1) *A* mortgages property to *B*. *B* sues *A* to realize the mortgage debt. During the pendency of the suit, *B* purchases the equity of redemption in execution of a money decree against *A*. The mortgage is extinguished by merger and *B*'s suit must be dismissed.[2940]

(2) *A* mortgages property first to *B* and then to *C*. *B* obtains a decree on his mortgage, and instead of bringing the property to sale makes a further advance to *A* and takes a fresh mortgage for the decretal amount plus the further advance. *C* claims priority over *B*. But *B*'s first mortgage is not extinguished by merger as there is a subsequent mortgage, and *B* is entitled to priority over *C*, in respect of the decretal amount.[2941]

(3) *A* mortgaged property to *B* in 1915. *A* then sold the property to *C* in 1916, and a month later professed to sell the property to *B*. *B* took possession but was evicted by *C*. *B* then sued *C* on the mortgage and *C* contended that the mortgage was extinguished by merger. Held that there was no merger (i) because *B* got nothing by his purchase, for *A* had already parted with the equity of redemption; and (ii) because at the time of purchase *C*'s interest was outstanding.[2942]

(5) Charge

When a landlord in execution of a decree for rent purchases his tenant's holding, he is entitled to use his rent-charge as a shield against a mortgagee of the tenant.[2943]

2937. (1935) ILR 15 Pat 120 : 163 IC 391 : AIR 1936 Pat 404.
2938. *Daso Pillai v Narayan Patro,* (1933) ILR 57 Mad 195 : 65 Mad LJ 819 : 148 IC 121 : AIR 1983 Mad 879.
2939. *Baldeo Prasad v Uman Shankar,* (1910) ILR 32 All 1 : 4 IC 810; *Syed Ibrahim v Arumugathayee,* (1915) ILR 38 Mad 18 : 16 IC 877; *Suppa Sokkaya v Suppu Bhuttar,* (1916) Mad WN 41 : 43 IC 714; *Madho Singh v Pancham Singh,* (1927) ILR 40 All 233 : 101 IC 409 : AIR 1927 All 211; *Ram Sarup v Ram Lal* (1922) ILR 44 All 659 : 20 All LJ 596 : 75 IC 472 : AIR 1922 All 394; *Phulchand v Surji,* 74 IC 684 : AIR 1923 All 457; *Darshan Singh v Arjun Singh,* (1926) ILR 1 Luck 560 : 98 IC 28 : AIR 1926 Oudh 606; *Hanwant Raj v Ram Harakh,* 103 IC 802 : AIR 1927 Oudh 341; *Bansidhar v Jagmohan Das,* (1928) ILR 3 Luck 472 : 110 IC 79 : AIR 1929 Oudh 88; *Sonaulla Karikar v Abu Sayad,* (1930) ILR 57 Cal 478 : 126 IC 413 : AIR 1930 Cal 530; *Kalimuddin v Baidyanath,* (1930) 51 Cal LJ 365 : 128 IC 192 : AIR 1930 Cal 573; *Abdul Majid v Arunachala,* (1931) 61 Mad LJ 857 : 136 IC 305 : AIR 1932 Mad 84; *Upendra Nath Samanta v Saroda Prosad Ghose,* (1932) 36 Cal WN 696 : 140 IC 589 : AIR 1932 Cal 773; *Makhan Lal v Gokal Chand,* 168 IC 699 : AIR 1932 Lah 237.
2940. *Balamani Ammal v Ram Aiyar,* (1925) 48 Mad LJ 273 : 87 IC 57 : AIR 1925 Mad 786.
2941. *Mahalakshmammal v Sriman Madhawa,* (1912) ILR 35 Mad 642 : 11 IC 865.
2942. *Sonaulla Karikar v Abu Syad,* (1930) ILR 57 Cal 473 : 126 IC 413 : AIR 1930 Cal 530.
2943. *Meherinness v Sham Sundar,* (1901) 6 Cal WN 834.

(6) As between Himself and Subsequent Mortgagee

When the mortgagee purchases the equity of redemption and acquires ownership, he may keep the mortgage alive for his own defence as against a puisne encumbrancer. He is entitled to remain in possession until the subsequent mortgagee has redeemed the prior mortgage, irrespective of the question of limitation on the prior mortgage.[2944] He can use the equity of redemption also by way of an attack.[2945] However, the mortgage is nevertheless extinguished as between the mortgagee, and the mortgagor, or as between the mortgagee and a stranger. Thus, the purchasing mortgagee has no claim for interest after the date of his purchase,[2946] and he cannot enforce his mortgage by suit.[2947] It has been said that the rights of the mortgagee merge in those of the mortgagor, or remain in suspension until they are needed for purposes of defence against the puisne mortgagee.[2948] Where a mortgagee purchases part of the mortgaged property in full satisfaction of his claim, the equities between the prior and puisne mortgagee are to be worked out by the executing court when the properties are directed to be sold or the sale proceeds are to be worked out. Although the prior mortgagee cannot claim the benefit of subrogation, he is entitled to keep his mortgage alive as against the puisne mortgagee.[2949] He can claim from him the amount due under the mortgage.[2950]

(7) Where Purchasing Mortgagee is also Puisne Mortgagee

If the purchasing mortgagee is also the puisne mortgagee, no estate intervenes and there is a merger of both mortgages in the estate of ownership. This occurred in the case of *Laxman Ganesh v Mathurabai.*[2951] There was a first mortgage in 1886 to *G,* and a second mortgage in 1894 also to *G.* In 1895, *G* brought a suit for sale on the first mortgage and purchased with leave of the court subject to the second mortgage. At a partition in 1905 between *G*'s grandson and *G*'s widowed daughter-in-law, the second mortgage was allotted to the grandson, and the sale certificate to the daughter-in-law. The grandson sued to enforce the mortgage and the suit was dismissed on the ground that, since *G* as puisne mortgagee could not have sued himself as owner, those claiming under him could have no higher right. The effect of the judgment was that after *G*'s purchase, both his mortgages merged in the estate of ownership, and the sale certificate and the puisne mortgage deed were both deeds of the same title. Where a subsequent usufructuary mortgagee paid off a foreclosure decree obtained by a prior mortgage to save the property from foreclosure and later sued the mortgagor to recover the amount so paid, and obtained a foreclosure decree, it was held that he had no intention of keeping his own mortgage alive.[2952]

(8) Novation

Novation differs from merger in the sense that the securities are of equal degree, and one security is accepted for the other, eg in *Badri Prasad v Daulat*[2953] where the second mortgage bond

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2944. *Hari Ram v Minakshi Rani,* AIR 1939 All 660. See also *Ram Sarup v Ram Lal,* (1922) ILR 44 All 659 : 75 IC 472 : 20 All LJ 596 : AIR 1922 All 394; *Nazani Din v Ram Sukh,* AIR 1938 Lah 286; *Sengamuthu v Thayarammal,* AIR 1940 Mad 646 : (1940) 1 Mad LJ 740 : (1940) Mad WN 256.
2945. *Bohra Bhup Singh v Sakha Ram,* (1945) ILR All 186 : (1945) All LJ 101 : 221 IC 434 : AIR 1945 All 158.
2946. *Syed Ibrahim v Arumugathayee,* (1915) ILR 38 Mad 18 : 16 IC 877.
2947. *Arumugasundara v Narasimha,* (1915) 29 Mad LJ 583 : 29 IC 916.
2948. *Ram Sarup v Ram Lal,* (1922) ILR 44 All 659 : 75 IC 472 : AIR 1922 All 394.
2949. *Rama Aiyar v Bagavathi Murthu,* AIR 1936 Mad 473 : 70 Mad LJ 506 : 163 IC 834.
2950. *Ghulam Khoja v Pandharinath,* AIR 1948 Bom 579 : 50 Bom LR 271.
2951. *Laxman Ganesh v Mathurabai,* (1914) ILR 38 Bom 369 : 23 IC 121.
2952. *Gafoor Khan v Baldeo,* 208 IC 180 : AIR 1943 Oudh 284.
2953. *Badri Prasad v Daulat,* (1880) ILR 3 All 706.

was to different obligees. When this occurs, the old security is extinguished. But if the new security fails, there is no substitution and, therefore, no extinction of the old security. Thus, in *Har Chundi Lal v Sheoraj Singh*,[2954] a Hindu mortgaged his five-sixths share of a village, and his separated nephew mortgaged his one-sixth share to the same mortgagee. After the Hindu's death, his widow and the nephew mortgaged the whole village for the same debt to the same mortgagee. The mortgagee sued on the last mortgage, but it was held not to be binding on the widow. After the widow's death, the nephew succeeded to the five-sixth share, and was held to be liable on the first mortgage. The intention to substitute a new mortgage of the five-sixth share having failed, the Privy Council said it was not consistent with equity and good conscience that the new mortgage should operate as a release of the old. In such a case, the remedy on the old security might become barred by estoppel or res judicata. In *Sheoraj v Harchandi Lal*,[2955] an earlier stage of the litigation in the case last cited, when the mortgage on the whole village was held to be not binding on the widow, the mortgagee sued on her late husband's mortgage, but the suit failed as he might and ought to have sued her on an earlier mortgage.

(9) Renewal

Renewal differs from novation in that a new security is taken without extinguishing the old. Under the doctrine of subrogation, a third mortgagee redeeming a first mortgage acquires the rights of the first mortgagee, and has priority over the second mortgage only as regards the first mortgage, but not as regards the third mortgage.[2956] Conversely, a first mortgagee making a fresh advance after a second mortgage, on a renewed mortgage, even if that fresh advance is to pay off the first mortgage, retains priority over the second mortgagee as regards the first mortgage, but not as to the fresh advance in respect of which he is in the position of third mortgagee.

The best illustration is the case of *Gopal Chunder v Herembo*.[2957] The first mortgage was in 1882 by Herembo to the plaintiff of his one-third share of a property for ₹ 1,000, with interest at 12 per cent. The second mortgage was also by Herembo of the same share to the defendant for ₹ 1,000, with interest at 18 per cent. The third mortgage was by Herembo and his two brothers, to the plaintiff of the whole property for ₹ 3,400, with interest at 18 per cent. The consideration was the balance due on the first mortgage, plus a further cash advance of ₹ 100, and with reference to the first mortgage it contained the following recital:

> Now in order to liquidate the said debt, and on account of other necessities of ours, we three brothers do this day mortgage to you whatever right, title and interest we have in the said two properties and take the loan of ₹ 3,400; out of this money we have also liquidated the said debt, therefore, for interest of the said money, we will pay at the rate of ₹ 1-8 per month and within 12 months from this date, we will repay the whole amount in full, principal as well as interest.

Upon these facts, the transaction was held to be a fresh advance and a fresh security, given both for the old debt and the fresh advance, and that the first mortgage remained alive for the protection of the plaintiff against the second mortgagee. A prior mortgagee taking another mortgage in renewal of his own does not on that account lose priority over a *mesne* mortgage even though the renewed mortgage includes other property, and varies the rate of

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2954. *Har Chundi Lal v Sheoraj Singh*, (1917) ILR 39 All 178 : 44 IA 60 : 39 IC 343 : AIR 1916 PC 68.
2955. *Sheoraj v Harchandi Lal*, (1913) 11 All LJ 365 : 19 IC 127.
2956. *Seetharama v Venkatakrishna*, (1893) ILR 16 Mad 94; *Alangaran Chetti v Lakshmanan Chetti*, (1897) ILR 20 Mad 274; *Kanhaiya Lal v Gulab Singh*, (1932) ILR 7 Luck 655 : 138 IC 206 : AIR 1933 Oudh 9.
2957. *Gopal Chunder v Herembo*, (1889) ILR 16 Cal 523, p 528; *Punjab and Sind Bank v Kishen Singh*, (1935) ILR 16 Lah 88 : 156 IC 795 : AIR 1935 Lah 350.

interest.[2958] But if the first mortgage is time-barred, the mortgagee making a fresh advance on a renewed mortgage has no right of priority over the *mesne* mortgagee.[2959] The renewal of a mortgage by a person with a limited interest, ie, the son having only a life interest under the will of his father, the deceased mortgagor, cannot operate as a discharge of the first mortgage,[2960] and when a mortgagor gave a third mortgage consolidating two prior mortgages, and the third mortgage was found invalid for want of registration, he was allowed to redeem the prior mortgages.[2961] In an Allahabad case,[2962] there were two mortgages, the first to *K* and the second to *NR*. *K* obtained a decree for sale on his mortgage, but the mortgagor gave a usufructuary mortgage to *K*, which *K* accepted in satisfaction of the decree. The court held that *K* could not use his first mortgage as a shield against *NR*. This was incorrect, for the existence of the subsequent encumbrance showed that *K* could not have abandoned his prior security. On the similar facts, a contrary conclusion was arrived at in a Madras case.[2963]

However, the creditor can if he chooses, abandon his original security in favour of the new one. Thus, if he gets a decree on the first mortgage and certified satisfaction of the decree,[2964] or admits in a recital in the subsequent mortgage that the first mortgage has been satisfied,[2965] he will not be allowed to fall back on it. However, the mere fact that the mortgagee has filed a suit on the first mortgage does not show that he has abandoned it.[2966] Again in *Shankar v Mejo Mal*,[2967] the Privy Council held that a suit on a second mortgage incorporating the first does not, apart from abandonment, necessarily have the effect of releasing the earlier security. In that case, there was a first mortgage to the plaintiff of certain villages for ₹ 15,500, a second mortgage to the defendant of the same villages for ₹ 7,000, and a third mortgage again to the plaintiff of the same and other villages for ₹ 20,000 inclusive of ₹ 15,500 due on the first mortgage. Decrees for sale were obtained on the second and third mortgages only, and in distributing the sale proceeds, the court gave priority to the defendant as the plaintiff had not sued on his first mortgage. The plaintiff then sued for recovery of the sale proceeds on the ground of priority under the first mortgage. The Privy Council held that the distribution was not conclusive of the rights of the parties, that the third mortgage did not impair the effect of the first, and that the fact of the plaintiff suing on the third mortgage alone did not lead to the inference that he had abandoned his rights on the first, for it was not necessary for him to do so in order to recover the whole debt.

Notice and Tender

102. Service or tender on or to agent.—Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situated, service or tender on, or to an agent holding a general power-of-

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2958. *Goluknath Misser v Lalla Prem Lal* (1878) ILR 3 Cal 307; *Gopal Chunder v Herembo*, (1889) ILR 16 Cal 523; *Inderdawan v Gobind*, (1896) ILR 23 Cal 790; *Baij Nath Goenka v Daleep*, 58 IC 489.
2959. *Kanhaiya Lal v Gulab Singh*, (1932) ILR 7 Luck 655 : 138 IC 206 : AIR 1933 Oudh 9; *Radhakishan v Hazarilal*, (1944) ILR Nag 383 : AIR 1944 Nag 163.
2960. *Skinner v Nauni Lal Singh*, (1913) ILR 35 All 211 : 40 IA 105 : 19 IC 267.
2961. *Arunugam v Periasami*, (1898) ILR 19 Mad 160.
2962. *Nakta Ram v Mati Ram*, (1906) All WN 191.
2963. *Mahalakshmammal v Sriman Madhawa*, (1912) ILR 35 Mad 642 : 11 IC 865; followed in *Velayudu Reddi v Narasimha*, (1917) 32 Mad LJ 263 : 38 IC 240.
2964. *Ram Krishna v Chotmal*, (1899) ILR 13 Bom 348.
2965. *Chhagan Lal v Muhammad Husain*, (1919) ILR 41 All 456 : 51 IC 133.
2966. *Purnamal v Venkata*, (1897) ILR 20 Mad 486.
2967. *Shankar v Mejo Mal*, (1901) ILR 23 All 313 : 28 IA 203.

attorney from such person or otherwise duly authorized to accept such service or tender, shall be deemed sufficient.

[2968][Where no person or agent on whom such notice should be served can be found or is known] to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient:

[2969][Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the court in which the deposit has been made.]

[2970][Where no person or agent to whom such tender should be made can be found or is known] to the person desiring to make the tender, the latter person may deposit [2971][in any Court in which a suit might be brought for redemption of the mortgaged property] the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

(1) Amendment

The section was amended by Act 20 of 1929.

103. Notice, etc., to or by person incompetent to contract.—Where, under the provisions of this Chapter, a notice is to be served on or by, a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served on or by, or tender or deposit made, accepted, or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Order XXXII in the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908) shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

2968. Subs. by Act 20 of 1929, sec. 52, for "Where the person or agent on whom such noticeshould be served cannot be found in the said district, or is unknown".
2969. Ins. by Act 20 of 1929, sec. 52.
2970. Subs. by Act 20 of 1929, sec. 52, for "Where the person or agent to whom such tendershould be made cannot be found within the said district or is unknown".
2971. Subs. by Act 20 of 1929, sec. 52, for "in such Court as last aforesaid".

Sections 102 and 103 deal with matters of procedure. Notice would be under sections 69 and 83, and tender on redemption under section 60. The third paragraph in section 102 was inserted by the amending Act 20 of 1929 to make it clear that the application for service of notice under section 83 should be made to the court in which the deposit has been made. This notice is consequent on the deposit having been made.[2972] Power to apply to the court for directions as to service of notice, and as to tender by deposit in court is now limited to cases in which the whereabouts of the mortgagee or his agent are entirely unknown to the mortgagor. Under the old section 102, it was sufficient if they could not be found in the district. The amendments in section 103 are merely clerical.

104. Power to make rules.—The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

Rules have been framed under this section by the various High Courts. It has been held that such rules prevail over the general terms of the Code of Civil Procedure.[2973]

2972. *Ganeshi Lal v Rohni Rukumdhuj,* (1928) ILR 50 All 655 : 108 IC 570 : AIR 1928 All 311.
2973. *Vrajlal v Venkataswami,* (1928) ILR 52 Bom 459 : 108 IC 794 : AIR 1928 Bom 123.

CHAPTER 5

Of Leases of Immovable Property

Sections 105–117, Transfer of Property Act, 1882

105. Lease defined.—A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.—The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

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(1) Lease

The relationship of lessor and lessee is one of contract, and a lease is defined as a contract between the lessor and the lessee for the possession and profits of land, etc, on one side and the recompense by rent or other consideration on the other. Hence, it has been held that a mere demand for rent is not sufficient to create the relationship of landlord and tenant which is a matter of contract assented to by both parties.[1] When the agreement vests in the lessee a

1. *Deo Nandan v Meghu Mahton,* (1907) ILR 34 Cal 57, p 62.

right of possession for a certain time, it operates as a conveyance or transfer, and is a lease. The section defines a lease as a partial transfer, ie, a transfer of a right of enjoyment for a certain time. The essential elements of a lease are:

- the parties;
- the subject-matter, or immovable property;
- the demise, or partial transfer;
- the term, or period;
- the consideration, or rent.

An agreement to lease or an agreement merely defining the terms of tenancy,[2] is not a lease; nor is it a licence.

Under section 105 of the TP Act, a lease creates a right or an interest in the enjoyment of the demised property and a tenant or a sub-tenant is entitled to remain in possession thereof until the lease is duly terminated, and eviction takes place in accordance with law.[3] A contract awarded by the corporation to *A*, to recover tolls (fees) from squatters, vendors, kiosks and for parking vehicles at specified places would be a lease as it creates rights and liabilities in favour of contracting parties qua each other. It is a lease as defined in section 2 (12) of the Stamp Act and 2(16) (c) and is accordingly chargeable to pay stamp duty as per the specified rates.[4]

The provisions of chapter V of the Transfer of Property Act, 1882, shall in so far as they are not inconsistent with the provisions of the Tenancy Act, apply to the tenancies and leases of land to which this Act applies.[5]

The Supreme Court has held that a renewal of a lease is really a grant of a fresh lease though it is called a renewal because it postulates the existence of a prior lease. Where the initial term is 90 years, it cannot co-exist with a renewal of that very lease within 90 years. If enhancement of rent is made conditional upon the grant of a fresh lease, renewal could take place only on the expiry of the initial lease, and not before. The English rule that a grant should be construed most favourably to the sovereign does not apply where the grant is made for consideration. There is no just ground why the state, as the lessor, with all its resources, should enjoy the benefit of some nebulous and unjust rule of construction so as to construe, in its favour, deeds drafted defectively.[6]

In a lease, the nature of the landlord-tenant relationship necessitates the possession to lie with the tenant.[7] No right is created on any person on strength of a forged lease deed of public land executed by Estate officer.[8] Where the ownership in land is not transferred and the rate of yearly ground rent and its terms were specified in the deed and the lessee was enjoined to pay all taxes, but not to make any excavation nor remove any stone, soil, sand, gravel or earth therefrom the transaction would be a lease and not sale.[9]

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2. *Manish Anand v Ramniwas Gupta,* AIR 2012 MP 90.
3. *Jaswantsinh Mathurasinh v Ahmedabad Municipal Corpn,* (1992) 1 SCC 5, p 12 (Supp).
4. *Nasiruddin v State of Uttar Pradesh,* AIR 2018 SC 127 : 2017 (14) SCALE 108 : 2018 (1) RCR (Civil) 1004.
5. *Savarga Bhaktibhai Dullabhai Sthapit Bhakta Patidar v Prabhubhai Dahyabhai Bhkta,* 2010 SCC OnLine Guj 13243.
6. *Delhi Development Authority v Durga Chand Kaushish,* AIR 1973 SC 2609 : [1974] 1 SCJ 554 : (1973) 2 SCC 825.
7. *Sadashiv Shyama Sawant v Anita Anant Sawant,* (2010) 3 SCC 385 : LNINDORD 2010 SC 242 : AIR 2010 SC (Supp) 798 : JT 2010 (2) SC 305.
8. *Usha Mehta v Govt of AP,* (2012) 12 SCC 419.
9. *Ashok Kumar Jain v Board of Revenue, Gwalior,* AIR 2014 MP 94.

A lease deed the evidence of which was available through a certified copy cannot be ignored by oral evidence more so as it was sought to be set aside by filing a suit after nine years of its alleged execution and the fact that it existed was within the knowledge of the municipality. Thus an order declaring the lease to be void ab- initio would be set aside.[10]

Sub-lease or Sub-let

A lease may be granted by a person, who is himself a lessee, and such a lease is commonly called an under-lease, sub-lease, or derivative lease, but it is still a lease within the section. The fact that the lessor is himself a lessee, and the transaction is called a sub-lease, does not in any way change the nature of the transfer as between them.[11]

The term "sub-let" is not defined under the TP Act, but the definition of "lease" can be adopted mutatis mutandis for defining "sub-lease". What is "lease" between the owner of the property and his tenant becomes a sub-lease when entered into between the tenant and the tenant of the tenant, the latter being sub-tenant qua the owner-landlord. A lease of immovable property as defined in section 105 is a transfer of a right to enjoy such property made for a certain time for a consideration of a price paid or promised. A transfer of a right to enjoy such property to the exclusion of all others during the term of the lease is *sine qua non* of a lease. A sub-lease would imply and stands discharged by adducing prima facie proof of the fact that the alleged sub-tenant was in exclusive possession of the premises or, to borrow the language of section 105, was holding right to enjoy such property. A presumption of sub-letting may then be raised and would amount to proof unless rebutted.[12] However, a tenant who himself has no right to occupy the premises after the determination of tenancy, such as a statutory tenant, has no right to create a sub-tenancy. He cannot grant a valid sub-lease in favour of another.[13] Similarly, the mere fact that another person is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. The thrust is on finding out as to who is in legal possession of the premises. So long as the legal possession remains with the tenant, the mere factum of the tenant having entered into partnership for the purpose of carrying on the business in the tenancy premises would not amount to sub-letting.[14] In *Parvinder Singh v Renu Gautam*, the Supreme Court has devised the test in these terms: If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, maybe along with the partners, the tenant may not said to have parted with possession.[15] As the legislature can modify, annul and substitute the contracts inter-vivos, therefore, when by a legislative provision parties to the lease are substituted, there is no assignment or transfer of the lease or subletting of the premises, by the lessee to the person or authority in whom the leasehold rights are vested by operation of law.[16] Where the government had granted untransferable leasehold rights but later under a notification permitted transfer of leasehold rights subject to payment, a transfer of leasehold rights and an application for the same can be looked into by the concerned authorities.[17]

A sub lease created without the authority of the owner is merely voidable and not void.[18]

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10. *Amarlal Ramlal v Nagar Palika, Sawai Madhopur*, AIR 2017 (NOC) 669 (Raj).
11. *Camberwell & South London Building Society v Holloway*, (1879) 13 Ch D 754, p 759; *Mineral Development Ltd v UOI*, [1961] 1 SCR 445 : AIR 1960 SC 1373.
12. *Mahendra Saree Emporium v G C Srinisava Murthy*, (2005) 1 SCC 481 : AIR 2004 SC 4289.
13. *Roop Kumar v Mahan Thadani*, 2003 (1) RCR (Rent) 615 (SC).
14. *Mahendra Saree Emporium v G C Srinisava Murthy*, (2005) 1 SCC 481 : AIR 2004 SC 4289.
15. (2004) 4 SCC 794 : AIR 2004 SC 2299.
16. *G Sridharamurthi v Hindustan Petroleum Corporation Ltd*, AIR 1991 Kant 249, p 252; See Esso (Acquisition of Undertakings in India) Act, 1974, sections 3, 4, 5(1).
17. *Debasish Mukherjee v State of West Bengal*, AIR 2018 Cal 1.
18. *Radha Sharan Dubey v Ram Niwas*, AIR 2017 (NOC) 828 (All).

Composite Tenancy and Single Tenancy for dual purposes

There may be several purposes for which the tenancy premises may be let out. Broadly speaking, the premises are let out either for the purpose of residence or for a non-residential or commercial purpose. A legislation may classify the purpose of letting into several categories by adopting some other criterion. In case of tenancy of type (a), for a composite or mixed purpose, the premises are let out for defined purposes, more than one, leaving the option open to the tenant to use the entire tenancy premises as one unit for either, or both purposes. The tenancy premises are not divided or demarcated separately into two so as to specify which part of the tenancy premises will be used for what purpose. In other words, in case of tenancy for composite purpose, the two diverse purposes for user of the premises are so blended or mixed up that they cannot be separated by dissecting the tenancy premises into compartments. However, in case of tenancy of type (b), which is a single tenancy for dual purposes, the contract of tenancy is no doubt an integrated one, but the premises are demarcated or divided by reference to the purpose for which they will be separately used. In an integrated contract of tenancy for dual purposes, different portions are earmarked for different types of user. The contract of tenancy is one, but it clearly sets out that out of the two rooms let out under one tenancy agreement, the tenant shall use the room in the front for non-residential purpose, and the room at the back side for the purpose of residence. The entire tenancy premises cannot be used interchanging the users, nor can the entire premises be subjected to simultaneous user as residence and commerce—both, without defining which part of the premises shall be used for what purpose. The legal implication is that in case of tenancy for composite or mixed purpose, ie, type (a) the need may arise for determining the dominant purpose of letting. However, the theory of dominant purpose or principle of predominant purpose of letting is irrelevant in the case of tenancies of type (b) when it is known, as previously agreed, that a particular portion of the premises shall be used for one purpose, while another portion shall be used for another purpose.[19]

Splitting of Tenancy

It is well settled that it is not permissible for the court to spilt up a contract of tenancy in eviction proceedings.[20] A tenancy can be spilt up by operation of law, or by contract between the parties. In cases governed by rent control legislation, if a ground for eviction in respect of part of the tenancy premises is made out, the decree shall be for eviction from the entire tenancy premises, unless the law permits a partial decree of eviction being passed.[21]

Concurrent leases

With respect to the same property two lease agreements cannot be executed between the same parties.[22] If two lease agreements are executed one after the other, without cancelling the first agreement, such agreement would automatically come to an end upon the execution of the second agreement.[23]

Suit for eviction

One of the co-owners can file a suit for eviction, according to the Rajasthan High Court in *Ratan Lal v Gopal.*[24]

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19. *Nilesh Nandkumar Shah v Sikandar Aziz Patel,* (2002) 6 SCC 678, para 6 : AIR 2002 SC 3073.
20. *T S Subramanian v Andhra Bank Ltd,* (1989) 2 SCC 252 (Supp); *Panjumal Daulatram v Sakhi Gopal,* (1977) 3 SCC 284; *S Sanyal v Gian Chand,* AIR 1968 SC 438 : [1968] 1 SCR 536.
21. *Nilesh Nandkumar Shah v Sikandar Aziz Patel,* (2002) 6 SCC 678, para 8 : AIR 2002 SC 3073.
22. *Manoj Roy v Gunendra Roy,* AIR 2007 Guj 172 : (2008) 1 GLR 171 : (2008) 1 GLH 665.
23. *Sambhinath Mitra v Khaitan Consutant Ltd,* AIR 2005 Cal 281 : (2005) 2 CHN 519.
24. *Ratan Lal v Gopal,* AIR 2014 Raj 53 : 2014 (1) RCR (Rent) 471 : 2014 (3) RLW 2340 (Raj) : 2014 (3) WLN 78 (Raj).

(2) The Parties

The parties are the lessor and the lessee. They must be persons who are competent to contract.[25] The lessor is called the landlord. The word "tenant" means a lessee, especially when used in opposition to landlord.[26]

In one decision,[27] the House of Lords considered the question whether a person can grant a lease to himself. It was argued, relying on section 72(3) read with section 205(l)(ii) of the Law of Property Act, 1925, that it was possible for a person to grant a lease to himself. Section 5 of TP Act also contemplates a transfer by a person to himself. A majority of the law Lords, Viscount Simonds, Lord Reid and Lord Denning, held that notwithstanding those provisions, a man could not grant a lease to himself. Lord Denning pointed out that at common law, a person could not grant a lease to himself. *Nemo potest esse tenens at dominus.* The Act of 1925 had not altered the position for the simple reason:

> that every tenancy is based upon an agreement between two persons and contains covenants expressed or implied by one person with the other. Now, if a man cannot agree with himself and cannot covenant with himself, I do not see how he can grant a tenancy to himself... The tenancy must stand or fall with the agreement on which it is founded and with the covenants contained in it: and as they fall so does the tenancy.

It is submitted that the same view would be taken in India, and for the same reasons.

Thus, there cannot be a contract by a person with himself—section 2 of the Indian Contract Act, 1872; and the mutual covenants between lessors and lessees stipulated in section 108 are insensible between the same person. Further, section 111(d). enacts statutorily the rule of merger, ie, if any such lease is created by a person, in the same right, it would immediately determine. Where, however, the land belonging to co-owners was leased out to a sole proprietory concern, of one of themselves which was subsequently converted into a partnership firm of that co-owner and his four sons, the Supreme Court held that there was a valid lease between the quondam owners and the tenant, and the finding of the trial judge that the lease executed by the co-owners of the property in favour of one of them was invalid, was erroneous. Section 5 of TP Act clearly envisages transfer of property by a person to "one or more living persons or to himself, or to himself and one or more other living persons". Whatever may be the position, despite the purported transfer by a person to himself alone (which is very often the position in the case of trusts), which was considered by the House of Lords in *Rye v Rye*, there is no reason to hold that a contract between a person with himself and others is invalid.[28]

The provisions of the TP Act do not apply to any transfer of land by or on behalf of the government. Where the corporation public land was leased out to a school for being used as a play ground, the rules of natural justice would not operate and the school would not be entitled to any opportunity to show cause notice against the cancellation of the same.[29] Similarly, where the leasehold vests in the government, it follows that a suit for possession at the instance of the (original) lessor (or his successor in interest by private alienation) is not maintainable.[30] Where the lease is effected by the government as the owner of the property, an agreement of sale cannot be entered into of such land by the lessor in violation of the

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25. *Narayan Gosain v The Collector Cuttack*, AIR 1986 Ori 46, p 51.
26. *Ekambara Ayyat v Meenatchi Ammal*, (1904) ILR 27 Mad 401.
27. *Rye v Rye*, (1962) AC 496 : [1962] 1 All ER 146.
28. *Life Insurance Corporation of India v India Automobiles & Co*, (1990) 4 SCC 286, p 292 : AIR 1991 SC 884.
29. *General Manager, Railway, Madras v Chintadripet Boys Higher Secondary School*, AIR 1998 Mad 180.
30. *Narain Prasad Aggarwal v State of MP*, AIR 2007 SC 2349 : (2007) 11 SCC 736.

terms of the lease agreement.[31] The legal effect of the terms of old government grants are to be understood as conveying a lease of the building standing on the cantonment land with the power of resumption in the granting authority subject to payment of compensation of cost of building and not as a lease of land itself.[32] A lease of property of a private temple without obtaining the sanction of the government is invalid.[33] An ordinary lease agreement between sovereign parties i.e., between Crown, through Secretary of State and Travancore State, does not lend any change to the character of the contract and it does not become a political agreement.[34]

Lessor

Competency to grant a lease depends upon competency to transfer under section 7. The lessor must, therefore, be competent to contract and have a title or authority. A lease is void when the purported lessor does not have any interest in property sought to be leased.[35] The conferment of patta as such does not confer title in a suit for declaration of title and possession.[36] Where a person claimed title that was proved to be false or fabricated, then the burden to prove actual, exclusive, open, uninterrupted possession will be upon him.[37] An absolute owner, who is under no personal incapacity, can grant a lease for any term he pleases. A limited owner can grant a lease only to the extent permitted by law. Thus, a lease by a tenant for life will not endure beyond his death, unless he is especially empowered under the terms of the deed of settlement. A lease can be executed by a person who is competent to execute the same. Where the property belonging to the temple could be transferred only in case of a legal necessity, but the *Mohatmim*, executed a lease without authority of law, such ease deed would be *void ab initio* and no right over this property under the void lease can be claimed by any person in whose favour such a lease is carved out. Even the issuance of notice prior to the order of cancellation of the lease would not be necessary in such cases.[38]

In English law, a minor cannot hold a legal estate in land.[39] Before the Law of Property Act, 1925, a lease by a minor was voidable, but could be ratified on his attaining majority, but as a minor's contract is void in India, it follows that a minor is not competent to be a lessor. A lease by a minor has been held to be void even though it was made by an instrument executed only by the lessee.[40] Restrictions on the power of the owner to grant leases have been imposed in the case of disqualified land owners, and of encumbered estates under management by various local Acts. Under section 29(b) of Guardian and Wards Act, 1890, the guardian of the property of a minor has authority without the permission of the court to grant a lease for a term not exceeding five years or enuring for more than one year

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31. *Jayalakshmi Patra v Shyama Kanta Mohanty,* AIR 2014 Ori 162 : 118 (2014) CLT 942 : 2014 (2) OLR 572.
32. *Purushottam Das Tandon v Military Estate Officer,* (2014) 9 SCC 344 : LNIND 2014 SC 737 : AIR 2014 SC 3555 : 2014 (9) SCALE 357.
33. *Vallikunnil Janaki Amma v Sree Amruthamangalam Kshethram Moorthi,* AIR 2014 (NOC) 402(Ker).
34. *State of Tamil Nadu v State of Kerala,* (2014) 12 SCC 696 : LNIND 2014 SC 636 : 2014 (6) SCALE 380 : AIR 2014 SC 2407.
35. *Collector, District Gwalior v Cine Exhibitors Pvt Ltd,* (2012) 4 SCC 441 : LNIND 2012 SC 74 : AIR 2012 SC 1239.
36. *UOI v Vasavi Cooperative Housing Society,* (2014) 2 SCC 269 : LNIND 2014 SC 12 : AIR 2014 SC 937 : 2014 (1) SCALE 126.
37. *L N Aswathama v P Prakash,* 2010 1 AWC (Supp) 543 SC : 2010 () AWC 543 (SC) : JT 2009 (9) SC 527 : 2010 (1) KCCR 113 : 2009 (4) PLJR 111 : 2009 (9) SCALE 658 : (2009) 13 SCC 229 : [2009] 10 SCR 615.
38. *Urmil Gupta v Commissioner,* AIR 2017 HP 183.
39. Law of Property Act, 1925, section 1(6).
40. *Govinda Kurup v Chowakkaram,* (1931) 59 Mad LJ 941 : 129 IC 449 : AIR 1931 Mad 147. See also Transfer of Property Act, 1882, section 107. See not "Minor" under section 7.

after the minor attains majority. In terms of section 28 of the said Act, the powers of a testamentary guardian or a guardian appointed by a deed are limited by the terms of the will or of the instrument of appointment. The power of an executor or administrator to grant a lease is regulated by section 307 of the Indian Succession Act, 1925.

A lease by joint tenants operates as a lease by each and by all as joint tenants have unity of title. On the death of any one of the joint tenants, the lessee holds under the survivors A lease by tenants in common however, operates as a separate demise by each of his share, and a confirmation by the others;[41] and each tenant in common may by separate demise lease his own share only,[42] as tenants in common have unity of possession, but not of title. But their lessees do not have unity of possession, and are not tenants in common inter se.[43] It is now well settled that after the death of the original tenant, subject to any provision to the contrary either negating or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidences of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefore. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants.[44]

Landlord and tenant relationship has to be proved for maintaining a suit for eviction and for payment of arrears of rent. Where it was proved that the property was ancestral in character and the defendant had one fourth share in it and there was no proof that there was ever any tenancy created in his favour, it was held that since the landlord tenant relationship is not proved no suit for eviction or for arrears of rent can be passed.[45]

Lessee

Leases may be granted to any person who is competent to contract at the date of execution. Where the shops were allotted on lease to ex-servicemen and dependants of the deceased defence personnel for a period of five years and the procedure/policy limited maximum period of lease only to five years, the lessees would have no right to continue in possession of the property after five years. These leaseholders would not be entitled to a renewal of the lease.[46] A lease may be granted to several persons who may take as tenants-in-common, or as joint tenants. In the case of joint tenants, the interest of each person passes upon death to the survivors. In the case of tenants-in-common, the interest of a deceased lessee passes at his death to his representatives. Thus, in a lease to a partnership, the surviving partners are trustees for the representatives of the deceased partner in respect of the latter's share. However, if two or more persons hold a demise under one lease, then, in the absence of a clear provision to the contrary, the entire body of tenants constitutes a single tenant *qua* the landlord.[47] Where a person convicted of permitting disorderly conduct in a cafe subsequently under a different name took a lease of premises in the neighbourhood for conducting a restaurant, it was held that the identity of the person with whom the landlord

41. *Thompson v Hakewill,* (1865) 19 CB (NS) 713, p 726.
42. *Jacob v Seward,* (1872) LR 5 HL 464.
43. *Manimohan Pal v Gour Chandra Das,* (1933) ILR 60 Cal 1212 : AIR 1934 Cal 71.
44. *H C Pandey v G C Paul,* AIR 1989 SC 1470 : (1989) 3 SCC 77; *Harish Tandon v Addl District Magistrate, Allahabad,* AIR 1995 SC 676 : (1995) 1 SCC 537; *Gian Devi Anand v Jeevan Kumar,* AIR 1985 SC 796 : 1985 SCR 1 (Supp).
45. *Sharda Narayan Lal Alika v Harji Lal,* AIR 2018 (NOC) 174 (Raj).
46. *Chandro Devi v UOI,* AIR 2017 SC 4445 : 2017 (11) SCALE 216 : 2017 (4) SCT 468 (SC).
47. *Motilal v Kartar Singh,* (1930) ILR 11 Lah 427 : 127 IC 1 : AIR 1930 Lah 515; *William White v Tyndall,* (1888) 13 App Cas 263.

was entering into the lease was a vital element in that agreement so that the landlord having been mistaken with regard to the identity of the lessee, the lease was void ab initio.[48]

Section 7 does not apply to transferees; and the general scheme of the TP Act is that minors may be transferees, but not transferors.[49] Both a sale to a minor and a mortgage to a minor are valid.[50] But it has been held that a lease to a minor is void as the lease imports a covenant by the minor to pay rent and other reciprocal obligations.[51] This was so decided before the amending Act of 1929, and the present section 107 makes it clear that a lease to a minor must be void, because it is to be executed both by the lessor and by the lessee. If the lease is granted by a minor, it is void even if the deed is executed by the lessee.[52]

A lease is a contract whereunder the transferee accepts certain obligations. The transferee must, therefore, be one who is capable of contracting. An unregistered association is not a legal entity, and is not so capable. Where the tenancy was in favour of an unregistered association, and there was no evidence to show that some members of the association undertook the lessee's obligations to the lessor, no valid tenancy could be said to have been created in favour of the association. The association was merely a licencee and, on termination of the purported tenancy, the association became only a trespasser liable to be ejected. Consequently, persons claiming through the association were also liable to ejectment.[53] The written rent note or a fresh lease is not an essential requirement of attornment; it may come into being by payment of rent, or by the recognition of a person as landlord. A tenant who has attorned in favour of a person is estopped from challenging the title of that person as his landlord.[54] The assignee of a lease, though entitled to enjoy the benefit of leased property, does not have a privity of contract with the lessor.[55] It is settled by the Supreme Court that though leasehold interest may be bequeathed by a testamentary disposition, the landlord is not bound by it, nor a stranger be thrusted as tenant against the unwilling landlord.[56] Where the mother of the landlord purchased property in 1994, the tenancy was created in 1995 and the tenant defaulted since 1996 claiming non-service of notice and adverse possession, while the service of notice proved by the landlord, the plea of adverse possession would be negated.[57]

(3) Subject-matter

The subject-matter of a lease must be immovable property as defined in section 3. The subject-matter is, therefore, not only land, minerals and buildings, but also benefits to arise

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48. *Sowler v Potter,* (1940) 1 KB 271 : [1939] 4 All ER 478.
49. *Raghava v Srinivasa,* (1917) ILR 40 Mad 308, p 315 : 36 IC 512.
50. *Ulfat Rai v Gauri Shankar,* (1911) ILR 33 All 657 : 11 IC 20; *Narain Das v Dhania,* (1916) ILR 38 All 154 : 35 IC 23; *Munni Kunwar v Madan Gopal,* (1916) ILR 38 All 62 : 31 IC 792; *Munia v Perumal,* (1911) 37 ILR Mad 390 : 26 IC 195; *Subba Ready v Guruva Reddy,* 120 IC 77 : AIR 1930 Mad 425 — Sales; *Raghava Chariar v Srinivasa,* (1917) ILR 40 Mad 308 : 36 IC 921; *Madhab Koeri v Baikuntha,* (1919) 4 Pat LJ 682 : 52 IC 338; *Thakar Das v Putli,* (1924) ILR 5 Lah 317 : 82 IC 96 : AIR 1924 Lah 611; *Zafar Ahsan v Zubaida Khatun,* (1929) 27 All LJ 1114 : 121 IC 398 : AIR 1979 All 604 — mortgages. See note under section 6(n)(3).
51. *Pramila Bali Das v Jogeshar,* (1918) 3 Pat LJ 518 : 46 IC 670; *Govinda Karup v Chowakkaram,* (1931) 59 Mad LJ 941 : 129 IC 449 : AIR 1931 Mad 147.
52. *Govinda Karup v Chowakkaram,* (1930) 59 Mad LJ 941 : 129 IC 449 : AIR 1931 Mad 147.
53. *Tejoomal Lakshmichand v M J Megoankar,* AIR 1980 Bom 369.
54. *Hari Ram v Lajpat Bhan,* AIR 1975 Raj 190.
55. *Kunj Behari Lal v Shri Shivji Maharaj,* AIR 1973 All 217 : (1972) ILR 2 All 1.
56. *State of West Bengal v Kailash Chandra Kapur,* AIR 1997 SC 1348.
57. *Shyamapad Samanta v Prafulla Kumar Padhy,* AIR 2018 (NOC) 9 (Orissa).

out of land such as fisheries,[58] ferries,[59] and market dues.[60] A right to carry on mining operations in land to extract a specified mineral and to remove and appropriate that "mineral" is a "right to enjoy immovable property" within the meaning of section 105.[61] There is no law prohibiting a composite lease of a building along with the equipment, or fixtures,[62] or the lease of a mill which includes building and machinery, or the lease of a factory similarly, which includes lease of building along with machinery and other equipments. All these leases are recognised by law and accepted by the court.[63] Where tools, equipment and a special type of furniture suitable for running a barber's shop were leased for an amount fixed for running the business, the court held that the dominant intention of the parties was to create a lease of business, and not of the shop.[64] Though ordinarily a house/shop would include not only the superstructure but also the site.[65] Law does not provide that lease of building above is impermissible, or that it necessarily takes in the site underneath as well.[66]

The "lease" within the meaning of Indian Stamp Act, 1899 has much wider meaning than the "lease" defined in TP Act, and the definition of "lease" in TP Act cannot be imported into definition as it is in the Stamp Act. A document by which the right to collect the toll is given is an "instrument" within section 2(14) of the Indian Stamp Act, 1899 and, therefore, is a lease within the said Act.[67]

Case

A *haat*, which is a right to collect certain dues;[68] a right to tap toddy palms;[69] or a right to fell trees for a term of years so that the transferee derives benefit from further growth, amount to a lease.[70] But if trees are sold with the object of being cut and removed within a reasonable time, it is the sale of movable property, and not a lease.[71] Grass is not immovable property and in Re *Hormusji Irani*,[72] a contract for grazing was held not to be a lease. A transfer of a right to pluck trees for fruits is also not a lease.[73] A *yagman vritti* is not immovable property, and an assignment of a right to collect offerings for a period of years, is not a lease.[74] Composite lease of cinema with equipments is valid, and lease of cinema cannot be considered separately from the lease of a building which would be tenable.[75]

It has been held in England that in the absence of provisions to the contrary in a lease, the demise of a part of a building divided horizontally or vertically, includes the external walls

58. *Ram Gopal v Nurumuddin,* (1893) ILR 20 Cal 446; *Somerset (Duke) v Fogwell,* (1825) 5 B & C 875; *Grove v Portal,* (1902) 1 Ch 727.
59. *R v Nicholson,* (1810) 12 East 330; *Peter v Kendall,* (1827) 6 B & C 703.
60. *Sikandar v Bahadur,* (1905) ILR 27 All 462; *Qudratullah v Mun Board, Bareilly,* AIR 1974 SC 396 : (1974) 1 SCC 202.
61. *Jagannath Minerals v State of Orissa,* 2010 SCC Online Ori 253: (2010) 109 CLT 782.
62. *Annick Chaymotti Devyani v Prem Mohini Mehra,* 2003 (1) RCR (Rent) 709 (Del).
63. *Bhagyashree Combines v Dist Magistrate, Bellary,* AIR 1998 Kant 328 : (1998) 4 Kar LJ 353.
64. *Vidyawati v Hans Raj,* AIR 1993 Del 187, p 196 : (1993) 49 DLT 585 : 1993 RLR 273.
65. *T Lakshmipathi v P Nityananda Reddy,* 2003 (3) RCR (Civil) 306 SC.
66. *Kishan Chand v Bihari Lal,* AIR 1999 HP 68, p 71; relied on *Mahadeo Prosad Shaw v Calcutta Dyeing and Cleaning Co,* AIR 1961 Cal 70.
67. *Uppalapati Durga Prasad v Executive Engineer, (R&B), NH Division, Srikakulam* AIR 2001 AP 442, pp 445, 446 : (2001) 4 Andh LT 176.
68. *Surendra Narain Singh v Bhai Lal,* (1895) ILR 22 Cal 752.
69. *Sheikh Jan Mohammad v Umanath Misra,* AIR 1962 Pat 441.
70. *Seeni Chettiar v Santhanathan,* (1897) ILR 20 Mad 58.
71. *Devi Singh v Janki Saran,* AIR 1948 All 396. See note "Things rooted in the earth" under section 3.
72. Re *Hormusji Irani* (1888) ILR 13 Bom 87.
73. *Manoharlal v State of Madhya Pradesh,* AIR 1959 MP 120.
74. *Kodulal v Beharilal,* 137 IC 136 : AIR 1932 Sau 60.
75. *Bhagyashree Combines v Dist Magistrate, Bellary,* AIR 1998 Kant 328.

enclosing the part so demised.[76] This principle extends to all leases, and includes portions of an external wall not structurally necessary to enclose the premises.[77] In the absence of a contract, tenants of flats in a multi-storeyed building cannot claim to have *ipso facto* become simultaneously the tenants also of terrace and air space above it. There is no such provision in the TP Act.[78] A similar opinion was expressed by a division bench of Delhi High Court in *Peter George v Janak J Gandhi.*[79] On the other hand the Allahabad High Court has held that where the dominant intention of the parties was to create a lease of only a cinema building, it was held that there was no lease of costly cinema equipment namely, the projector, the generator and the screen.[80]

If the subject-matter is property not only in the possession of the lessor, but property to which he may never establish title, the so-called lease will be construed as an agreement to lease upon the happening of a contingency.[81] A mining lease is to be regarded in India as a lease, and not as a sale of minerals. The annual payment of royalty would be rent.[82] Where a person leases a building together with land, it seems impermissible in absence of clear intention spelt out in the deed, to dissect the lease as (a) of building and appurtenant land covered by the Rent Control Act, and (b) of the land above governed by other relevant statutory provisions. What the parties have joined, one would think, the court cannot tear as under.[83] Where there is a lease of a building, such lease would normally take in the site, unless the same is specifically excluded from the definition of land in the lease deed.[84] The right of the lessee in the leased property subsists even if the leased property has been destroyed by fire, tempest, flood or violence of an army or of a mob or other irresistible force, unless the lessee exercises his option that on happening of such an event, the lease shall be rendered void.[85] Where a godown that was subject of a rent agreement was destroyed by fire, the plea that since the subject matter of the lease was in itself not in existence and it would lead to frustration of contract and therefore the question of payment of rent would not arise is not tenable as section 56 of the contract is not applicable and the rights and liabilities of the parties would be subject to the application of the TPAct, and the lessee would be liable to pay the rent.[86]

(4) The Demise

Demise

The word "demise" is not used in the TP Act, but it is a term of English law commonly used by conveyancers in India to denote a transfer by lease. The strict technical import of the word

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76. *Carlisle Cafe Co v Muse,* (1867) 67 LJ Ch 53; *Hope Bros Ltd v Cowan,* (1913) 2 Ch 312; *Goldfoot v Walch,* (1914) 1 Ch 213.
77. *Sturge v Hackett,* (1962) 1 WLR 1257 : [1965] 3 All ER 506 (CA).
78. *Nemichand Sasmal v Jainuddin Allihusein,* AIR 1986 Bom 369.
79. *Peter George v Janak J Gandhi,* (1996) 36 DRJ 248.
80. *J J Pancholi v Sridharjee,* AIR 1984 All 130, p 136 : 88 CWN 551.
81. *Mohendra v Kali,* (1903) ILR 30 Cal 265.
82. *CIT v Kamaksha Narain,* (1940) ILR 20 Pat 13 : 191 IC 340 : AIR 1940 Pat 633; following *HV Low & Co Ltd v Jyoti Prasad Singh Deo,* 58 IA 392 : 35 Cal WN 1246 : 54 Cal LJ 366 : 33 Bom LR 1544 : 61 Mad LJ 699 : (1931) All LJ 1112 : 135 IC 632 : AIR 1931 PC 299; *Fala Krishna Pal v Jagannath,* (1932) ILR 59 Cal 1314 : 36 Cal WN 709 : 56 Cal LJ 187 : 140 IC 788 : AIR 1932 Cal 755; *Pashupati Nath v Sankari Prasad,* AIR 1957 Cal 128.
83. *Suryakumar Govindjee v Krishnammal,* (1990) 4 SCC 343, para 12; *Larsen and Toubro Ltd v Trustees of Dharmamurthy Rao Bahadur Calavala Cunnam,* (1988) 4 SCC 260, para 16; *K Bhagirathi G Shenoy v KP Ballakuraya,* (1999) 4 SCC 135, para 22 : AIR 1999 SC 2143.
84. *Vkalpakam Amma v Muthurama Iyer Muthurkrishna Iyer,* AIR 1995 Ker 99 : (1994) 2 KLJ 554.
85. *Hind Rubber Industries Pvt Ltd v Tayebhai Mohammedbhai Bagasarwalla,* AIR 1996 Bom 389 : (1996) 4 Bom CR 414 : (1996) 98 Bom LR 87.
86. *Shankar Prasad v State of MP,* AIR 2013 (NOC)172 (MP).

(from the Latin *demitto*) is any transfer or conveyance, but by force of habit, it is used to denote a partial transfer by way of lease.[87] A lease contemplates, as per J Shah (as he then was) in *Byramjee Jeejeebhoy (P) Ltd v State of Maharashtra,*[88] a demise or a transfer of a right to enjoy land for a term or in perpetuity in consideration of a price paid or promised or services or other things of value to be rendered periodically or on specified occasions to the transferor.

If ownership is transferred, with or without restrictions, it is not a lease. The words "transfer of a right to enjoy such property" indicate that all rights of ownership are not transferred. The significance of these words as indicative of the limited estate transferred is apparent if contrasted with those in section 54, where a sale is defined as a "transfer of ownership in exchange for a price." In *Giridhari Singh v Megh Lal Pandey*[89] Lord Shaw said:

> The essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which, does not in the nature of things and by reason of the user, disappears.

His Lordship explained that this was the reason why, in the absence of express words, a lease does not include mineral rights. In a Supreme Court case, the landlord and the tenant entered into a compromise in an eviction suit, in which the tenant agreed to vacate the premises, but was allowed to retain one portion for five years. At the end of five years, proceedings were commenced by the landlord to obtain the possession of the portion. It was held that there was no intention to create a lease of any portion, and that there was no question of registration of the decree.[90]

A lease, therefore, is not a mere contract, but is a transfer of an interest in land and creates a right in rem.[91] Such an interest of a tenant is a right to property within the meaning of Article 19(1) (f) of the Constitution.[92] It is good against the whole world, irrespective of notice, and cannot be affected by any subsequent disposition by the lessor. The estate transferred to the lessee is called the leasehold. The estate remaining in the lessor is called the reversion. Even when the lease is in perpetuity, there is an interest still remaining in the lessor. In *Kalty Dass Ahiri v Monmohim Dassee,*[93] Sir Lawrence Jenkins said:

> A man who being owner of land grants a lease in perpetuity, carves a subordinate interest out of his own and does not annihilate his own interest This result is to be inferred by the use of the word "lease", which implies an interest still remaining in the lessor. Before the lease the owner had the right to enjoy the possession of the land, and by the lease he excludes himself during its currency from that right, but the determination of the lease is the removal of that barrier, and there is nothing to prevent the enjoyment from which he had been excluded by the lease.

The estate of the lessor and lessee are estates of inheritance and the interest of the lessor and the lessee after their death vest in their heirs, executors, or devisees.[94] This is not so expressly stated in the TP Act, for the Act does not deal with the subject of succession.[95]

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87. *Greenaway v Adams,* (1806) 12 Ves 395, p 397.
88. *Byramjee Jeejeebhoy (P) Ltd v State of Maharashtra,* [1964] 2 SCR 737 : AIR 1965 SC 590 : [1965] 1 SCJ 65.
89. *Giridhari Singh v Megh Lal Pandey,* (1918) ILR 45 Cal 87 : 44 IA 246, p 250 : 42 IC 651.
90. *Nai Babu v Lala Ram Narain,* AIR 1978 SC 22 : [1978] 1 SCR 723 : (1978) 1 SCQ 58.
91. *Ragoonathdas v Morarji,* (1892) ILR 16 Bom 568; *Kandasami v Ramaswami,* (1919) ILR 42 Mad 203 : 51 IC 507.
92. *Corpn of Bombay v Lala Pancham,* [1965] 1 SCR 542, p 554 : AIR 1965 SC 1008 : [1966] 1 SCJ 49.
93. *Kalty Dass Ahiri v Monmohim Dassee,* (1897) ILR 24 Cal 440 approved by the Privy Council in *Abhiram v Shyama,* 36 IA 148 : 4 IC 449; and in *Raghunath Roy v Raja of Jheria,* 46 IA 158 : 50 IC 849; *Venkatesh v Bhujaballi,* (1933) ILR 57 Bom 194 : 35 Bom LR 60 : 142 IC 481 : AIR 1933 Bom 97.
94. *Maharaja Tej Chund v Sri Kanth,* (1846) 3 Mad IA 261; *Shaikh Danoollah v Shaikh Amanutoolah,* (1871) 16 WR 147; *Badinath v Bhajan Lal,* (1883) ILR 5 All 191; *Khitish Chandra v Bhikan,* (1914) 19 Cal LJ 448 : 25 IC 530; *Gobind Lal v Hemendra* (1890) ILR 17 Cal 686.

If a company has a subsisting interest in a permanent lease on the date of its dissolution, such interest must vest in the government on dissolution of the corporation, by escheat or *bona vacantia*. Property of a dissolved corporation passes to the government, subject, of course, to the trust and charges, if any, by which the property was affected prior to dissolution. If the leasehold vests in the government, it follows that a suit for possession at the instance of the (original) lessor (or his successor in interest by private alienation), is not maintainable.[96] A person, who obtains a share of a leasehold either by assignment or by inheritance, becomes a co-tenant in the whole tenure; and so far as the relations between him and the landlord are concerned, he cannot be held to hold any estate in severalty. Each such person becomes a tenant in common of the whole estate by reason of the rule of the indivisibility of the estate without the landlord's consent, and has privity of estate with the landlord in respect of the whole estate.[97] In case of joint tenants, each tenant is liable to the landlord for the whole rent, and all covenants running with the land.[98] A *kharposh* grant made by a *zamindar* for the maintenance of the junior members of his family is not a lease, although such grant provides for the payment of government revenue and road cess.[99] It has been held that a mere permission to an advertising agency by a municipal corporation under an agreement for installation and displaying of ornamental "grill work poles" to provide for outdoor displays of advertisements and civil slogans for charges described as "ground rent", is not a demise of that portion of land covered by the poles "so as to bring in notions of TP Act".[100]

(5) The Terms

Commencement

The commencement of a lease must be certain in the first instance, or capable of being ascertained with certainty afterwards, so that both the time when it begins and the time when it ends, is fixed. The word "certain" under this section cannot mean certain on the date of the lease. It is enough if it is capable of being made certain on a future date.[101] Section 110 enacts that if the day of commencement is not stated, the lease begins from the day of execution. However, this does not apply to an executory agreement of lease; and such an agreement is void for uncertainty if the commencement of the term is not mentioned, or if there are no materials for ascertaining it.[102] However, if possession is taken under such an agreement, the term will commence from the date of entry.[103]

A lease may commence either in the present or the future, eg on the determination of a prior lease for years.[104] If it is expressed to commence from a past day, that is only for the purpose of computation, and the interest of the lessee begins from the date of execution. Before execution, no interest passes;[105] and conversely, the lessee is not liable for breaches of

95. *Kishori Lal v Krishna Kamini,* (1910) ILR 37 Cal 377, p 382 : 5 IC 500.
96. *Narender Bahadur v Shankar Lal,* AIR 1980 SC 575 : (1980) 2 SCC 253.
97. *Hollaway v Berkeley,* (1826) 6 B & C 2.
98. *United Dairies v Public Trustee,* (1923) 1 KB 469 : [1922] All ER Rep 444; *Jagan Mohan Sarkar v Brojendra Kumar,* (1926) ILR 53 Cal 197 : 90 IC 211 : AIR 1925 Cal 1056; *Moti Lal v Kartar Singh,* (1930) ILR 11 Lah 427 : 127 IC 1 : AIR 1930 Lah 515.
99. *Shib Prasad v Lekhraj,* AIR 1945 Pat 162.
100. *Steelmans Advertising Agencies Pvt Ltd v The Municipal Corpn for Greater Bombay,* AIR 1990 Bom 338, p 341.
101. *Juthika Mulick v M Y Bal,* AIR 1995 SC 1142 : (1995) 1 SCC 560.
102. *Marshall v Berridge,* (1881) 19 Ch 233, p 239.
103. *Doe d Cornwall v Matthews,* (1851) 11 CB 675.
104. *Pitcha Kutti v Kamala,* (1864) 1 Mad HC 153 : (1858) 1 E&E 12.
105. *Jervis v Tomkinson,* (1856) 1 H & N 195.

covenants before execution.[106] If the lease commences in the future, it is sufficient if it is capable of being definitely ascertained when the lease takes effect. Until that time it may be contingent on a future event, for when that event happens the principle, *id certum est quod certum reddi potest*, applies. The meaning of this phrase is "that is sufficiently certain which can be made certain". Therefore, it cannot be said that on the date of commencement of lease itself, the period must be certain. It is enough if the period is capable of being ascertained at a future date on the happening of a certain event.[107]

Duration

In India, a lease may be in perpetuity. However, in India as in England, a mere general letting, ie, a lease which is silent as to duration of the term, would be void as a lease,[108] though it would create a tenancy-at-will which would be converted by payment of rent into a tenancy from year to year or month to month. In the case of a *benami kabulayet* or agreement of lease without a term for an annual rent, the Privy Council held that it operated either as a permanent lease, or as a lease from year to year and that no intermediate position was open.[109] The Act lays down a rule of construction which is to be applied when there is no period agreed upon between the parties. In those cases, the duration of lease has to be determined by reference to the object or purpose for which the tenancy is created.[110]

The terms of a lease may provide for renewal or extension of the lease. The distinction between "renewal" and "extension" of lease is chiefly that in the case of renewal, a new lease is required, while in the case of extension, the same lease continues in force during the additional period by the performance of the stipulated act. In other words, the word "extension" when used in its proper and usual sense in connection with a lease means a prolongation of lease.[111] A covenant for renewal is not treated as a part of the terms prescribing the period of lease, but only entitles a lessee to obtain a fresh lease.[112] The renewal clause in a lease deed is an important term of the agreement. Ordinarily the court should be reluctant to ignore such a term of the lease, unless on a fair reading and reasonable construction no meaning can be attached to it. If the renewal clause is not clear and specific regarding the terms of renewal, the court is to ascertain the intention of the parties from the materials on record.[113] Whether the option clause contained in a lease provides for renewal or extension is to be ascertained primarily from its terms and conditions. if there is uncertainty or ambiguity, the other covenants of the lease would be read to find out the intention of the parties. Oral evidence led by the parties at the trial would help to resolve the issue. But at interim stage the court has to find out the answer only from the lease and other undisputed pieces of admissible evidence.[114]

Renewal of lease is a creation of a fresh lease and a fresh lease is required to be registered according to law, but where no such fresh lease is created in terms of the renewal clause of the original registered deed of lease, no question of registering it arises. If in such a case, the lessee continues in possession in exercise of his option as per the renewal clause over the leased period after the initial period is over, his continuance in possession would be deemed to be under the original registered deed. The further period is to be treated in such a case as

106. *Shaw v Kay*, (1847) 1 Exch 412.
107. *Juthika Mulick v M Y Bal*, AIR 1995 SC 1142 : (1995) 1 SCC 560.
108. *Sewakram v Meerut Municipal Board*, AIR 1937 All 328; *Anwarali v Jamini Lal Ray*, (1939) 2 ILR Cal 254 : 43 Cal WN 797 : 180 IC 625 : AIR 1940 Cal 89.
109. *Janaki Nath v Dina Nath*, (1931) 54 Cal LJ 412 : 133 IC 732 : AIR 1931 PC 207.
110. *Mohinder Pal Singh Khurana v Modi Alkali & Chemicals*, (2010) 118 DRJ 593 (Delhi).
111. *Provash Chandra Dalvi v Biswanath Banerjee*, AIR 1989 SC 1834, p 1839; *Ansuman Mullick v Mallika Investment Co (P) Ltd*, AIR 2004 Cal 316, p 320.
112. *Hindustan Petroleum Corporation Ltd v Dolly Das*, (1999) 4 SCC 450, para 12 : (1999) 2 SCALE 584.
113. *Naveen Chand v Nagarjuna Travels & Hotels Pvt Ltd*, (2002) 6 SCC 331, para 12 : AIR 2002 SC 2870.
114. *Ansuman Mullick v Mallika Investment Co (P) Ltd*, AIR 2004 Cal 316, p 320.

part of the period of the original registered deed of lease. Thus, in such a case, where a lease contains a renewal or extension clause, the period does not remain limited to the initial period only, but it breaks the limit to further flow for another term and the lease does not determine at the end of the initial period on exercise of unilateral option by the lessee, as in such a case, there does not arise any question of fresh assent by the lessor because the right to enjoy for a further period gets conveyed to the lessee under the original registered lease itself.[115]

Where the principal lease executed between the parties containing a covenant for renewal, is renewed in accordance with the said covenant, the question whether the renewed lease shall also contain similar clause for renewal depends on the facts and circumstances of each case, regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances.[116]

An option of renewal, whether the option be of the tenant,[117] or of the lessor,[118] does not affect the duration of the term. This is because the option, until exercised, creates no interest in the superadded term.[119] A covenant for a perpetual renewal of the lease must always be unequivocal.[120] Where by an agreement in writing, the owner of a furnished house let it to a tenant at a weekly rent for six months certain with an option "of continuing the tenancy for a further period of six months on the same terms and conditions including this clause," it was held that the tenant had the right to renew for one further period of six months and no more.[121] It is not, however, necessary that the term of the lease should be for a fixed period. It is sufficient if it is definite.[122] The period of lease cannot be infinite by mere provisions of renewal every three years, when the lease was for a specific period.[123]

A tenant cannot have a legitimate expectation to continue the occupation of the premises indefinitely.[124]

Leasehold estates

"Freehold land" and "leasehold land" are conceptually different. Freehold refers to the land that is under ownership, with liability to pay tax to the authorities while leasehold refers to the property that is subject to lease agreement with an obligation to pay rent. If a property subject to a lease and in the possession of a lessee is offered for sale by the owner to a prospective private purchaser, the purchaser being aware that on purchase he will get only title and not possession and that the sale in his favour will be subject to encumbrance namely, the lease, he will offer a price taking note of the encumbrances.[125]

The duration of the tenancy determines the leasehold estate created. There are two estates which, strictly speaking, do not fall within this section. One is a tenancy at sufferance, which is merely a fiction of law to prevent what would otherwise be a trespass. The other is a tenancy at will, which does not fulfill the definition of a lease, as the term is uncertain. A lessee is liable for

115. *Ranjit Kumar Dutta v Tapan Kumar Shaw*, AIR 1997 Cal 278.
116. *State of Uttar Pradesh v Lalji Tandon*, (2004) 1 SCC 1 : AIR 2004 SC 32.
117. *Boyd v Kreig*, (1890) ILR 17 Cal 548; disapproving *Bhobani v Shibnath*, (1886) ILR 13 Cal 113; *Yousaf v Poleplogo*, (1906) 8 Bom LR 580; *Radhika Prasad v Ramsunder*, (1868) 1 Beng LR 7 (AC).
118. *Apu v Narhari*, (1878) ILR 3 Bom 2; *Jagjivandas v Narayan*, (1884) ILR Bom 493; *Mojo v Tukaram*, (1865) 5 Bom HC 92 (AC); *Mohunto Southo Pursad v Rughoo*, (1875) 26 WR 98.
119. *Hand v Hall*, (1877) 2 Ex D 355.
120. *Sewakram v Meerut Municipal Board*, AIR 1937 All 328.
121. *Green v Palmer*, (1944) Ch 328 : [1944] 1 All ER 670. See note "Covenant for renewal" under section 111(a).
122. *Ramchand v Lush*, AIR 1936 Lah 890. See note "Leases for a certain time."
123. *P S Bedi v Project and Equipment Corp of India*, (1994) 28 DRJ 680.
124. *G Soman v State of Kerala*, AIR 2004 Ker 26.
125. *Kapil Mehra v UOI*, (2015) 2 SCC 262 : 2014 (12) SCALE 248 : 2014 (10) SCJ 36.

rent; but not so a tenant at sufferance, or a tenant at will. A tenant at will is not a trespasser, for his occupation is permissive, and so he is liable for compensation for use and occupation.[126] A tenant at sufferance is sometimes said to be liable for compensation for use and occupation.[127]

Tenancy at sufferance[128]

A tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality.[129] It, therefore, cannot be created by a contract and arises only by the implication of law when a person who has been in possession under a lawful title continues in possession after that title has determined, without the consent of the person entitled.[130] But the TP Act, as already observed, is not exhaustive; and the term is a useful one to distinguish a possession, rightful in its inception but wrongful in its continuance, from a trespass wrongful both in its inception and in its continuance. A tenant holding over after the expiration of his term is a tenant at sufferance.[131] He continues in possession after extinction of a lawful title, and does not create relationship of landlord and tenant.[132] If he holds over against the landlord's consent, he is a trespasser,[133] and is liable for mesne profits.[134] A tenant at sufferance must establish some overt act in defiance of the title of the landlord, so as to change the character of his possession to the position of the trespasser, to enable him to claim adverse possession against his landlord.[135] A mortgagor left in possession under an English mortgage is a tenant at sufferance, and cannot grant a lease without the concurrence of the mortgagee and if it does, the mortgagee can treat the lessee as a trespasser.[136]

A tenancy at sufferance does not create the relationship of landlord and tenant; and in a suit for the ejectment of a tenant holding over without the landlord's consent, limitation runs under Article 139 from the expiration of the term, and not from the termination of the tenancy at sufferance.[137]

A tenancy at sufferance is determined at any time by the landlord entering without notice or demand, or by the tenant quitting. Thus, a tenant remaining in possession in defiance of his landlord after termination of the lease is a tenant at sufferance, and is not entitled to notice to quit.[138] So also, if a Hindu widow grants a lease and the reversioner after her death elects to avoid it, the lessee is a tenant at sufferance and can be evicted without notice.[139]

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126. *Kanailal Biswas v Nitai Chand Saha*, (1910) 12 Cal LJ 612 : 7 IC 492; *Howard v Shaw*, (1841) 8 M & W 118; *Goggan v Warwicker*, (1852) 3 Car & Kir 40.
127. *Bayley v Bradley*, (1848) 5 CB 396, p 406.
128. See also Transfer of Property Act, 1882, section 116.
129. Jowett, *Dictionary of English Law*, p 1696.
130. *Mozam Shaikh v Ananda Prasad*, AIR 1942 Cal 341 : 75 Cal LJ 444 : 46 Cal WN 366 : 200 IC 660; *Dammulal v Mahomedbhai*, (1956) ILR Nag 10 : AIR 1955 Nag 306; *Thadani v Chief Settlement Commissioner*, (1958) 60 Punj LR 62 : AIR 1958 Punj 314.
131. *Kundan Lal v Deepchand*, (1938) All LJ 682 : 146 IC 762 : AIR 1933 All 756; *Bansidhar v Ramcharan* 189 IC 488 : AIR 1940 Oudh 401. The proposition of law set out herein was cited with approval in *B Valsala v Sundaram Nadar Bhaskaran*, AIR 1994 Ker 164, p 167.
132. *Wests Patent Press (P) Ltd v Municipal Council Beawar*, AIR 2003 Raj 231 (NOC) : (2002) 3 Raj LR 552.
133. *Deo d Patrick v Beaufort (Duke)*, (1851) 6 Exch 498; *Jones v Foley*, (1891) 1 QB 730, p 731.
134. *Gulam Mohiuddin v Dayabhai*, (1923) 25 Bom LR 477 : 73 IC 442 : AIR 1923 Bom 398.
135. *Raj Kishore Biswal v Bimbadhar Biswai*, AIR 1993 Ori 115, p 122.
136. *Keech v Hall*, (1778) 1 Doug (KB) 21; *Macleod v Kissan*, (1906) ILR 30 Bom 250, p 269.
137. *Kantheppa v Sheshappa*, (1898) ILR 22 Bom 893; *Chandri v Daji Bhau*, (1900) ILR 24 Bom 504; *Pusa Mal v Makdum*, (1909) ILR 31 All 514 : 3 IC 566.
138. *Gokul Chand v Shib Charan*, (1912) 9 All LJ 574 : 13 IC 59; *Bansidhar v Ram Chandra* 189 IC 488 : AIR 1940 Oudh 401; *Hasanalli v Dara Shah*, (1948) ILR Nag 922 : AIR 1949 Nag 289; *Raj Kishore Biswal v Bimbadhar Biswal*, AIR 1993 Ori 115, p 122; *Champakalata Mohanty v Amaranjan Mohapatra*, AIR 2011 Ori 136.
139. *Bijoy Gopal v Krishna*, (1907) ILR 34 Cal 329 : 34 IA 87; *Raghubir Singh v Jethu Mahton*, (1923) ILR 2 Pat 171 : 70 IC 290 : AIR 1923 Pat 130.

A landlord cannot evict a tenant *proprio motu*. It has been held that a tenant continuing in possession after the termination of his tenancy, without the assent of the landlord being only in the position of a trespasser, necessarily, the rule relating to suits against trespassers by the co-owner must apply, eg a co-owner can in his own right sue for recovery of possession from such a person, without arraying the other co-owners as parties to the suit. However, an exception to this rule is made where the suing co-owner claims exclusive title to the property in derogation of the rights of other owners. In such an event, the other co-owner whose rights are denied is a necessary party to the suit.[140]

Tenancy at will

A tenancy at will is determinable at the will either of the landlord, or of the tenant. The law implies a tenancy at will of one party to be a tenancy at will of either party.[141] A tenancy at will arises by implication of law in cases of permissive occupation when a person is in possession of premises with the consent of the owner,[142] it may arise expressly by an agreement to let for an indefinite term for a compensation accruing from day to day, so long as both parties please.[143] Thus, a tenancy at will is terminable by either party and a demand by the landlord for possession is sufficient.[144] Notice, however, by the tenant is not effectual, unless he gives up possession. If the landlord seeks a decree of ejectment, it is necessary to have given to the tenant, a notice to quit.[145]

Indian cases of tenancy at will have arisen when the tenant expressly agrees to vacate whenever possession is demanded by the landlord.[146] It had been held that a tenancy terminable at any time on 15 days' notice was a tenancy at will;[147] but a Full Bench of the Allahabad High Court has taken a contrary view, holding that if notice is required to terminate a tenancy, it is not a tenancy at will.[148] Similarly, a lease for a certain term, in which the lessor is given an option to terminate at will, is not a tenancy at will;[149] nor where no rent is fixed;[150] or where there has been possession under an invalid or void lease before payment of rent;[151] or where there has been permissive occupation.[152] An *utbandi* holding in Bengal is merely a tenancy at will.[153]

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140. *B Valsala v Sundaram Nadar Bhaskaran*, AIR 1994 Ker 164, p 167 : 1993 Civil CC 662, holding that the observations of the Supreme Court in para 15 of the judgment in *Kenakarathanammal v Loganatha*, AIR 1965 SC 271, should be confined to its own facts.
141. *Manicka v Chinnappa*, (1913) ILR 36 Mad 557 : 16 IC 1002.
142. *Deo d Jones v Jones*, (1830) 10 B & C 718 (minister in possession by leave of trustees of congregation); *Garrard v Tuck*, (1849) 8 CB 231 (cestui que trust in possesion with the acquiescence of the trustees).
143. *Richardson v Langridge*, (1811) 4 Taunt 129.
144. *Deo Nandan Pershad v Meghu Mahton*, (1907) ILR 34 Cal 57; *Ram Kishun v Bibi Sohila*, 145 IC 567 : (1933) ILR AP 561; *Deo d Price v Price*, (1932) 9 Bing 356; *Janki v Kanhaiya Lal* 159 IC 488 : AIR 1940 Oudh 102.
145. *Indubhushan v Haribhajan Singh*, AIR 1976 Pat 280.
146. *Jivraj Gopal v Atmaram*, (1890) ILR 14 Bom 319; *Balkrishna Vamanaji v Jasha Farsi*, (1895) ILR 19 Bom 150; *Ramasabhapathi v Venkatachalam*, (1891) ILR 14 Mad 271; *Karani Manicka Mudaliar v Chinnappa Mudaliar*, (1913) ILR 36 Mad 557 : 16 IC 1002; *Ram Lal v Bibi Zohra*, (1941) ILR 20 Pat 115 : AIR 1941 Pat 228; *Babu Lall v Gopi Lal*, AIR 1957 Pat 490.
147. *Khuda Bakhsh v Sheo Din*, (1886) ILR 8 All 405; *Hanso v Har Narain*, (1886) All WN 115; *Vallabhji v Jivandas*, AIR 1952 Kutch 13.
148. *Shiv Nath v Ram Bharosey*, (1967) All LJ 944 : AIR 1969 All 333.
149. *Kanwar Lal v Kamakhya Narayan*, (1956) ILR 35 Pat 967 : AIR 1957 Pat 350; and see the decisions cited in the judgment.
150. *Ranee Lalun Monee v Sona Monee*, (1874) 22 WR 334.
151. *Puroma Soonduree v Prollad Chunder*, (1870) 12 WR 289; *Goya Prasad v Baijnath*, (1892) ILR 14 All 176; *Sheokaran Singh v Majaraja Parbhi Singh*, (1909) ILR 31 All 276 : 2 IC 211; *Ramchandra v Tama*, (1912) ILR 36 Bom 500 : 15 IC 830; *Ramchandra v Syameswar*, (1925) 42 Cal LJ 71 : 90 IC 98 : AIR 1925 Cal 1171; *Jhalku Singh v Chandrika Singh*, AIR 1961 Pat 350.

A tenancy at will is a new tenancy created by a bilateral act of offer and acceptance, ie, the lessee's offer of taking a new lease evidenced by the lessee remaining in possession after the expiry of the term and the lessor's acceptance of that offer, evidenced by a definite consent to the continuance of possession by the lessor. Such consent may be expressed by acceptance of rent or otherwise. Where the tenant agrees to vacate the premises whenever the landlord would desire him to do so, it is a tenancy at will. The mere fact that the rent note provides for the payment of rent at an annual rate does not constitute it a lease reserving a yearly rent. In such cases, no registered lease is required, and the rent note is admissible in evidence.[154] Under section 116, in the absence of an agreement to the contrary, the lease stands renewed from year to year or from month to month, according to the purpose for which the property was leased, as specified in section 106 of the TP Act. Both the statutory renewal under section 116 and the statutory deeming of duration under section 106 are, however, subject to any agreement to the contrary. Thus, if the parties create a tenancy at will terminable at the will of either party, it would be a "contract to the contrary" within the meaning of sections 106 and 116.[155]

ILLUSTRATIONS

(1) *A* hires from *B* two houses under an agreement as follows:- "*I* have this day hired from you two houses. ₹ 5000, a year are agreed as rent. I am to live there in as long as you will allow me to do so." Although an annual rent was reserved this was a tenancy at will.[156]

(2) *A* sold his lease to *B* without a written assignment by merely handing over the lease to *B*. The lessor sued for rent. *B* was a tenant at will, liable only for compensation for use and occupation.[157]

Use and occupation

A tenant at will is not liable to pay rent because there has been no demise to him. He is not liable for mesne profits or damages like a trespasser because his occupation is permissive. But he is liable to pay compensation for use and occupation. There must be a contract of tenancy before a person can be a tenant. But if there be no contract and the possession of a person is permissive, then it is the case of an occupier. Rent is realised from a tenant. Profit, on the other hand, is payable by an occupier for the use of another's property with his consent. When the rent for the period is not fixed, the occupier is not a tenant; when the rent is fixed, the tenant pays the agreed rent.[158] If the rent is fixed, or there is an express agreement as to rent, the amount fixed or agreed is recoverable, the amount so fixed or agreed being evidence of the quantum payable. If there is no express agreement that he should pay, the mere fact of this occupation of the land of another implies an agreement to pay reasonable compensation.[159] If the defendant takes possession under an agreement of sale to him and the sale goes off, he is a tenant at will and liable for use and occupation from the time when the contract is at an end.[160]

Compensation for use and occupation was also awarded when the occupants were really trespassers, and the plaintiff waived the trespass and treated them as tenants at will.[161] Where

152. *Kanailal v Nitaj Chand Shah*, (1910) 19 Cal LJ 612 : 7 IC 492; *Ram Kishun v Bibi Sohila* 145 IC 567.
153. *Surrendranath Sarkah v Poornachandra Mukherji*, (1933) ILR 60 Cal 681 : 37 Cal WN 335 : 146 IC 55 : AIR 1933 Cal 609.
154. *Udaram v Tej Karan*, AIR 1975 Raj 147 : 1975 WLN 141.
155. *Devaki v Alavi*, (1979) KLT 67.
156. *Jivaraj Gopal v Atmaram Dayaram*, (1890) ILR 14 Bom 319.
157. *Gaya Prasad v Baijnath*, (1892) ILR 14 All 176.
158. *Dinendra v Union Bank of India*, AIR 1952 Cal 915.
159. *Gibson v Kirk*, (1841) 1 QB 850.
160. *Howard v Shaw*, (1841) 8 M & W 118.
161. *Surnomoyee v Denonath Gir*, (1883) ILR 9 Cal 908.

there is a lease to one partner, the lessor is not entitled to recover compensation from the other partners, for they occupy not with his permission, but with that of the lessee.[162] A suit for rent may not be converted into a suit for use and occupation, at the hearing, for it involves different issues.[163]

The rights of lessee was discussed by the Supreme Court in the light of provisions in Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and it was held that until lease of an immoveable property gets determined, lessee has right to enjoy the property and this right to property cannot be taken away without the authority of law. There is no provision in section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when secured creditor takes steps mentioned in section 13.[164]

Leasehold estates under this section

The leases recognised by this section are:

(i) leases for a certain time;

(ii) periodic leases;

(iii) leases in perpetuity.

Chief Justice Jenkins in *Municipal Corporation of Bombay v Secretary of State*[165] said:

> It is a principle of general application that it is not within the power of a person to create whatever interests he may please in land; he is limited to such interests as are recognized by the system of jurisprudence governing his disposition.

Therefore, a lease until suitable land is provided for and six months' notice is given, is void.[166]

(i) *Leases for a certain time*—The words "a certain time" seem inconsistent with the phrase "a lease of uncertain duration" which occurs in section 108(i) where it is used to describe yearly or monthly tenancies. Thus, a lease from month to month is a lease for uncertain duration.[167] But as Lord Kenyon said in *Goodright D Hall v Richardson*,[168] the certainty need not be ascertained at the time; for if in the fluxion of time, a day will arrive which will make it certain, that is sufficient. The lease deed is capable of being made certain on a future date. There cannot be anything more certain than death.[169] The term may, therefore, be defined either by express limitation or by reference to some event which will afterwards fix its exact length. In the first case, a certain time is expressed; in the latter, it is implied. However, the result must be certain, and a lease until suitable ground should be provided by the lessor is void.[170]

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162. *Ragoonathdas v Morarji*, (1892) ILR 16 Bom 568.
163. *Surendra Narain Singh v Bhai Lal*, (1895) ILR 22 Cal 752; *Rachhea v Upendra*, (1900) ILR 27 Cal 239; *Veerabhadra v Sir Vaithianathaswami*, (1927) 52 Mad LJ 399 : 99 IC 977 : AIR 1927 Mad 182; *Kirpa Shankar v Janki Prasad* 199 IC 83 : AIR 1942 Pat 86; *Mahabir Prasad v Pateshwan Prasad* 202 IC 548; AIR 1942 Oudh 506; *Haji Mahomed v Hyderabad Municipality*, AIR 1944 Sau 49. But see *Md Farooq v Masjidi Begum* 200 IC 593 : AIR 1942 Oudh 408.
164. *Harshad Govardhan Sondagar v International Assets Reconstruction Company Ltd*, (2014 (6) SCC 1 : JT 2014 (5) SC 75 : 2014 (3) KLJ 495 : 2014 (4) SCALE 484.
165. *Municipal Corporation of Bombay v Secretary of State*, (1905) ILR 29 Bom 580, p 602.
166. (1905) ILR 29 Bom 580.
167. *Collector of Bombay v Laxmibai*, (1948) ILR Bom 342; See also *Ramchandra v Lachminarayan*, (1949) ILR Cut 231 : AIR 1950 Ori 1.
168. *Goodright D Hall v Richardson*, (1789) 3 Term Rep 462.
169. *Juthika Mulick v MY Bal*, AIR 1995 SC 1142 : (1995) 1 SCC 560 : 1994 Supp (5) SCR 249.
170. *Municipal Corpn of Bombay v Secretary of State*, (1905) ILR 20 Bom 580.

A lease for life is a lease for a certain time, for it terminates with the death of the lessee.[171] A lease for so long as the lessee pays rent has been construed as a lease for life.[172] In a Bombay case,[173] CJ Macleod held that such a lease was a permanent lease, differing from an earlier Bombay case[174] where a lease for so long as the lessee pleases to hold the land was said to be determinable at the death of the lessee. Such a lease may be transferable, but is not necessarily heritable.[175] So a lease for which no term is fixed, with an agreement not to raise the rent so long as the tenant pays it regularly, has been held to operate as an agreement to lease for the life of the tenant.[176]

(ii) *Periodic leases*—These are tenancies from year to year, or from month to month.[177] The period may be a year, a quarter, a month, or even a week, and the mode in which the rent is reserved may afford a presumption as to the period of the lease.[178] A tenancy from year to year differs from a tenancy at will in that it can only be determined by notice duly given, and the interest created is not terminated by the death of either party. An annual lease is a lease for one year, which confers no right of transfer or inheritance.[179] But a lease from year to year is a periodical lease, which continues from one period to another period. Such a lease is of uncertain duration which does not purport to be for a definite period, as the interest of the tenant does not terminate at the end of the period.[180]

Duration of the term in periodic leases is continuous from period to period.[181] Such a lease is described in section 108(i) as a lease of uncertain duration, and in Article 35 of the Indian Stamp Act, 1899 as a lease which does not purport to be for any definite period. The interest of the lessee, therefore, does not terminate at the end of the period. A tenant from year to year has an interest for one year certain, with a growing interest during every year thereafter, springing out of the original contract and as a part and parcel of it.[182] The characteristics of the periodic tenancy from year to year were laid down in the Court of Exchequer Chamber in *Candy v Juhber*[183] as follows:

> There frequently is an actual demise from year to year so long as both parties please. The nature of this tenancy is discussed in *4 Bac Abr Lit Leases and Terms for years pp 838, 839, 7th ed* and the article has always been deemed of the highest authority. It seems clear that the learned author considered that the true nature of such a tenancy is that it is a lease for two years certain, and that every year after it is a springing interest arising upon the first contract and parcel of it, so that if the lessee occupies for a number of years, these years by computation from the time past, make an entire lease for so many years, and that after the commencement of each new year, it becomes an entire lease certain for the years past and also for the year so entered on, and that it is not a reletting at the commencement of the third and subsequent years. We think this is the

171. Cf *Parshotam Vishnu v Nana Prayag*, (1894) ILR 18 Bom 109; *Abdulrahim v Sarafalli*, (1928) 30 Bom LR 1596 : 114 IC 374 : AIR 1929 Bom 66 (lease for 25 years and so long thereafter as the lessee paid rent).
172. *Pool v Secretary of State*, (1886) PR 68; *Mania v Lallubhai*, (1900) 2 Bom LR 488; *Karim Baksh v Natha Singh*, (1921) 3 Lah LJ 14 : 66 IC 904.
173. *Bai Sona v Bai Hiragavri*, (1926) 28 Bom LR 552 : 95 IC 524 : AIR 1926 Bom 374.
174. *Vaman Shripad v Maki*, (1880) ILR 4 Bom 424; followed in *Higgins v Nobin Chunder*, (1907) 11 Cal WN 809; and *Abdulrahim v Sarafalli*, AIR 1929 Bom 66.
175. *Donkangowda v Revanshedappa*, AIR 1943 Bom 148.
176. *Zimbler v Abraham*, (1903) 1 KB 577.
177. *S Rajdev Singh v Punchip Associates*, AIR 2008 Del 56.
178. *Wilkinson v Hall*, (1837) 3 Bing (NC) 508; *Durgi Nikarini v Gobordhan*, (1914) 19 Cal WN 525 : 24 IC 183; *Sheikh Akloo v Sheikh Emaman*, (1917) ILR 44 Cal 403 : 33 IC 899.
179. *Ram Bahadhur v Haikhu Singh*, AIR 1949 Pat 265.
180. *Mafizuddin v Manindra Kr*, AIR 1951 Ass 141.
181. *Bowen v Andersen*, (1894) 1 QB 164.
182. *Legg v Strudwick*, (1690) 2 Salk 414; cited in *Oxley v James*, (1844) 13 M & W 209, p 214; *Cattley v Arnold*, (1859) 28 LJ Ch 352.
183. *Candy v Juhber*, 9 B & S 15, p 18.

true nature of a tenancy from year to year created by express words, and that there is not in contemplation of law, a recommencing or reletting at the beginning of each year.

In *Queen's Club Gardens Estates Ltd v Bignel*,[184] J Salter said:

> In the case of all periodic tenancies, whether from year to year, or from quarter to quarter, or from month to month or for any other period, the law, as I find it stated in the authorities, appears to be that the tenancy is from period to period, from one fixed date to another. It is a tenancy from so many years, or quarters, or months or weeks as the parties may think fit. If a new period be allowed to begin, the tenancy must, in the absence of course of any other arrangement between the parties, continue until the period ends, and neither party can, against the will of the other, put an end to the tenancy during the currency of the period.

Following this, CJ Beaumont in the undernoted case[185] said:

> A monthly tenancy, that is a tenancy subject to a month's notice, creates in the first instance a tenancy for two months certain. But as soon as the third month commences, that is not a new tenancy; it turns the original tenancy into a three months' tenancy and when the fourth month begins, the tenancy becomes a four months' tenancy and so on so long as the tenancy continues, until, that is to say, notice to quit is given.

A month's notice is mentioned in this passage because according to local usage in Bombay, a month's notice is necessary. Justice Gentle in the undernoted case[186] said:

> A monthly tenancy in my view is not a tenancy which commences or begins in one month and on its expiry a fresh tenancy is created in the following month or months but, is a tenancy for an unstated period which is determinable by one or other of the parties giving a notice to quit.

To the like effect are the observations of the court in *Ganesdas Ramgopal v Jamuna*.[187]

A periodic tenancy is sometimes called a tenancy at will, regarding it as a tenancy at will with a restraint on the exercise of the will. A tenancy from year to year or from month to month arises by express agreement, or, in the absence of a contract, by presumption of law under section 106. A tenancy at will implied from holding over, or from entry under a void lease, becomes on payment of rent a tenancy from year to year, or from month to month, or from week to week.[188] A lease for an indefinite period is generally construed as a lease for life, but if the rent is payable yearly it would be taken to be a lease from year to year.[189] A lease for a year with a stipulation that it should remain in force until another lease is granted has been construed as a lease from year to year.[190]

(iii) *Leases in perpetuity*—In India, such a lease is created either by an express grant, or by a presumed grant. Such leases are generally agricultural leases or they are leases executed before the TP Act. As section 107 of the TP Act excludes the agricultural lease from the operation of the Act.

Express grant

Words which suffice by themselves to import permanency are—*miras* or *mirasdar*;[191] *mourasi*;[192] *mulgni*;[193] *nirantar*;[194] *patni*;[195] so also, words indicative of a heritable grant such as *Ba*

184. *Queen's Club Gardens Estates Ltd v Bignel*, (1924) 1 KB 117, p 134 : [1923] All ER Rep 165.
185. *Utility Articles Manufacturing Co v Raja Bahadur Motilal Mills*, AIR 1943 Bom 306 : (1943) ILR Bom 553.
186. *Usharani Debi v The Research Industries Ltd*, (1945) 50 Cal WN 461.
187. *Ganesdas Ramgopal v Jamuna*,(1945) ILR 24 Pat 449.
188. *Ladies Hosiery and Underwear Ltd v Porker*, (1930) 1 Ch 304, p 329 : [1929] All ER Rep 667.
189. *Ashutosh v Chandi Charan*, (1927) 31 Cal WN 46 : 99 IC 200 : AIR 1927 Cal 179; *Chandi Charan Mitra v Ashutosh Lahiri*, (1926) ILR 53 Cal 95 : 94 IC 684 : AIR 1926 Cal 558; *Jagadish Chandra v Bisweswari*, 41 IC 227; cf *Higgins v Nobin Chunder*, (1907) 11 Cal WN 809 and *Vaman Shripad v Maki*, (1880) ILR 4 Bom 424.
190. *Venkatachellam v Audian*, (1881) ILR 3 Mad 358; *Virammal v Rungayyangar*, (1882) ILR 4 Mad 381.
191. *Vithu v Dhondi*, (1891) ILR 15 Bom 407; *Ayimannessa v Panna Lal*, (1923) 27 Cal WN 1037 : AIR 1923 Cal 705.

Farzandan[196] or *Naslan bad Naslan.*[197] The words *istemari mourasi mokurari* in a lease mean permanent and heritable.[198] The tenancy created by a *taluka putta* is presumed to be permanent, unless there are indications to the contrary in the surrounding circumstances.[199] On the other hand, the following words are not per se sufficient to import permanency of tenure: *Paracudi* and *Ulavadi Mirasidar;*[200] *Mokarari;*[201] *Istemari Mokarari;*[202] *Kyam* and *Saswatham*[203] *Mukkaddami.*[204] But these words do not exclude the notion of permanency, and when they occur, their effect is a matter of construction having regard to the other terms of the instrument, the object of the lease, the circumstances under which it was granted, and the subsequent conduct of the parties.[205] Such considerations may show that a *bemiadi* lease, i.e., a lease without, a term, is a permanent lease.[206] Where a contract of lease provided that the tenant was to continue in possession as long as he paid rent, it was a tenancy for the lifetime of the tenant and not a permanent tenancy.[207] The precondition to establish a landlord and tenant relationship in a permanent lease is that the landlord should have reserved to himself a right to evict the tenant.[208]

The fact that the lease is a permanent lease does not exclude the Bengal *zamindars'* right to enhance rent up to the limit sanctioned by usage in respect of tenures created after the permanent settlement.[209] The right of enhancement of rent is not inappropriate in case of a

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192. *Giribala v Kedar Nath*, (1929) ILR 56 Cal 180 : 117 IC 534 : AIR 1929 Cal 454.
193. *Unhamma v Vaikunta*, (1894) ILR 17 Mad 218.
194. *Gungava v Konher*, (1876) PJ 227.
195. *Modhu Sudan v Rooke*, (1898) ILR 25 Cal 1 : 24 IA 164.
196. It means including descendants.
197. It means from generation to generation: *Tulshi Pershad Singh v Ram Narain Singh*, (1886) ILR 12 Cal 117 : 12 IA 205.
198. *Baikanta Nath v Lakshan Chandra*, 41 IC 875.
199. *Budayar Rahman v Karam Ali*, (1913) 18 Cal LJ 271 : 21 IC 47; *Sarada Kripa v Akhil*, (1917) 21 Cal WN 903 : 41 IC 530; *Jogesh Chandra v Makbul Ali*, (1921) ILR 47 Cal 979 : 60 IC 984.
200. *Mayandi Chettiyar v Chockalingam*, (1904) ILR 27 Mad 291 : 31 IA 83; reversing *Chockalingam v Mayandi*, (1896) ILR 19 Mad 485.
201. *Bengal Govt v Nawab Jafur Hossein Khan*, (1860) 5 Mad IA 467; *Sheo Pershad v Kally Dass Singh*, (1880) ILR 5 Cal 543; *Bilasmoni v Raja Sheo Pershad Singh*, (1882) ILR 8 Cal 664 : 9 IA 33.
202. *Leelanand Singh v Munoorunjun Singh*, (1874) 13 Beng LR 124; *Tulshi Pershad Singh v Ram Narain Singh*, (1886) ILR 12 Cal 117 : 12 IA 205; *Beni Pershad Koeri v Dudhnath Roy*, (1900) ILR 27 Cal 156, p 165 : 26 IA 216; *Agin Bindh Upadhya v Mohan Bikram*, (1903) ILR 30 Cal 20; *Narsing Dayal Sahu v Ram Narain Singh*, (1903) ILR 30 Cal 883; *Ram Rachhya Singh v Kumar Kamakhya*, (1925) ILR 4 Pat 139 : 84 IC 586 : AIR 1925 Pat 216 affirmed in 55 IA 212 : (1953) ILR Bom 1071.
203. *Rajaram v Narasinga*, (1891) ILR 15 Mad 199; *Rama Aiyangar v Gurusami*, (1918) 35 Mad LJ 129 : 46 IC 62; *Venkatachariar v Narasimha*, (1918) 35 Mad LJ 647 : 48 IC 301.
204. *Bhagwati v Hanuman*, (1900) ILR 23 All 67.
205. *Robert Watson & Co v Mohesh Narain Roy*, (1875) 24 WR 176; *Sheo Pershad v Kally Dass Singh*, (1880) ILR 5 Cal 283; *Bilasmoni v Raja Sheo Pershad Singh*, (1882) ILR 8 Cal 664 : 9 IA 33; *Tulshi Pershad Singh v Ram Narain Singh*, (1886) ILR 12 Cal 117 : 12 IA 205; *Narsing Dayal v Ram Narain Singh*, (1903) ILR 30 Cal 833; approved by the Privy Council in *Kamakhya Narayan Singh v Ram Raksha Singh*, (1928) ILR 7 Pat 649 : 55 IA 212 : 109 IC 663 : AIR 1928 PC 146; *Ram Narain Singh v Chota Nagpur Banking Association*, (1916) ILR 43 Cal 332 : 36 IC 321; *Gaya v Ramjiawan Ram*, (1881) ILR 8 All 569.
206. *Dinanath Kundu v Janaki Nath*, (1928) ILR 55 Cal 435 : 110 IC 368 : AIR 1928 Cal 392; on app *Janaki Nath v Dina Nath*, (1931) 54 Cal LJ 412 : 133 IC 732 : AIR 1931 PC 207; *CIT v Visheshwar*, (1939) ILR 18 Pat 805 : 187 IC 691 : AIR 1940 Pat 24; *Bara Lal v Bhaju Mian*, (1955) ILR 34 Pat 767 : AIR 1955 Pat 499.
207. *Bavasaheb v West Patent Co Ltd*, (1954) ILR Bom 445 : AIR 1954 Bom 257; *Sinha BP v Som Nath*, AIR 1971 All 297.
208. *Chittor Chegaiah v Pedda Jeyangar Mutt*, AIR 2010 SC 1278 : (2010) 3 SCC 776.
209. *Bamasoondari v Radhika*, (1869) 13 Mad IA 248; *Bhupendra Chandra v Harihar*, (1920) 24 Cal WN 874 : 58 IC 867; *Krishendra Nath v Kusum Kumari*, 54 IA 48 : 100 IC 93 : AIR 1927 PC 20; *Bhabani v Suchitra*, (1930) 51 Cal LJ 25 : 126 IC 203 : AIR 1930 Cal 270; *Satya Charon Law v Rai Mohan Sil Das*, (1932) 36 Cal WN 183 : 138 IC 139 : AIR 1932 Cal 436. See also Bengal Tenancy Act, 1885, section 7(1).

tenure which is perpetual.[210] Permanency of a lease does not necessarily imply both fixity of rent and fixity of occupation, and the fact of enhancement of rent does not necessarily militate against the tenancy being a permanent one.[211] But if for a long time, the rent has not been enhanced in spite of an increase in the value of the tenure, the inference will be that the rent is fixed.[212] A lease does not cease to be a lease in perpetuity because there is a forfeiture clause, for such a provision is merely a security for the payment of rent.[213] If the lease is a lease in perpetuity, a slight increase in rent will not by itself destroy the permanent character of the tenancy.[214] But a tenancy, though permanent in its inception, ceases to be permanent, if the tenant executes rent deeds for a specified period, and admits his ability to ejectment and enhancement of rent.[215]

Presumed grant—If the tenant has been in possession long before the TP Act, the conduct of the parties and the circumstances of the case may show that the tenancy is permanent. Long possession is by itself insufficient to prove permanency,[216] as the only presumption from long possession is a yearly tenancy.[217] Where land has been held on rent which is variable, the mere fact that buildings have been erected on the land with knowledge of the landlord is not itself sufficient to raise the presumption that the tenancy is permanent.[218] In the absence of a provision in the terms of the grant that the tenancy is not to continue after the grantee's lifetime, a lease for a definite period does not terminate on the death of the lessee, but continues with the heirs for the remainder of the term. A lease for an indefinite period on the other hand, enures for the lifetime of the lessee only, unless there are words in the document, or other circumstances revealing an intention to grant a perpetual lease.[219]

If the origin of the tenancy is known, long possession, even if coupled with payment of a uniform rent, is not sufficient[220] unless a custom to the contrary is proved,[221] or unless other circumstances such as the sale of a building on the land by the lessee and the transfer

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210. *Jogendra Krishna v Sahasini Dassi,* AIR 1941 Cal 541 : (1941) ILR 2 Cal 44 : 74 Cal LJ 145 : 45 Cal WN 590 : 197 IC 376.
211. *Bijoy Gopal Mukherji v Prafula Chandra Ghose,* [1953] SCR 930 : AIR 1953 SC 153.
212. *Saroda Prosad v Umasankar,* (1927) 44 Cal LJ 385 : 99 IC 258 : AIR 1977 Cal 168; *Dhunput Singh v Gooman Singh,* (1867) 11 Mad IA 433.
213. *Megh Lal Pandey v Rajkumar Thakur Girdhari Singh,* (1907) ILR 34 Cal 358; *Bhagwan Prasad v Balgobind,* (1933) ILR 8 Luck 377 : 142 IC 885 : AIR 1933 Oudh 161; *CIT v Visheshwar Singh,* (1939) ILR 18 Pat 805 : 187 IC 691 : AIR 1940 Pat 24; *Dinabandhu v Gopinath,* AIR 1948 Pat 12.
214. *Bhabataran Pohari v Trailokyanath Bag,* (1932) ILR 59 Cal 1282 : 36 Cal WN 632 : 55 Cal LJ 398 : 140 IC 743 : AIR 1932 Cal 764; *Priya Nath v Surendra Nath,* 69 IC 992 : AIR 1922 Cal 511.
215. *Suraj Bhan v Hafiz Abdul,* AIR 1941 Lah 195 : 43 Punj LR 75 : 195 IC 291.
216. *Secretary of State v Rajendra Prasa,* 170 IC 316 : AIR 1937 Pat 391; *Raja Rameshwar Rao v Govind Rao,* AIR 1961 SC 1442, p 1445; *Valia Raja v Veeraraghava,* AIR 1961 Ker 222; *Sri Radhakrishna Rice Mill Co v The Jumma Maseed,* AIR 2003 AP 70, p 80 : (2002) 6 ALD 52 : (2002) 6 ALT 791.
217. *Secretary of State v Luchmeswar Singh,* (1888) ILR 16 Cal 223 : 16 IA 6; *Nabu Mondal v Cholim Mullik,* (1898) ILR 25 Cal 896, p 908; *Barada Prosad v Prasanno Kumar,* (1912) 16 Cal WN 564 : 14 IC 152; *Kedar Nath v Madhu Sudan,* (1923) 37 Cal LJ 478 : 75 IC 105 : AIR 1923 Cal 682; *Prosunno Coomaree v Sheikh Rutton,* (1877) ILR 3 Cal 696; *Narayanbhat v Davlata,* (1891) ILR 15 Bom 647; *Ramabai v Babaji,* (1891) ILR 15 Bom 704.
218. *Secretary of State v Beni Prasad,* 170 IC 677 : AIR 1937 Pat 444; *Gordhanlal v Purucudu Narayan,* AIR 1939 Cal 291 : 68 Cal LJ 481 : 182 IC 8; *Nand Ram v Hakim Suraj,* AIR 1938 All 42.
219. *Rammohanrai v Somabhai,* (1950) 52 Bom LR 97 : AIR 1950 Bom 161.
220. *Gangabai v Kalapa,* (1885) ILR 9 Bom 419; *Ismail Khan Mahomed v Broughton,* (1900) 5 Cal WN 846; *Ismail Khan Mahomed v Jaigun Bibi,* (1900) ILR 27 Cal 570; *Raimala v Shiba Sundari,* (1912) 16 Cal LJ 26 : 16 IC 351; *Secretary of State v Digambar,* (1919) ILR 46 Cal 160 : 45 IC 43; *Jyoti Prasad v Dasrath,* (1922) 36 Cal LJ 73 : 63 IC 109 : AIR 1921 Cal 453; *Bechu Singh v Kumar Kamakhya Narain Singh,* (1932) 36 Cal WN 626 : 138 IC 234 : AIR 1932 PC 105; *Ram Lal Sahu v Bibi Zohra,* (1940) ILR 20 Pat 115 : 195 IC 583 : AIR 1941 Pat 228.
221. *Babaji v Narayan,* (1879) ILR 3 Bom 340; *Narayanbhat v Davlata,* (1891) ILR 15 Bom 647; But see *Guru Din Sahu v Badu,* (1936) ILR 12 Luck 516 : 164 IC 1003 : AIR 1937 Oudh 165.

of the land several times by the lessee show that the lease was perpetual.[222] However, if the origin of tenancy is not known, then the maxim *optimus rerum interpres usus* applies, and long possession coupled with a uniform rent raises a presumption of permanency.[223]

A presumption was made in favour of a lessee of a *wakf* property, who had held for a long period of time at an unchanged rent and as heritable property, even though a permanent lease could not have been granted without the permission of the *kazi*, and no such permission had been proved.[224] Viscount Summer said:

> The presumption of an origin in some lawful title, which the courts have so readily made in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming, is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. Hence, their Lordships cannot accept the appellant's contention that the provisions of the Indian Evidence Act, section 114 prevent the inference of a consent by the kazi in the absence of any evidence of an application to the kazi for leave, or some other proved fact of that kind. The matter is one of presumption, based on the policy of the law. The presumption is not an "open sesame" with which to unlock in favour of a particular kind of claimant a closed door, to which neither the law nor the proved facts would in themselves have afforded any key. It is the completion of a right, to which circumstances clearly point where time has obliterated any record of the original commencement.

Again, the fact that the land is held for building purposes or for residence may raise a presumption of permanence.[225] It had been held that in the absence of a contract to the contrary or local law or usage, a lease of land for putting up a permanent construction cannot be deemed to be a permanent lease, but must be regarded as a lease from month to month;[226] but this was dissented from in *Bavasaheb v West Patent Press Co.*[227] Such a tenancy could be for life or for a permanent tenancy. It could not be a tenancy at will. All these views have now been in terms approved by the Supreme Court in *Sivayogeswara Cotton Press v M Panchaksharappa*[228] in which a lease for building purposes was construed to be a permanent lease. In *Chapsibhai v Purushottam*,[229] the Supreme Court has considered *Sivayogeswara's* case

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222. *Uttar Pradesh Government v Church Missionary Trust Association Ltd*, (1948) ILR 22 Luck 93 : AIR 1948 Oudh 54.
223. *Nidhee Kristo v Nistarinee Dossee*, (1874) 21 WR 386; *Dukhina Mohun Roy v Kureemoolah*, (1869) 12 WR 243; *Ram Ranjan v Ram Narain Singh*, (1895) ILR 22 Cal 533 : 22 IA 60; *Nilratan Mandal v Ismail Khan Mahomed*, (1905) ILR 32 Cal 51 : 31 IA 149; *Durga Mohun v Rakhal Chandra*, (1901) 5 Cal WN 801; *Ismail Khan Mahomed v Asmatulla Sareng*, (1904) 8 Cal WN 297; *Ismail Khan Mahomed v Srimutty Mrinmoyi*, (1904) 8 Cal WN 301; *William Grant v Robinson*, (1907) 11 Cal WN 242; *Kittu Hegadthi v Channamma*, (1907) ILR 30 Mad 528; *Nemai Chandra v Mahomad Basir*, (1909) 9 Cal LJ 475 : 4 IC 173; *Moharam v Telamuddin*, (1912) 16 Cal WN 567 : 13 IC 606; *Naba Kumari v Behari Lal*, (1907) ILR 34 Cal 902 (PC); *Shoroshi v Bhagloo*, (1920) 32 Cal LJ 85 : 57 IC 877; *Syed Ali v Manik Chandra*, (1923) 27 Cal WN 969 : 80 IC 580 : AIR 1924 Cal 156; *Dinabandhu v Gopinath*, AIR 1948 Pat 12.
224. *Mahammad Muzaffaral Musavi v Jabeda Khatun*, (1930) ILR 57 Cal 1293 : 57 IA 125, p 130 : 123 IC 722 : AIR 1930 PC 103.
225. *Prosunno Coomar v Jagannath*, (1881) 10 Cal LR 25; *Gangadhur Shikdar v Ayimuddin*, (1882) ILR 8 Cal 960; *Rungo Lall Cohea v Wilson*, (1899) ILR 26 Cal 204; *Promada Nath Roy v Srigobind*, (1905) ILR 32 Cal 648; *Navalram v Javerilal*, (1905) 7 Bom LR 401; *Sheikh Dargahan v Hafiz Mahamed*, 176 IC 562 : AIR 1938 Pat 333 : (1939) ILR 18 Pat 571 : 184 IC 363 : AIR 1939 Pat 448; but see the cases under note (r) above and note (a) and (h) below; Re *Lakshminarayan*, (1953) 2 Mad LJ 160 : AIR 1954 Mad 412.
226. *Bujrang Sahai v Mulla*, AIR 1941 All 399.
227. *Bavasaheb v West Patent Press Co*, (1954) ILR Bom 445 : 56 Bom LR 61 : AIR 1954 Bom 257; *Chapsibai v Purshottam*, (1964) 36 Bom LR 515 : AIR 1964 Bom 287; *Jal Ram v Hari Singh*, AIR 1967 Punj 159.
228. *Sivayogeswara Cotton Press v M Panchaksharappa*, [1962] 3 SCR 876 : AIR 1962 SC 413; *Hukum Chand v Sansar Chand*, AIR 1972 HP 11.
229. *Chapsibhai v Purushottam*, AIR 1971 SC 1878.

and held that the lease in that case was permanent because the rights of the lessee were to be heritable; where an indefinite lease for building purposes is not heritable, it would be construed as enuring for the life-time of the lessee. The question of buildings generally arises in the case of homestead lands in Bengal; and in a Calcutta case,[230] it was suggested that as to such land an inference of permanency could hardly arise unless a *pucca* structure had been erected. But the correctness of this conclusion has been doubted[231] and in several cases,[232] inference of permanency has been drawn in the case of homestead lands on which no substantial structure had been erected, when a uniform rent has been charged despite a great increase in the value of the land. The mere fact that permanent buildings have been erected on the land cannot in any way alter the incidence of tenancy.[233]

As regards tenancies in Bengal of which the origin was not known, CJ Rankin in *Kamal Kumar Datta v Nanda Lal Dule*[234] said:

> The principles applicable to cases of this class may be stated as follows:
>
> (1) when a person claims to hold land as a tenant under a landlord it is for him to prove the existence, the nature and the extent of the interest which the owner of the full rights has granted to him;
>
> (2) the terms of the holding as between landlord and tenant must in these cases be a matter of contract either express or implied;
>
> (3) the Legislature, as regards this province (Bengal), has regulated the terms of agricultural holdings. The letting of land for residential purposes is regulated by the Transfer of Property Act of 1882, but from the operation of this statute old tenancies such as those now in question, are excluded by section 2;
>
> (4) ordinarily the person who sets up a contract will be required to give reasonable particulars and direct proof of the contract relied upon, but in the case of tenancies proved to be of long standing this principle is inapplicable, and from the history of the tenancy and the circumstances of the case it is open to the tenant to show that the origin of the tenancy being unknown, the correct inference is to the effect that the right granted to the tenant and enjoyed by him is a permanent right.

Although this judgment has reference to Bengal, the principles enunciated are of general application. In *Afzalunissa v Abdul Karim,*[235] the Privy Council quoted with approval the following head note to the case of *Casperz v Kader Nath Sarbadhikari,*[236] and said that its application was not limited to Bengal:

> Although the origin of a tenancy may not be known, yet if there is a proved fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a pucca house upon it, the fact of the house having been there for a very considerable time, of it having been added to by successive tenants, and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a court is justified in presuming that the tenure is of a permanent nature.

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230. *Abdul Hakim v Elahi Baksh,* (1925) ILR 52 Cal 43 : 85 IC 103 : AIR 1923 Cal 309.
231. See *Kamal Kumar v Nanda Lal Dule,* (1929) ILR 56 Cal 738, p 746 : 116 IC 378 : AIR 1929 Cal 37 and *Pramatha Nath v Champa Dasi,* (1929) ILR 56 Cal 275 : 118 IC 353 : AIR 1929 Cal 473.
232. *Moharam v Telamuddin,* (1912) 16 Cal WN 567 : 13 IC 606; *Winterscale v Sarat Chandra,* (1904) 8 Cal WN 155.
233. *Secretary of State v Beni Prasad,* 170 IC 677 : AIR 1937 Pat 444; *Banseedhar Singh v Chakradhar Prasad,* (1938) ILR 17 Pat 358 : AIR 1938 Pat 569; *Chaganlal v Indra Koer,* 194 IC 459 : AIR 1941 Pat 495; *Anant Teli v Ramdhan Puri,* 179 IC 940 : AIR 1939 Pat 350.
234. *Kamal Kumar Datta v Nanda Lal Dule,* (1929) ILR 56 Cal 736 : 116 IC 178 : AIR 1929 Cal 37; *Debendra Nath v Pashupati,* (1931) 35 Cal WN 1047 : 136 IC 889 : AIR 1932 Cal 198.
235. *Afzalunissa v Abdul Karim,* (1919) ILR 47 Cal 1 : 46 IA 131 : 50 IC 49 : AIR 1919 PC 11; *Sukumar Chandra v Nagendra Bala Dasi,* (1940) 72 Cal LJ 209 : 190 IC 622 : AIR 1940 Cal 393.
236. *Casperz v Kader Nath Sarbadhikari,* (1901) ILR 28 Cal 738.

Whether the facts and circumstances of the case justify the inference of permanence has been said by the Privy Council to be a mixed question of fact and of law.[237] But the courts hold firmly to the principle declared in *Secretary of State v Lunchmeswar Singh*[238] that the burden of proving permanency of tenancy is on the tenant;[239] and this view has been specifically approved by the Supreme Court in *Hamidullah v Abdullah.*[240] Clear and unambiguous language is required for inferring a permanent lease. A lease with the right of renewal is, in the absence of clear language, construed as giving a right to one renewal, but not a right to a second or third renewal.[241] In an Oudh case,[242] it was held that although none of the following facts taken by itself were sufficient to establish the fact that the lease was a permanent one, the cumulative effect of all of them taken together was to establish that the land was held under a perpetual lease:

(a) The land was given on lease at the same time as a building thereon was sold for residential purposes to the lessee; (b) no period was fixed for the lease; (c) the land was held at a uniform rent for 69 years; (d) several transfers had taken place; (e) the lessor never claimed that the lease was terminable.

Permanency by prescription—A permanent tenancy may be acquired by prescription, for it is a well-established rule that there can be adverse possession of a limited interest in property as well as of the full title of the owner.[243] The Bombay case of *Datto v Babasahib*[244] was, it is submitted, a clear case of a permanent tenancy acquired by prescription. The tenant came into possession in 1865 under a permanent lease, which was inadmissible as evidence of a lease for want of registration. This evidence was supported by a series of entries in the Record of Rights showing that the lessee claimed to be a permanent tenant. Nevertheless, the court held that a permanent tenancy could not be, and was not acquired. Though the court professed to follow *Naina Pillai v Ramanathan,*[245] but that case had no application, for the tenant there had entered as a tenant at will, and his subsequent assertion of a permanent

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237. *Dhanna Mal v Moti Sagar*, (1927) ILR 8 Lah 573 : 54 IA 178 : 101 IC 355 : AIR 1927 PC 102. But see the explanation and application of this case in *Kamala Kumar v Nanda Lal Dule*, AIR 1929 Cal 37; and in *Debendra Nath v Pashupati*, AIR 1932 Cal 198; *Ram Rambijaya v Ramjiwan Ram*, 200 IC 769 : AIR 1942 Pat 397.
238. *Secretary of State v Lunchmeswar Singh*, (1889) ILR 16 Cal 223 : 16 IA 6, p 11.
239. *Seturatnam Aiyar v Venkatachala Gounden*, (1920) ILR 43 Mad 567 : 47 IA 76 : 55 IC 117 : AIR 1920 PC 67; *Chidambara Sivaprakasa v Veerama Reddi*, (1922) ILR 45 Mad 586 : 49 IA 286 : 68 IC 538 : AIR 1922 PC 292; *Nainapillai v Ramanathan*, (1924) ILR 47 Mad 337 : 51 IA 83 : 82 IC 226 : AIR 1924 PC 65; *Subramanya Chettiar v Subramanya Mudaliar*, (1929) ILR 52 Mad 549 : 56 IA 248 : 116 IC 601 : AIR 1929 PC 156; *Kamal Kumar v Nanda Lal Dule*, AIR 1929 Cal 37; *Sidhanath v Chiko*, (1921) 23 Bom LR 533 : 63 IC 935 : AIR 1921 Bom 454; *Ponniah v Deivanai*, (1919) 36 Mad LJ 463 : 52 IC 247; *Nilratan Mandal v Ismael Khan Mahomed*, (1905) ILR 32 Cal 51 : 31 IA 149; *Rangasami v Gnana*, (1899) ILR 22 Mad 264; *Ram Ranjan v Ram Narain Singh*, (1895) ILR 22 Cal 533, p 542 : 22 IA 60; *Gopala v Juvappa*, 133 IC 369 : AIR 1931 Mad 577; *Hiralal v Secretary of State*, (1931) 33 Bom LR 828 : 134 IC 721 : AIR 1931 Bom 436; *Md Zayauddin v Dargahan*, (1939) ILR 18 Pat 571 : 184 IC 363; *Abdul Behari v Kunj Behari Lal*, AIR 1957 All 346.
240. *Hamidullah v Abdullah*, AIR 1972 SC 410.
241. *Syed Jaleel Zame v R Venkata Murlidhar*, AIR 1981 AP 328.
242. *Uttar Pradesh Government v Church Missionary Trust Association*, (1948) ILR 22 Luck 93 : AIR 1948 Oudh 54.
243. *Maidin Saiba v Nagappa*, (1883) ILR 7 Bom 96; *Madhava v Narayana*, (1886) ILR 9 Mad 244, p 247; *Sankaran v Periasami*, (1890) ILR 13 Mad 467; *Parameswaram v Krishnan*, (1903) ILR 26 Mad 535; *Icharan Singh v Nilmoney*, (1908) ILR 35 Cal 470; *Periyan Chetty v Govind Rao*, (1932) 62 Mad LJ 496 : 137 IC 487 : AIR 1932 Mad 328; *Thakor Fatehsingh v Bamanji*, (1903) ILR 27 Bom 515; *Rum Rachhya Singh v Kumar Kamakhya*, (1925) ILR 4 Pat 139, p 150 : 84 IC 586 : AIR 1925 Pat 216 affd on appeal *Kamakhya Narayan Singh v Ram Raksha Singh*, 55 IA 212 : 109 IC 663 : AIR 1928 PC 146.
244. *Datto v Babasahib*, (1934) ILR 58 Bom 419 : 36 Bom LR 359 : 150 IC 555 : AIR 1934 Bom 194.
245. *Naina Pillai v Ramanathan*, 50 IA 83 : 82 IC 226 : AIR 1924 PC 65.

tenancy could not create title by adverse possession. That case was distinguished on this ground in *Periyan Chetty v Govind Rao.*[246]

When the possession is that of a trespasser, it is adverse from the time of the trespass. Thus, in a Bombay case,[247] a permanent tenant encroached upon the other land of his landlord and claimed it as included in his lease and his possession was held to be adverse from the time of his encroachment. Again, in a Calcutta case,[248] possession under an invalid lease granted by a wife in the belief that her husband was dead, was adverse in its inception. A typical case is *Budesab v Hanmanta,*[249] where the tenant resisted eviction on the ground that he was a permanent tenant and remained in possession for 12 years thereafter. It was held that he was a trespasser after the original tenancy was determined, and his possession was adverse from that date. When a permanent tenancy is claimed by one who is already in possession as a tenant for years or from year to year, different considerations arise. The relationship of landlord and tenant, once established, is presumed to continue, and the tenant cannot, by the mere assertion of a title inconsistent with the real legal relationship between the parties, convert that relationship into adverse possession.[250] Such assertions do not necessarily throw upon the landlord the onus of refuting them by suit.[251] In *Vaman v Khanderao,*[252] the plaintiff claimed a permanent tenancy as to two plots. He succeeded as to the plot where the origin of his possession was not proved, but failed as to the plot where it was shown that he had entered as tenant. In *Tekait Ram Chunder Singh v Srimati Madho Kumari,*[253] the Privy Council held that the assertion by tenants, in suits against third parties, of a permanent tenancy was not sufficient to make their position adverse when there were no conflicting claims between themselves and the landlord; and again, in *Beni Prashad Koeri v Dudhnath Roy,*[254] the Privy Council held that mere notice by a person holding for life that he held on perpetual tenure would not make his possession adverse. There are cases[255] which apparently conflict with this statement of the law; but these have been explained in a Madras case,[256] as being cases in which the possession was really that of a trespasser when the permanent tenancy was claimed.

Permanency by estoppel—A permanent tenancy may also be acquired by estoppel as in the case of *Forbes v Ralli,*[257] or by implied contract as in *Lala Beni Ram v Kundan Lall.*[258] These cases are discussed in the note "Estoppel by acquiescence" under section 51.

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246. *Periyan Chetty v Govind Rao*, (1932) 62 Mad LJ 496 : 137 IC 487 : AIR 1932 Mad 328.
247. *Maidin Saiba v Nagappa*, (1883) ILR 7 Bom 96.
248. *Bejoy Chunder v Kaify Prosonno*, (1879) ILR 4 Cal 327.
249. *Budesab v Hanmanta*, (1897) ILR 21 Bom 509; *Parmeswaran v Krishnan*, (1903) ILR 26 Mad 535; *Icharan Singh v Nilmoney*, (1908) ILR 35 Cal 470; *Periyan Chetty v Govind Rao*, (1932) 62 Mad LJ 492 : 137 IC 487 : AIR 1932 Mad 328.
250. *Seshamma Shettati v Chickaya Hegade*, (1902) ILR 25 Mad 507; *Narasayya v Raja of Venkatagiri*, (1914) ILR 37 Mad 1 : 7 IC 202; *Narayan Visaji v Lakshuman*, (1873) 10 Bom HC 324; *Prasanna Kumar v Srikantha Rout*, (1913) ILR 40 Cal 173 : 16 IC 365; *Muhammad Mumtaz Ali Khan v Mohan Singh*, 50 IA 202 : 74 IC 476 : AIR 1923 PC 118; *Nainapillai v Ramanathan*, (1924) ILR 47 Mad 337 : 51 IA 83 : 82 IC 226 : AIR 1924 PC 65; *Sohama Singh v Kesar Singh*, (1932) ILR 13 Lah 432 : 140 IC 474 : AIR 1932 Lah 586; *Sarajul Haque v Dwijendra Mohan*, (1941) 45 Cal WN 240 : AIR 1941 Cal 33.
251. *Rajah Nilmoney Singh v Kally Churn Battacharjee*, 2 IA 83 : 23 WR 150 (PC).
252. *Vaman v Khanderao*, (1935) 37 Bom LR 376 : 156 IC 1020 : AIR 1935 Bom 247.
253. *Tekait Ram Chunder Singh v Srimati Madho Kumari*, (1886) ILR 12 Cal 484 : 12 IA 188.
254. *Beni Prashad Koeri v Dudhnath Roy*, (1900) ILR 27 Cal 156 : 26 IA 216.
255. *Budesab v Hanmanta*, (1897) ILR 21 Bom 509; *Gopalrao v Mahadevrao*, (1897) ILR 21 Bom 394; *Vithalbowa v Narayan*, (1894) ILR 18 Bom 507; *Bejoy v Kally*, (1879) ILR 4 Cal 27.
256. *Seshamma Shettati v Chickaya Hegade*, (1902) ILR 25 Mad 507.
257. *Forbes v Ralli*, (1925) ILR 4 Pat 707 : 52 IA 178 : 37 IC 318 : AIR 1925 PC 146; *Rani Bhuneshwari v Secretary of State*, 169 IC 756 : AIR 1937 Pat 374.

(6) The Consideration

The consideration is either premium, or rent.[259] Premium is the price paid or promised in consideration of the demise. The term "money advanced" does not include the amount of security deposit as it is adjustable towards unpaid rent and the lessor is not bound to pay stamp duty on it.[260] The definition of lease in section 105 was criticised in the case of Re *Uttar Pradesh Electric Supply Co*[261] as excluding a lease where the consideration is premium as well as rent. There is no doubt, however, that the consideration may be rent plus premium as well as rent alone or premium alone. The undernoted case,[262] is an instance of such a lease. The premium or price may be an outstanding debt.[263] When there is a lease agreement that is executed upon the condition that in case of failure to deposit instalments within prescribed limit, agreement would become void, under section 105, such promised consideration not paid shall render the lease void automatically.[264]

Though section 105 of the TP Act envisages even "services" rendered by the lessee as a consideration for the grant; the position would be different under the Rent Acts. The Supreme Court has held that in context of the provisions of Rent Act, services rendered in lieu of the right of occupation would not amount to receipt of rent so as to create a sub-tenancy.[265]

The transfer of right to enjoy immovable property may be made in lieu of money, a share of crops, service rendered or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee; and the money, share, service or other thing to be so rendered is called the rent and therefore it is not difficult to conceive of a lease of an immovable property, with a landlord-tenant relationship between the parties, in lieu of a share of profits or in lieu of commission paid or even in lieu of a service rendered.[266] Consideration in the form of generation of employment and industrial production for the welfare of the subject is not the "consideration" contemplated by section 105.[267]

Premium

Premium means a sum of money paid as consideration for grant of lease. It represents capitalized rent and is different from the actual rent which otherwise be obtained by the lessee. It also includes any like sum whether payable to the intermediate or a superior landlord and any sum (other than rent) paid on or in connection with the granting of a tenancy.[268] The difference between a premium and rent in the context, lies in the fact that premium is a sum paid in consideration of the conveyance implied in the lease and is quantified in lump, whether it is paid outright or by installments over a period told to be paid at a certain time. But a rent, while it is also in consideration of lease is in lieu of the

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258. *Lala Beni Ram v Kundan Lall*, (1899) ILR 21 All 496 : 26 IA 58.
259. *Rajesh Vaibhav v State of Chhattisgarh*, AIR 2011 Chh 51.
260. *Moideen Koya v K Girish Kumar*, AIR 2014 Ker 30 : LNIND 2013 KER 362 : 2013 (3) Ker LJ 702 : 2013 (3) Ker LT 616.
261. Re *Uttar Pradesh Electric Supply Co*, (1934) ILR 61 Cal 556 : 38 Cal WN 627 : 152 IC 601 : AIR 1934 Cal 803.
262. *Janaki Nath v Dina Nath*, (1931) 54 Cal LJ 412 : 133 IC 732 : AIR 1931 PC 207.
263. *Beni Prasad v Mulchand*, (1910) 6 Nag LR 65 : 6 IC 817.
264. *Khela Banerjee v City Montessori School*, (2012) 7 SCC 261 : LNINDU 2012 SC 12 : JT 2012 (6) SC 369 : AIR 2012 SC 3776.
265. *Dipak Banerjee v Smt Lilabath Chakraborty*, (1987) 4 SCC 161, p 165; *Rajbir Kuar v Chokesiri & Co*, (1989) 1 SCC 19, p 33.
266. *National Textile Corporation Ltd v Ashval Vaderaa*, (2010) 167 DLT 602 (Delhi) : ILR (2010) Supp. (1) Delhi 470.
267. *Rampur Engineering Co Ltd v State*, AIR 1981 All 396.
268. *Halsbury* 4th Edn, vol 5, para 169 p 85.

enjoyment which the lessee has and particularly as consideration thereof. Another feature of rent is that it is payable as and when it accrues unlike a premium the liability for which arises at the time the contract is entered into.[269]

The distinction between premium and rent has also been considered in a number of cases arising under the Income Tax Act, 1961, and as discussed by the Supreme Court in *CIT v Panbari Tea Co.*[270] If a payment is a consideration of being let in possession such as *salami*, it is a premium, even if it is to be paid in instalments.[271] But premium must be distinguished from advance rent.[272] If the consideration is premium alone, the transaction may be either a lease, or a usufructuary mortgage. The expression "*zuripeshgi lease*" means literally a lease for a premium. The premium was the original loan, and mortgages were given in this form to evade the prohibition against usury. In a *zuripeshgi* lease, the so-called lessee is actually a creditor operating the repayment of his debt out of the subject-matter of the so-called lease. If the indebtedness continues despite the grant of the lease, then the transaction is in effect a mortgage. However, the distinction is sometimes very fine. In *Nidha Sah v Murli Dhar,*[273] there was a grant of land rent free, for 14 years in consideration of a debt to the grantee at the time of execution. The Privy Council said that it was not a mortgage, as no accounts were to be taken and the land was not security for the debt. *Zuripeshgi* leases are discussed in a note under section 58. There is no charge for unpaid premium corresponding to the charge of the unpaid vendor under section 55(4)(b); and this is so even though the lease be in perpetuity.[274]

Rent

In Indian law, any payment by the lessee that is part of the consideration of the lease is rent.[275] Thus, when the lease provides for collection charges in addition to rent, such charges are really a part of the rent.[276] So also, a stipulation to pay assessment,[277] or taxes payable by the lessor[278] makes the assessment or taxes a part of the rent.[279] However, in the absence of any lease deed or rent note, mere payment of house tax cannot by any stretch of imagination be equivalent to an agreement of tenancy.[280] When the lessee agrees to pay rent to the lessor, and also to pay the head lessor a rent payable by the lessor, this latter sum is also rent.[281] On the other hand, if the payment is not made in consideration of the lease, it is not rent. Such are payments under the Bombay Land Revenue Code by inferior to superior holders between whom the relationship of landlord and tenant does not exist;[282] or cesses levied for public purposes such as sanitation, education, or policing.[283] Parties may agree that certain payments would not be regarded as rent. A personal agreement by a tenant to pay a certain sum or a

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269. *Law Lexicon* Edn, 2005 : vol 2 P 2056.
270. *CIT v Panbari Tea Co,* [1965] 3 SCR 811 : AIR 1965 SC 1871 : [1965] 2 SCJ 350.
271. Ibid.
272. Ibid.
273. *Nidha Sah v Murli Dhar,* (1903) ILR 25 All 115 : 30 IA 54.
274. *Venkatacharyulu v Venkatasubba,* (1925) ILR 48 Mad 821 : 90 IC 725 : AIR 1926 Mad 55.
275. *State of Punjab v British India Corpn,* [1964] 2 SCR 114 : AIR 1963 SC 1459.
276. *Mahomed Fayez v Jamoo Gazee,* (1882) ILR 8 Cal 730; *Radha Charan v Golakchandra,* (1904) ILR 31 Cal 834, p 837; see also *Muhammad Abdul v Nathu,* (1905) ILR 27 All 183.
277. (1884) ILR 7 Mad 155.
278. *Surnomoyee v Koomar Purresh,* (1879) ILR 4 Cal 576; *Watson v Sreekristo,* (1894) ILR 21 Cal 132; *Assanulla v Tirthabashini,* (1895) ILR 22 Cal 680.
279. *Bengal Coal Co v Janardan Kishore Lal Singh Deo,* 65 IA 354 : (1938) ILR 2 Cal 624 : 176 IC 433 : AIR 1938 PC 243.
280. *Suraj Prakash v Union of Delhi,* AIR 1998 Del 236.
281. *Basanta Kumari v Ashutosh Chuckerbutti,* (1900) ILR 27 Cal 67; *Mohebut Ali v Mohamed Faizullah,* (1898) 2 Cal WN 455; contra *Ruttnessur v Hurish Chunder,* (1885) ILR 11 Cal 221 and *Hemendra Nath v Kumar Nath,* (1905) ILR 32 Cal 169 submitted to be incorrect.
282. *Sadashiv v Ramkrishna,* (1901) ILR 25 Bom 556, p 563.
283. *Abdul Hari v Nathua,* (1904) 1 All LJ 537.

certain quantity in kind to the landlord is not rent.[284] A share of the first can be rent.[285] Though section 105 envisages even "services" rendered by the lessee as a consideration for the grant, it has been held that services in lieu of the right of occupation would not amount to receipt of rent under the Rent Acts to create sub-tenancy.[286]

The expression "lease" in section 105 covers a lease accompanied with payment of advance rent.[287]

As in England, rent may not be only payment in money, but also the delivery of chattels,[288] corn or the share of crop[289] or the rendering of services,[290] or partly in money and partly in kind.[291] Similarly, in the Bengal Tenancy Act, "rent" is defined as whatever is lawfully payable in money or deliverable in kind by a tenant to his landlord on account of the use and occupation of land held by the tenant. If the rent is fixed in perpetuity in money and measures of paddy, the tenancy is a fixed rate *mukerari* tenancy, although the price of paddy may vary.[292] But the mere description of a lease as *mauroshi mukerari* would not show that the rent was fixed in perpetuity. The terms of the deed may provide for its variation.[293] Where a lease provides that the rent shall be paid in kind of a certain money value, the lessor can recover the market value of the produce. The lessee has no option but to pay the rent in money.[294]

Rent must be certain, but it is not necessary that the actual figure be determined if there is no uncertainty as to the way in which it is fixed.[295] If it is certain or capable of being ascertained, it may fluctuate.[296] So a renewal clause at a rent subject to "such fair and equitable enhancement as the lessor shall determine" is not void for uncertainty because the requirement "fairness and equity" meant that the final decision was not left to the lessor.[297] Similarly, an option to renew at a rent to be fixed having regard to the market value of the premises at the relevant time is not void for uncertainty; a court is reluctant to hold void for uncertainty a provision intended to have legal effect, and as a formula was indicated for determining the rent, the court could determine it, even though no machinery for working out the formula was provided for,[298] but an agreement to pay whatever rent the lessor may impose, is void.[299]

The payment and acceptance of an increased or diminished rent does not of itself import a new demise.[300] But an agreement which varies the amount of rent or other essential terms of a lease amounts to a fresh lease, and must be registered as such.[301]

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284. *Anant Lal v Bhibute Bhuwan*, AIR 1944 Pat 293.
285. *Raja Ram Singh v Kanhaya Raj*, AIR 1950 Pat 284.
286. *Dipak Banerjee v Smt Lilabati Chakraborty*, AIR 1987 SC 2055, p 2058.
287. *Lachhmandas v Zumberlal*, AIR 1974 Bom 115 : 75 Bom LR 678.
288. *Pitcher v Tovey*, (1692) 4 Mod Rep 71.
289. Usually called *batai*.
290. *Doe v Edney*, (1845) 7 QB 976 (cleaning a church); *Jyotish Chandra v Ramanath*, (1905) ILR 32 Cal 243 (service as physician); *Bandhu Ganda v Balaram*, (1902) 15 CPLR 42; *Lakshmi Narain v Shri Krishna*, (1958) 56 All LJ 278; *Montagu v Browning*, [1954] 2 All ER 601 (cleaning a synagogue).
291. *Muluk Chand v Surendra Nath*, AIR 1957 Cal 217.
292. *Tafazzal Ahmed v Masalat Khan*, (1934) 38 Cal WN 797 : 152 IC 484 : AIR 1934 Cal 747.
293. *Shri Prasad v Sris Chandra*, (1942) ILR 22 Pat 220 : 210 IC 426 : AIR 1943 Pat 327.
294. *Krishna Bhatt v Narayan Acharya*, (1949) 1 Mad LJ 191 : AIR 1949 Mad 618; *Muluk Chand v Surendra Nath*, AIR 1957 Cal 217; *Ummathu v Ali*, AIR 1961 Ker 292.
295. *Viziaran v Vikran Dev*, AIR 1944 Mad 518.
296. *Sree Sankarachari v Varada*, (1904) ILR 27 Mad 332 (rent according to rates of neighbouring land); Re *Knight, Ex parte Voisey* (1882) 21 C D 442.
297. *Mangalmurti v State of Bombay*, [1959] 2 SCR 180 (Supp) : [1959] SCJ 760 : [1959] 2 SCA 47 : AIR 1959 SC 639; *King's Motors v Lax*, (1970) 1 WLR 426 : [1969] 3 All ER 665.
298. *Brown v Gould*, (1972) 1 Ch 53.
299. *Ramasami v Rajagopala*, (1888) ILR 11 Mad 200.
300. *Deo d Monek v Geekie*, (1844) 5 QB 841; *Crowley v Vitty*, (1852) 7 Exch 319.

When once the relationship of landlord and tenant is established, mere non-payment of rent is not enough to prove that the relationship has ceased.[302] Mere non-payment of rent in point of fact is not equivalent to absence of consideration in point of law.[303] On the other hand, a mere demand of rent from a person found in possession operates only as an offer of a tenancy, and the relationship of landlord and tenant is not established until the rent is paid and accepted.[304] A lease may provide for enhanced rent in case of alienation. Such additional rent, though sometimes called penal rent, cannot be relieved against.[305]

Periodically or on specified occasions

Rent is a periodical payment, it is usually reserved yearly, quarterly or monthly, and if so, it becomes due at the end of each such period. If the occasions are specified, such as quarter days or feast days, it becomes due on the first of such days after the commencement of the term. Rent is not in arrear until after midnight of the day for payment.[306] Rent falling due on a Sunday may lawfully be paid on that day, and is in arrears on Monday.[307]

Agreement to lease or Agreement for lease

A contract for a lease is to be distinguished from a lease, because a lease is actually a conveyance of an estate in land, whereas a contract for a lease is merely an agreement that such a conveyance shall be entered into at a future date. A lease is a transaction which as of itself creates a tenancy in favour of the tenant. An agreement for a lease is a transaction whereby the parties bind themselves, one to grant and the other to accept, a lease. Whether an instrument operates as a lease or an agreement for a lease, depends on the intention of the parties, which intention must be ascertained from all the relevant circumstances.[308]

The TP Act does not define an agreement to lease, but section 2(7) of the Registration Act, 1908 defines lease as including "agreement to lease". The Supreme Court in the case of *Trivenibai v Lilabai*[309] after interpreting the provisions of section 2(7) of the Registration Act and taking into consideration the decision of the Privy Council in *Hemant Kumari Devi v Midnapur Zamindari Co Ltd*[310] came to the conclusion that an "agreement to lease" under section 2(7) of the Registration Act must be a document which effects an actual demise and operates as a lease. An agreement between two parties, it was held, which entitles one of them merely to claim the execution of a lease from the other without creating a present and immediate demise in his favour is not an agreement to lease within the meaning of section 2(7)

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301. *Lalit Mohan v Gopali*, (1912) ILR 39 Cal 284, p 297 : 12 IC 723; *Biraj v Kedar Nath*, (1908) ILR 35 Cal 1010, p 1012; *Durga Prasad Singh v Rajendra Narain Singh*, 40 IA 223 : 21 IC 750.
302. *Hari v Mahadaji*, (1868) 5 Bom HC 85; *Rungo Lall v Abdool Guffoor*, (1879) ILR 4 Cal 314; *Prem Sukh Das v Bhupia*, (1878) ILR 2 All 517; *Gangabai v Kalapa*, (1885) ILR 9 Bom 419; *Tiruchurna v Sanguvien*, (1881) ILR 3 Mad 118; *Dadoba v Krishna*, (1883) ILR 7 Bom 34; *Rambhat v Bababhat*, (1894) ILR 18 Bom 250; *Mazhar Rai v Ramgat Singh*, (1896) ILR 18 All 290; *Jalasutram v Bommadevara*, (1906) ILR 29 Mad 42; *Jagannatha v Muthia Pillai*, (1901) 14 Mad LJ 477; *Bama Charan v Administrator General*, (1907) 6 Cal LJ 72; *Sriramulu v Jogiraju*, (1913) 24 Mad LJ 188 : IC 243.
303. *Pankaj Bhargava v Mohinder Nath*, (1991) 1 SCC 556, p 562.
304. *Deo Nandan v Meghu Mahton*, (1907) ILR 34 Cal 57; *Evans v Edith*, (1838) 9 Ad and El 342; *Towerson v Jackson*, (1891) 2 QB 484.
305. *Rama Krishna Rao v Mahadeo Bhatte*, (1935) 68 Mad LJ 482 : 156 IC 767 : AIR 1935 Mad 335.
306. *Dibble v Bowater*, (1853) 2 E & B 564.
307. *Child v Edwards*, (1909) 2 KB 753.
308. *State of Maharashtra v Atur India Pvt Ltd*, (1994) 2 SCC 497 quoting Woodfall in *Law of Landlord and Tenant*, 28th edn, vol I, 1978, p 127 and Hill and Redman in *Law of Landlord and Tenant*, 17th Edn, vol 1, p 100; followed in *ICICI v State of Maharashtra*, (1999) 5 SCC 708.
309. *Trivenibai v Lilabai*, AIR 1959 SC 620 : (1959) 2 SCC 107.
310. *Hemant Kumari Devi v Midnapur Zamindari Co Ltd*, (1919) ILR 47 Cal 485 : 46 IA 240 : 55 IC 534.

of the said Act. This view has again be reiterated by the Supreme Court in *V B Dharmyat v Shree Jagadguru Tontadrya*[311] by further holding that such documents are not required to be registered under section 2(7) read with section 17(1)(c) of the Registration Act, 1908. An agreement to lease may affect an actual demise in which case it is a lease. On the other hand, the agreement to lease may be a merely executory instrument binding the parties, the one, to grant, and the other, to accept a lease in the future. An agreement to lease not creating a present demise is not a lease, and requires neither writing, nor registration.[312]

As to an executory agreement to lease, it was at one time supposed that an intending lessee, who had taken possession under an agreement to lease capable of specific performance, was in the same position as if the lease had been executed and registered. These cases have, however, been rendered obsolete by the decisions of the Privy Council that the equity in *Walsh v Lonsdale* does not apply in India. The note under section 53A "Statutory Law of India excludes *Walsh v Lonsdale*" deals with this issue. If the agreement is in writing, the intending lessee may, however, defend his possession under section 53A.

Actual demise

When a document, though in the form of an agreement to lease, finally ascertains the terms of the lease, and gives the lessee a right of exclusive possession either immediately or at a future date, the document is said to affect an actual demise, and it operates as a lease. Whether it operates as a lease or as an agreement to lease, is a matter of construction and intention.[313] The transferee need not be put in actual possession. The transfer of the right to be in possession amounts to the transfer of possession.[314] So also, the transfer of a right to the usufruct of the property without possession may amount to a lease.[315]

Words of present demise are generally conclusive of a lease.[316] There is a present demise even if the leasehold interest is to commence in the future.[317] This is because a transfer may operate not only in the present, but in the future. In this connection, the note "In present or in future" under section 5 may be referred. In other words, the agreement must create an immediate right in the party to be a tenant either from that day or from a future day and before the execution of any formal lease.[318] Therefore, an agreement by which one of the parties to a suit to recover land agreed that in case of success he would grant a lease of the land to the other on specified terms, does not create a present demise.[319] If all the terms essential to a lease are not fixed, the agreement is not construed as a lease.[320] In *Ramjoo*

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311. *V B Dharmyat v Shree Jagadguru Tontadrya*, (1999) 6 SCC 15, para 10.
312. *Balram Raoji Nasare v Mahadeo Panduji*, (1949) ILR Nag 849 : AIR 1949 Nag 389; *K Venkatadri Sarma v IG of Registration & Stamp*, AIR 1986 AP 256, p 257.
313. *Swaminatha v Ramaswami*, (1921) ILR 44 Mad 399 : 62 IC 354 : AIR 1921 Mad 72; *Purmananddas v Dharsey*, (1886) ILR 10 Bom 101, p 104; *Ramjoo Mahomed v Haridas Mullick*, (1925) ILR 52 Cal 695, p 700 : 91 IC 320 : AIR 1925 Cal 1087; *Poole v Bentley*, (1810) 12 Bast 168; *Gore v Lloyd*, (1844) 2 M & W 463; *Brijnandan Singh v Jamuna Prasad*, (1958) ILR 37 Pat 339 : AIR 1958 Rang 589.
314. *Governor-General in Council v Indra Mani*, AIR 1950 East Punj 296.
315. *Sanker Krishnan v Hari Prabhu*, AIR 1952 Tr & Coch 333; *Eswari Amma v M K Korah*, AIR 1972 Mad 339.
316. *Barry v Nugent*, (1782) 3 Dong KB 179 (doth demise); *Baxter Abrahall v Browne*, (1775) 2 Wm Bl 973 (hereby set and let); *Ramjoo Mahomed v Haridas Mullick*, (1925) ILR 52 Cal 695 : 91 IC 320 : AIR 1925 Cal 1087; *Sultanali v Tyeb*, (1930) 32 Bom LR 188 : 125 IC 428 : AIR 1930 Bom 210.
317. *Ramjoo Mahomed v Haridas Mullick*, AIR 1925 Cal 1087; *Sultanali v Tyeb*, AIR 1930 Bom 210; *Poole v Bentley*, (1810) 12 East 168; *Deo d Walker v Groves*, (1812) 15 East 244; *Mopurappa v Ramaswami Gramani*, (1934) ILR 57 Mad 760 : 67 Mad LJ 54 : 152 IC 538 : AIR 1934 Mad 418; *Karta Ram v State of Punjab*, (1966) ILR 1 Punj 71 : 67 Punj LR 1143 : AIR 1966 Punj 365.
318. *Gore v Lloyd*, (1884) 2 M & W 463; *Deo d Walker v Grow*, (1812) 15 East 244.
319. *Hemanti v Midnapur Zamindari Co*, (1919) ILR 47 Cal 485 : 46 IA 240 : 55 IC 534.
320. *Champman v Towner*, (1840) 6 M & W 100; *Macnaghten v Rameshwar Singh*, (1903) ILR 30 Cal 831.

Mahomed v Handas Mullick,[321] the agreement was contained in two letters. The lessee's letter set forth all the terms essential to a lease and the lessor's letter of acceptance concluded with the words, "all terms will be settled in the agreement". Justice Page held that this did not imply that the terms were not settled by the letters, but was merely an assurance that the terms mentioned in the lessee's letter would be embodied in the formal lease. The letters were, therefore, construed as a lease. In *Goodyear India Limited v BB Jain and ors*, a division bench of Delhi High Court held that a lease cannot be created by way of a letter on account of non-registration. In the said case, the terms of lease were for three years, which required registration under section 107 of the TP Act.[322] An agreement is so construed, if the terms are fixed;[323] especially if possession is to be taken under it;[324] or if the lessee is already in possession;[325] or if rent is to be paid before the execution of a formal lease.[326] On the other hand, despite words of present demise, the instrument will be construed as executory if the terms are not settled,[327] or if before granting the lease, the lessor has to do work of completion,[328] or improvement.[329] Again, the agreement may expressly provide either that it shall,[330] or shall not,[331] operate as a lease. However, the courts should look into the dominant purpose of the relationship which the parties created while entering into the agreement. Clever phraseology and ingenuity must not be permitted to overshadow the real intention of the parties. The court must ascertain whether the agreement creates any interest in the property.[332] A dowlferist or rent roll is not even an agreement of lease, although the entries are signed by the tenants.[333]

ILLUSTRATIONS

(1) *A* gave *B* a memorandum setting forth terms of a lease for the reclamation of land in the Sundarbans jungle. *B* entered into possession on the strength of the memorandum. The memorandum was a lease, and was not admissible in evidence of want of registration.[334]

(2) By an agreement of 8 October 1882, *A* agreed to let his property to *B* for a term of five years, the rent to commence from 1 October 1882. *B* was regarded as a tenant at the date of the agreement, which operated as a present demise.[335]

(3) *A* by an agreement of 16 February 1915, agrees to let to *B* a building then under construction as from 1 April 1915, when it was expected to be completed. On 1 April the building is not completed, but with *A*'s consent, *B* takes possession and pays rent. There was by

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321. *Ramjoo Mahomed v Handas Mullick*, (1925) ILR 52 Cal 695 : 9 IC 320 : AIR 1925 Cal 1087.
322. *Goodyear India Limited v BB Jain and ors*, (1998) 75 DLT 620.
323. *Gore v Lloyd*, (1884) 2 M&W 463.
324. *Port Canning and Land Improvement Co v Katyani*, (1919) ILR 47 Cal 280 : 46 IA 279 : 53 IC 522; *Deo d Pearson v Ries*, (1832) 8 Bing 178; *Hamerton v Stead*, (1824) 3 B & C 478.
325. *Purmananddas v Dharsey*, (1886) ILR 10 Bom 101; *Sanjib Chandra v Santosh Kumar*, (1922) ILR 49 Cal 507 : 69 IC 877 : AIR 1922 Cal 436; *Deo d Phillip v Benjamin*, (1839) 9 Ad & El 644, p 651; *Lovelock v Franklyn*, (1840) 8 QB 371.
326. *Pinero v Judson*, (1829) 6 Bing 206.
327. *Morgana Dowling v Bissell*, (1810) 3 Taunt 65 (rent to be subsequently ascertained); *Dunk v Hunter*, (1822) 5 B & Ald 322 (uncertainty as to term).
328. *Sir Mahomed Yusuf v Secretary of State*, (1921) ILR 45 Bom 8 : 57 IC 971 : AIR 1921 Bom 200; *Regnort v Porter*, (1831) 7 Bing 451.
329. *Gore v Lloyd*, (1884) 2 M&W 463.
330. *Nund Ram v Mauno Bibee*, (1869) 10 WR 177.
331. *Driscoll v Battersea Borough Council*, (1903) 1 KB 881.
332. *Didi Modes Pvt Ltd v Hind Trading & Manufacturing Co*, AIR 1996 Del 319.
333. *Gunapersad v Gogun*, (1878) ILR 3 Cal 322; *Narain Coomary v Ramkrishna*, (1880) ILR 5 Cal 864.
334. *Port Canning and Land Improvement Co v Katyam*, (1910) ILR 47 Cal 280 : 46 I A 279 : 53 IC 522.
335. *Purmananddas v Dharsey*, (1886) ILR 10 Bom 101.

reason of delivery of possession, a demise on 1 April, but not under the agreement which was merely executory.[336]

Rent notes

These are agreements to lease which fall under the wider definition of lease in the Registration Act, which includes a *kabulayet* and an undertaking to cultivate or to occupy. The rent note or agreement to lease may be in counterpart signed by both parties, or it may be in correspondence;[337] or it may be an application for a lease accepted by the endorsement of the word "granted",[338] or it may be an application for a lease accepted orally or by the conduct of the lessor putting the applicant into possession.[339] If there is no present demise, the agreement may be effected by an unregistered instrument or even orally. So when a tenant agreed orally to take three successive yearly leases after the expiry of his term, it was held that the agreement was valid as the oral agreement did not operate as a transfer of property.[340] If there is a present demise, the rent note operates as a transfer by way of lease and if the term does not exceed one year, registration is not necessary.[341] But if the term exceeds one year, registration is necessary not under section 107, but, under the Registration Act. A transfer by way of lease must be made by a person who owns the interest to be transferred. A rent deed which is executed by the transferee of interest to be conveyed by a lease, and reciting that the transferee had taken the premises from the transferor and the transferee merely agrees by the terms of the deed to pay a certain rent for a certain period, cannot be considered to be a lease.[342]

A rent note, in the case of a lease deed is a vague document and may be rejected if it is incapable of furnishing any information, as regards who executed it and in whose favour it is executed, date of execution, tenure of lease and mode of payment of rent (per day, fortnightly, monthly etc).[343] Where as per the leased deed it was provided that for settlement of any dispute between parties with regard to the agreement and the subject matter thereof including the existence and validity of the agreement, the same would be settled by arbitrators as per the Indian Arbitration and Conciliation Act, 1996, it would not bar the filing of an eviction suit by the owner upon the determination of the lease on expiry of the lease agreement as with expiry of lease agreement such arbitration clause also comes to an end,[344] but an application made for reference to arbitration shall not be entertained if the petitioner does not show any inclination to pay the deficit stamp duty on the lease deed, nor the penalty imposed by the Collector.[345]

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336. *Sir Mahomed Yusuf v Secretary of State*, (1921) ILR 45 Bom 8 : 57 IC 971 : AIR 1921 Bom 200.
337. *Boyd v Kreig*, (1890) ILR 17 Cal 548, p 554; *Morgan v Fernandaz*, (1916) 30 Mad LJ 519 : 33 IC 439; *Sir Mohamed Yusuf v Secretary of State*, (1921) ILR 45 Bom 8 : 57 IC 971 : AIR 1921 Bom 200; *Ramanna v Rangaswamy*, AIR 1951 Mys 13; *Hassan Salt v Mirchandani*, AIR 1951 Mys 24.
338. *Syed Sufdar v Amzad Ali*, (1881) ILR 7 Cal 703, p 707; *Ramaswamy v Thirupathi*, (1904) ILR 27 Mad 43; *Sheikh Elahi v Sheikh Hukum*, (1914) 18 Cal WN 38 : 20 IC 907.
339. *Moro v Tukaram*, (1868) 5 Bom HC 92; *Hiralal v Collector of Surat*, (1876) PJ 36.
340. *Syrian Land Co v J D Rodrigues*, 148 IC 301 : AIR 1933 Rang 220.
341. *Hirachand v H H Hammond*, 48 IC 548 : AIR 1934 Pesh 81 (rent note of a bungalow for 5 months signed by the lessee only).
342. *Taj Din v Abdul Rahim*, AIR 1939 Lah 423 : 41 Punj LR 498.
343. *UOI v Ibrahim Uddin*, (2012) 8 SCC 148 : LNIND 2012 SC 419 : JT 2012 (6) SC 466 : 2012 (6) SCALE 476.
344. *Master Pieces Furniture Pvt Ltd v K Lakshma Reddy*, AIR 2014 AP 56 : LNIND 2013 AP 727 : 2014 (3) ICC 35, 2014 (1) ALT 773. See also *Loyola School, Hyderabad v Megha Kumar*, AIR 2010 (NOC) 469 (AP) : (2010) (1) Ald 399; *Booz Allen and Hamilton Inc v SBI Home Finance Ltd*, AIR 2011 SC 2507 : (2011) 5 SCC 532; *Magma Leasing and Finance Ltd v Potluri Madhavilata*, AIR 2010 SC 488 : (2009) 10 SCC 103; *Hindustan Petroleum Corporation Ltd v Pinkcity Midway Petroleums Corporation Ltd*, AIR 2003 SC 2881 : (2003) 6 SCC 503.
345. *Naina Thakkar v Annapurna Builders*, (2013) 14 SCC 354 : 2012 (7) SCALE 236.

Whether a rent note is a lease as defined in this section is a question on which there was a conflict of decisions. The Allahabad High Court held that a lease must be a deed signed by the lessor.[346] This view was taken by the Madras and Calcutta High Courts in the earlier cases,[347] but was abandoned in later cases by the Madras High Court,[348] and by the High Court of Calcutta.[349] The Bombay,[350] Rangoon[351] and Patna[352] High Courts had followed the High Court of Allahabad.

The above conflict of opinions expressed by different High Courts regarding the validity of lease made through a rent note signed by lessee alone, has been settled by introducing third para in section 107 by the Transfer of Property (Amendment) Act, 1929. A close reading of the third para indicates that there is no stipulation that the instrument must be signed by both the parties. The requirement is that when the lease is made by a registered instrument "such instrument shall be executed by both the lessor and lessee". The underlying purpose is that the creation of a lease is not an unilateral exercise of one of the parties, but a bilateral endeavour of both the lessor and the lessee. An instrument is usually executed through multifarious steps of different sequences. Whether both the parties have executed the instruments will be a question of fact to be determined on evidence. Merely because the document shows only the signature of one of the parties, it is not that non-signing party has not joined in the execution of the instrument.[353] A rent note or a *kabuliyet* signed only by the intending lessee is not a lease under TP Act, but would be a lease under the Registration Act, and the question of its registration would be decided under that Act.[354] A rent note not compulsorily registrable under the Registration Act, executed by a tenant in favour of a landlord, if not registered, can be relied upon to establish the relationship existing between the parties.[355]

A rent note executed by the tenant alone is not a "lease" within the meaning of section 107, and does not require registration.[356]

Lease or licence

In *Associated Hotels of India v R N Kapoor,*[357] J Subba Rao set out the following propositions as well established for ascertaining whether a transaction is a lease or licence:

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346. *Nand Lal v Hanuman Das*, (1904) ILR 26 All 368; *Kathi Gir v Jogendro Nath*, (1905) ILR 27 All 136; *Beni v Puran Das*, (1904) ILR 27 All 190; *Kedar Nath v Shankar Lal*, (1924) ILR 46 All 303 : 78 IC 934 : AIR 1974 All 514; followed in *Ahmed Khan v Sadasheo*, 80 IC 736 : AIR 1925 Nag 121; *Safdar Ali v Maharaja Ambika Prasad*, (1930) 28 All LJ 1385 : 130 IC 8 : AIR 1930 All 678; *Sheo Karan v Prabhu Narain*, (1909) ILR 31 All 2 [illegible] IC 211; *Mahomed Liaqat Ali v Ajudhia Prasad*, AIR 1943 All 212 : (1943) All LJ 66 : 207 IC 323; *Mohan Lal v Genda Singh*, (1943) ILR Lah 695 : 45 Punj LR 274 : 208 IC 22 : AIR 1943 Lah 127.
347. *Turof Sahib v Esuf Sahib*, (1907) ILR 30 Mad 322; *Kaki Subbanadri v Muthu Rangayya*, (1909) ILR 32 Mad 532 : 4 IC 1039; *Nilmamud Sarkar v Boul Das*, (1909) 14 Cal WN 73 : 2 IC 994.
348. *Syed Ajam v Ananthanarayanna*, (1910) ILR 35 Mad 95 : 8 IC 668.
349. *Akram Ali v Durga*, (1910) 14 Cal LJ 614 : 10 IC 489; *Raimoni v Mathura*, (1912) ILR 39 Cal 1016 : 14 IC 540; *Dinanath Kundu v Janaki Nath*, (1928) ILR 55 Cal 435 : 110 IC 368 : AIR 1928 Cal 392; on app *Janaki Nath v Dina Nath*, (1931) 54 Cal LJ 412 : 133 IC 732 : AIR 1931 PC 207.
350. *Ramsingh v Bai Dhanba*, (1925) 27 Bom LR 626 : 88 IC 648 : AIR 1925 Bom 512.
351. *U Tha Nyo v Maung Kyaw Tha*, (1925) ILR 3 Rang 379 : 90 IC 693 : AIR 1925 Rang 273; *Maung Ba Sein v Maung Htoon Shwe*, (1927) ILR 5 Rang 95 : 102 IC 105 : AIR 1927 Rang 169.
352. *Ramkrishna Jha v Jainandan Jha*, (1935) ILR 14 Pat 672 : 157 IC 98 : AIR 1935 Pat 291; *Bastacolla Colliery Co v Bandhu Beldar*, (1960) ILR 39 Pat 140 : AIR 1960 Pat 344.
353. *Rajendra Pratap Singh v Rameshwar Pal*, (1998) 7 SCC 602 : paras 9-11 : AIR 1999 SC 37.
354. *Jagadish Chandra Deo v Bisheswar Lal*, 199 IC 341 : AIR 1942 Pat 323; *Tulsiram Rajaram v Govinda Ramji*, AIR 1940 Nag 143.
355. *Mohan Lal v Genda Singh*, AIR 1943 Lah 127 : (1943) ILR Lah 695 : 45 Punj LR 274 : 208 IC 22.
356. *Ram Sewak Jaiswal v Abdul Majeed*, AIR 1980 All 262.

(i) To ascertain whether a document creates a lease or a licence, the substance of the document must be preferred to its form;

(ii) the real test is the intention of the parties—whether they intended to create a lease or a licence;

(iii) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which legal possession continues with the owner, it is a licence; and

(iv) if under the document a party gets exclusive possession of the property, "prima facie", he is considered to be a tenant; but circumstances may be established which negate the intention to create a lease.

A licence is defined in section 52 of the Indian Easements Act, 1882 as a right to do or continue to do, in or upon the immovable property of the grantor, something which would in the absence of such right be unlawful, and such right does not amount to an easement or an interest in the property.[358] A licence may be created on deal or parole and it would be revocable. However, when it is accompanied with grant it becomes irrevocable. A mere licence does not create interest in property to which it relates. Licence may be personal or contractual. A licence without the grant creates a right in the licensor to enter into a land and enjoy it. Lease on the other hand would amount to transfer of property.[359] The distinction between a licence and a lease is marked by the last clause of the definition, for a licence does not create any estate or interest in the property to which it relates.[360]

A licensee is not entitled to notice to quit before eviction.[361]

Accordingly, a licence—

(1) is not assignable (Indian Easements Act, 1882, section 56);

(2) does not entitle the licensee to sue strangers in his own name;

(3) is revocable by the grantor (Indian Easements Act, 1882, section 60);

(4) is determined when the grantor makes an assignment of the subject-matter.[362]

The rights and obligations of the lessor as contained in the TP Act are also subject to the contract to the contrary. Even the right of assignment of leasehold property may be curtailed by an agreement.

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357. *Associated Hotels of India v RN Kapoor*, AIR 1959 SC 1262, p 1269; *Karuna Manoharlal Shri v Vipinbhai U Sanghani*, AIR 1933 Bom 177, p 180; *CM Beena v PN Ramachandra Rao*, (2004) 3 SCC 595 : AIR 2004 SC 2103; *Corpn of Calicut v K Sreenivasan*, (2002) 5 SCC 361 : AIR 2002 SC 2051; *Sardar Pruthisingh v Kanchanlal Purushottamdas Desai*, AIR 2001 Bom 255, p 258; *Peter Alex D'Souza v Prithi Paul Singh*, AIR 2002 Bom 471 : (2002) 3 Mah LJ 437.
358. *Muskett v Hill*, (1839) 5 Bing (NC) 694, p 707; *Heap v Hartley*, (1889) 42 Ch D 461 : p 468 (CA).
359. *Pradeep Oil Corporation v Municipal Corporation of Delhi*, AIR 2011 SC 1869 : (2011) 5 SCC 270 : (2011) 4 SCR 764.
360. *Lall v Dunlop Rubber Co*, [1968] 1 SCR 23 : AIR 1968 SC 175 : [1968] 1 SCJ 644; *Heap v Hartley*, (1889) 42 Ch D 461, p 470; *Heiniger v Droz*, (1901) ILR 25 Bom 433; *Secretary of State v Karuna Kanta*, (1908) ILR 35 Cal 82, p 99; *Board of Revenue v South Indian Rly*, (1925) ILR 48 Mad 368 : 86 IC 688 : AIR 1925 Mad 434; *BNW Railway v Janki Prasad*, (1936) ILR AP 362; *Bhadreswar Pandit v Puspa Rani Pandit*, AIR 1991 Cal 405, p 408; *Ajab Singh v Shital Puri*, AIR 1993 All 138, p 142.
361. *Lall v Dunlop Rubber Co*, [1968] 1 SCR 23 : AIR 1968 SC 175 : [1968] 1 SCJ 644; *Ma Gyi v Maung Tet*, AIR 1934 Rang 291 : 151 IC 971; *Sri Upendra Mandal v Bhajahairi Mandal*, AIR 1991 Gau 107 (NOC).
362. *Pradeep Oil Corporation v Municipal Corporation of Delhi*, AIR 2011 SC 1869 : (2011) 5 SCC 270 : (2011) 4 SCR 764.

There is no simple litmus test for distinguishing a lease from a licence. The character of the transaction turns on the operative intent of the parties. If interest in immovable property, entitling the transferee to its enjoyment, is created, it is a lease; if permission to use the land without the right to exclusive possession is alone granted, the transaction is a licence.[363] The test of exclusive possession, though not decisive, is of significance.[364] Exclusive possession coupled with the transfer of a right to enjoy the property is an important test,[365] and indicates an intention to create a lease.[366] It may create a lease even though the sum is described as a "licence fee".[367]

A finding on the question whether the defendant is a tenant or a licensee is a finding of fact.[368] The Supreme Court has held that exclusive possession would not be conclusive evidence of the existence of a tenancy though that would be a consideration of first importance.[369] It has further been held that exclusive possession itself is not decisive in favour of a lease and against a mere licence, for, even the grant of exclusive possession might turn out to be only a licence, and not a lease where the grantor himself has no power to grant the lease.[370] Exclusive possession of the premises in the hands of a party is always crucial for ascertaining as to whether a lease has been created, [371] but even in the case of exclusive possession, sometimes, the court may upon consideration of the terms and conditions of documents and conduct of the parties, hold that the parties never intended to create a lease, and only leave and licence was granted. Where though exclusive possession of the premises was given to the company for an automobile showroom for five years, with liability to pay taxes, but no interest in property was created in their favour it would be a licence and not a lease.[372] Thus, exclusive possession by itself will not amount to creation of interest, and it will not militate against the concept of a licence if the circumstances negative any intention to create any interest.[373] Mere exclusive possession by itself does not indicate a lease but if exclusive possession of suit property is not parted by owner, intention is to create a license not a lease.[374] While interpreting the agreement Court has also to see what transpired before and after the agreement. *Ex praecedentibus et consequentibus optima bit interpretation* i.e the best interpretation is made from the context. If in fact it was intended to create an interest in the property, it would be lease, if it did not, it would be a license.[375] It is the creation of

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363. *Qudraiullah v Municipal Board Bareilly,* (1974) 1 SCC 202 : AIR 1974 SC 396; See also *Rajbir Kaur v S Chokosiri & Co,* AIR 1988 SC 1845; *Permanand Gulabchand & Co v Moolly Visanji,* AIR 1990 Ker 190, p 192; *Rajbir Kaur v Chokosiri & Co,* AIR 1988 SC 1845; *TK Jacob v Gracykutty,* AIR 1991 Ker 281, p 283; *P Narayanan v Managing Director Kerala Health Research & Welfare Society,* AIR 1991 Ker 306, p 307; *Associated Hotels of India Ltd v RN Kapoor,* AIR 1959 SC 1262 (tests-indicated); *Associated Hotels of India Ltd v RB Sardar Ranjit Singh,* AIR 1968 SC 933; *Brahm Raj v Vidyawati,* AIR 1991 P & H 188, p 192.
364. *Ram Niwas v Mun Board Nawabganj,* AIR 1976 All 241.
365. *Thakur Prasad v State Iron & Steel Co Ltd,* AIR 1976 Pat 156.
366. *Ram Niwas v Mun Board Nawabganj,* AIR 1976 All 241.
367. *Kidar Nath v Swami Prasad,* AIR 1978 Punj 204, 80 Punj LR 523; *Thakur Prasad v State Iron & Steel Co Ltd,* AIR 1976 Pat 156; *Ram Niwas v Mun Board Nawabganj,* AIR 1976 All 241.
368. *Samir Kumar Chateya v Hirendra Nath Ghosh,* AIR 1992 Cal 129, p 131.
369. *M N Clubwala v Fida Hussain Saheb,* AIR 1965 SC 610; followed in *Darshan Kumar Sharma v Vimal Bansal,* AIR 2004 P&H 129, p 130; *Peter Alex D'Souza v Prithi Pal Singh,* AIR 2002 Bom 471.
370. *Rajbir Kaur v S Chokosiri & Co,* AIR 1988 SC 1845, p 1850; *Marchant v Charters,* [1977] 3 All ER 918, p 922 (CA).
371. *Vidya Securities Ltd v Comfort Living Hotels Pvt Ltd,* AIR 2003 Del 214, p 217.
372. *Sandeep Sharma v Sai Chhya Autolink (p) Ltd,* AIR 2012 MP 98.
373. *Peter Alex D'Souza v Prithi Paul Singh,* AIR 2002 Bom 471, p 478 : (2002) 3 Mah LJ 437.
374. *Joao Necessidada Rooque Antonio v Vaman Govind Lotlikar,* AIR 2013 Bom 45 : LNIND 2012 GOA 335 : 2013 (1) AIR Bom R 853 : 2013 (3) All MR 93.
375. *R V Infrastructure Engineers Pvt Ltd v State of MP,* (2010) 2 MP LJ 357 : (2010) 91 AIC 479.

an interest in immovable property or a right to possess it that distinguishes a lease from a licence.[376] Interest for this purpose means a right to have the advantage accruing from the premises or a right in the nature of property in the premises but less than a title. The real intention of the parties is to be deciphered not only from a complete and close reading of the document itself but also from the attendant circumstances. The conduct of the parties before and after the creation of this relationship is also of relevance to find out their intention.[377] For the purpose of deciding whether a particular transaction is a lease or a licence, the question of intention of the parties is to be determined, and the intention has to be inferred from the circumstances of each case.[378] It is essential, therefore, to look to the substance and essence of the agreement, and not merely to the form.[379] Where the agreement was only for a short period (about nine months), and the respondents were granted merely the right to pluck, cut, carry away and appropriate the enumerated forest produces, no interest was created.[380]

> The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property and the subject-matter of the agreement. If it is in fact intended to create an interest in the property it is a lease, if it does not, it is a licence.[381]

Similar views were expressed by Delhi High Court in the cases mentioned below.[382]

In cases where courts are required to consider the nature of transactions and the status of parties thereto, one cannot go on mere nomenclatures. In order to ascertain the substance of the transaction, one has to ascertain the purpose and substance of the agreement. In such cases,

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376. *Narain Prasad Aggarwal v State of MP,* AIR 2007 SC 2349 : (2007) 11 SCC 736; *Raka Singhal v Pushpa Builders Ltd,* AIR 2007 Del 222 : (2007) 96 DRJ 753.
377. *Jagdish Chander Khurana v Ghanshyam Dass,* (2010) 172 DLT 681(Delhi).
378. *Johnson Kanadan v Patel Saw Mill,* AIR 2008 (NOC) 842 (Ker); *Madan Mohan Kukreti v Geeta Bhawan,* AIR 2007 Uttranchal 32 : (2006) 3 UC 1549; *Gajriben v Kantilal Uttamram Chevli,* AIR 2007 Guj 18 : (2007) 1 GLR 904; *Goa Tourism Development Corporation v S C Palyenkar,* AIR 2006 Bom 243; *Bhageband v Administrator, Municipal Corporation, Indore,* AIR 2005 MP 159 : (2005) 2 JLJ 93 : (2005) 2 MPHT 410; *Westinghouse Saxby Farmer Ltd v Sunil Kumar Gupta,* AIR 2005 Cal 322 : (2005) 3 Cal LT 46 (HC); *Jainabi Yousuf v Jainabi Allimiya,* AIR 2004 Bom 394 : (2004) 4 All MR 248 : (2004) 3 MHLJ 619; *Prabhu Dayal v Roop Kumar,* AIR 2005 Del 144; *C M Beena v P N Ramachandra Rao,* (2004) 3 SCC 595 : AIR 2004 SC 2103; *Achintya Kumar Saha v Nanee Printers,* AIR 2004 SC 1591 : (2004) 12 SCC 368; *Megh Raj v DCM Ltd,* AIR 2000 Del 332 : 2000 IV AD (Del) 554.
379. *Paradip Phosphates Ltd v Board of Trustees Paradip Port Trust,* AIR 2009 Ori 114 : (2009) 1 CLR 531. See also *Reg v Morrish,* (1863) 32 LJ (MC) 245; *Seeni Chettiar v Santhanathan,* (1897) ILR 20 Mad 58; *Mammikutti v Puzhakkal,* (1906) ILR 29 Mad 353; *Indian Hotels Co v Phiroz,* (1923) 25 Bom LR 84 : 88 IC 316 : AIR 1923 Bom 228; *Emperor v Sherif Dadumiyaji,* (1930) 32 Bom LR 332 : 126 IC 872 : AIR 1930 Bom 165; *Athakutti v Govinda,* (1893) ILR 16 Mad 97 (no exclusive possession); *Glenwood Lumber Co v Phillips,* (1904) AC 405, p 408 : [1904-7] All ER Rep 203; *Young v Liverpool Assessment Committee,* (1911) 2 KB 195; *Secretary of State v Bhupalchandra Ray,* (1930) ILR 57 Cal 655 : 129 IC 177 : AIR 1930 Cal 739 (such possession given); *Associated Hotels of India Ltd v R N Kapoor,* AIR 1959 SC 1262 : (1960) 1 SCR 368; *M N Clubwala v Fida Husain Saheb,* AIR 1965 SC 610; *Lall v Dunlop Rubber Co,* AIR 1968 SC 175; *Errington v Errington, AIR* (1952) 1 KB 290; *Ramjibhai v Gordhandas,* (1954) 56 Bom LR 365; *Shanti Sarup v R S Sabha,* AIR 1969 All 248; *Abbey field (Harpenden) Society Ltd v Woods,* (1968) 1 WLR 374 : [1968] 1 All ER 352; *Chinna v Govindaswami,* (1968) ILR 3 Mad 335 : AIR 1969 Mad 191; *Samir Kumar Chateya v Hirendra Nath Ghosh,* AIR 1992 Cal 129, p 131.
380. *Board of Revenue v A M Ansari,* AIR 1976 SC 1813 : (1976) 3 SCC 512 : [1976] 3 SCR 661; *Khalil Ahmed Bashir Ahmed v Tufelhussein Samasbhai Sarangpurwalla,* AIR 1988 SC 184 : (1988) 1 SCC 155; *Rajbir Kaur v S Chokosiri & Co,* (1989) 1 SCC 19, pp 32-34; *Marchant v Charters,* [1977] 3 All ER 918, p 922 (CA); see S Moriorty, Licences and Land Law: Legal Principles and Public Policies (1984) 100 LQR 376.
381. *Sohan Lal Narandas v Laxmandas,* (1977) 1 SCC 276, p 280.
382. *Sarwir Kumar v Subash Kukreja,* (1997) 67 DLT 259; *Jagjit Cotton Textiles Ltd v Col A K Malhotra,* AIR 1996 Del 165; *Ashok Chaudhry v Inderjit Sandhu,* (1998) 47 DRJ 575; *Vidya Securities Ltd v Comfort Living Hotels Pvt Ltd,* AIR 2003 Del 214, p 217 (words used in the agreement not to be taken on their face value.)

intention of the parties is the deciding factor.[383] In order to ascertain the intention, we have to examine the surrounding circumstances including the conduct of the parties.[384] In case of determining whether the transaction is a lease or licence, an effort should be made to find out whether the deed confers a right to possess exclusively coupled with transfer of a right to enjoy the property or what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention.[385] The line between lease and licence is very thin. Mainly the intention is to be gathered from the meaning and the words used in the document, except where it is alleged and proved that the document is a camouflage.[386] If there be a formal document, the intention is inferred from its terms. If the document is ambiguous, the question is to be decided with reference to parole evidence and attendant circumstances.[387] However, parties to an agreement cannot contract out of the Rent Acts; if they were able to do so, the Acts would be a dead letter, because in a state of housing shortage, a person seeking residential accommodation may agree to anything to obtain shelter. A document which expresses the intention genuine or bogus, of both parties or of one party to create a licence will nevertheless create tenancy, if the rights and obligations enjoyed and imposed satisfy the legal requirements of tenancy.[388] Whether a transaction is a licence depends on the intention of the parties, and the nature of the possession granted. The following circumstances, present in a Madras case[389] were held to establish the transaction as a lease:

(1) Exclusive possession of the premises;

(2) The opposite party had no access to the portion of the premises occupied by the person in possession;

(3) The portion occupied by the person in possession was provided with a sub-meter for electricity;

(4) The monthly payment, though termed as "compensation and commission", was, in reality, rent for the premises occupied by person in possession;

(5) The demise was for a fixed term of five years;

(6) No power was reserved for cancelling the contract before the expiry of the fixed term;

(7) Provision was also made for extending the term of the contract by mutual agreement;

(8) Penal provisions were incorporated, providing for enhanced payment of rent in case the person in possession continued after the term of five years.

However, the following facts led the Delhi High Court[390] to hold that the transaction is a license:

(1) Shop was to be run only for sale of a particular product;

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383. *Banwarilal v UOI,* AIR 1973 Gau 123; *The Oriential Hotels Ltd v Parameshwari Devi,* AIR 1994 Mad 383 (NOC).
384. *Achintya Kumar Saha v Nanee Printers,* AIR 2004 SC 1591 : (2004) 12 SCC 368.
385. *C M Beena v P N Ramachandra Rao,* (2004) 3 SCC 595 : AIR 2004 SC 2103.
386. *Delta International Ltd v Shyam Sundar Ganeriwalla,* (1999) 4 SCC 545 : AIR 1999 SC 2607; followed in *Jainabi Yusuf Lambe v Jainabi Allimiya Wagale,* AIR 2004 Bom 394.
387. *Pratap Narain v Juggilal Kamlapat Iron & Steel Co Ltd,* AIR 1975 All 73 : (1974) All LJ 845.
388. *A G Securities v Vaughan,* [1988] 3 All ER 1058; *Street v Mount Ford,*(1985) 2 All ER 289; *Paramanand Gulabchand & Co v Mooligi Visanji,* AIR 1990 Ker 190, pp 193, 195.
389. *R Srinivasa Chetty v G Nagarajan,* (1982) 1 Cal LJ 25.
390. *Megh Raj v DCM Limited,* AIR 2000 Del 332, p 335 : 2000 IV AD (Delhi) 554.

(2) Shop was to cater to the needs of a particular group of people;

(3) License would not be heritable and assignable;

(4) On expiry of two years and on expiry of any renewed period, possession was to be handed back;

Where the question arises as to whether an agreement is a lease or a licence, the intention of the parties must be gathered from the terms of the agreement, examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention, but is not decisive. Mere use of words appropriate to the creation of a lease will not preclude the agreement from operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is, whether the instrument is intended to create an interest in the property. The subject-matter of the agreement, if it is in fact intended to create an interest in the property, is a lease; if it does not, it is a licence. In the course of granting permissive possession, the granter may hand over the keys of the suit premises to the grantee, but that does not itself create exclusive possession.[391]

A person permitted to occupy premises for safety and without payment, where no exclusive possession is proved, is a licencee, and not a lessee.[392] Where there was overwhelming evidence negating exclusive possession and the agreement also described the person in possession as a licencee, it was held that the parties did not intend to create an interest in the property, but only a licence.[393] A similar view was expressed by the Delhi High Court.[394] Where *A*, who had to leave for abroad for the purposes of her employment at the request of her friend *B*, permitted *B*'s relative to occupy her furnished flat, with the condition that upon her return he would vacate it immediately, and after her return, she occupied part of the flat, retaining one key to the main entrance, but stayed in the official quarters allotted to her till her superannuation, it was held that the occupier was a licencee and not a lessee.[395]

The very definition of lease and licence indicates that the essence of the distinction lies in the creation of an interest in the property, as distinguished from a mere permission to use the property. Where the licensee, acting upon the licence, executes permanent works and incurs expense, the licence cannot be revoked by the grantor if the grantor stands by and allows the licensee to do such acts in the belief that he has a right to do so.[396] Permission given to the tenant to enjoy the land in a particular manner does not mean that the legal possession has passed to the tenant.[397] A bilateral instrument transferring the right to collect market dues for a certain period on payment has been held by the Allahabad High Court to satisfy the ingredients of a lease.[398]

In *Pradeep Oil Corporation v Municipal Corporation of Delhi*,[399] the oil corporation was granted separate and distinct licences by President of India, under the government Grants Act, for the purposes of maintaining depots for storage of petroleum products and also the right to erect/construct petroleum installations buildings and other conveniences for receiving and storing therein petroleum in bulk pursuant to which, the corporation took exclusive possession that they retained undisturbed for around 50 years and raised huge

391. *C Devdas v Calicut Corpn*, AIR 1996 Ker 274 : ILR 1996 (3) Kerala 86.
392. *Turab Ghosi v Laxmi Agarwal*, AIR 1984 All 180.
393. *Ratilal Tanna v Abdul Husain Hasanali*, AIR 1982 Guj 266.
394. *Ashok Chaudhary v Inderjit Sandhu*, (1998) 47 DRJ 575.
395. *G Cariappa v Leila Sinha Roy*, AIR 1984 Cal 105 : 88 CWN 83.
396. *Babu Fazal Haq v Lala Data Ram*, AIR 1975 All 373.
397. *C Devdas v Calicut Corpn*, AIR 1996 Ker 274 : ILR 1996 (3) Kerala 86.
398. *Dropadi Devi v Ram Das*, AIR 1974 All 473, p 475 : (1974) ILR 1 All 434.
399. *Pradeep Oil Corporation v Municipal Corporation of Delhi*, AIR 2011 SC 1869 : (2011) 5 SCC 270.

construction. The agreement made it incumbent on the corporation to pay rent and stipulated service of three months' notice calling upon either party to terminate the agreement. In these circumstances, the apex court held that the document/agreement created a lease in favour of the Oil Corporation and not a licence. In cases where the landlord alleges that the tenant has sub-let the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into, inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed. The tenant and the sub-tenant, who jointly set up a plea of licence against the landlord may choose to camouflage the truth and substance of the transaction behind a facade of self-serving instrument. In such a case, the realities and substance of the transaction, and not merely the deed, become the basis for the determination of the legal nature of the relationship. The deed is a mere piece of evidence—the weight to be accorded to which will depend upon all the other circumstances of the case.[400] Transfer for a fairly long period and coupled with exclusive possession may lead to an inference in favour of a lease.[401]

Whether an instrument operates as a lease or as a licence is a matter not of words, but of substance.[402] There have been a large number of decisions on this question. It is submitted that the decisive consideration is the intention of the parties,[403] but the intention must be gathered on a true construction of the agreement, and not merely from the description given by the parties.[404] The intention of the parties to an agreement has to be gathered from the terms of the agreement construed in the context of the surrounding antecedent and consequent circumstances.[405] But the description given is indicative of the intention of the parties. The mere use of words appropriate to a lease will not preclude its being held to be a licence; so even a document referring to "rent" may be a licence.[406]

Where, after the expiry of the original period of lease, the lessee continued in possession and the lessor accepted from him premium for the subsequent period, the lessee could not be ejected without the termination of the freshly created lease.[407] Where the owner of the premises and the person in need of the premises execute a deed, labelling it as a licence deed to avoid the operation of rent legislation, the mask is to be removed or the veil is to be lifted,

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400. *Rajbir Kaur v S Chokesiri & Co,* (1989) 1 SCC 19, p 34.
401. *Mohan Sons (Bombay) Pvt Ltd v Lady Sonnoo Jamsetji Jeejeebhoy,* AIR 1976 Bom 417 : 78 Bom LR 198.
402. *Lall v Dunlop Rubber Co,* AIR 1968 SC 175; *Smith v St Michael Cambridge Overseers,* (1860) 3 E & E 383, p 390; *Mammikutti v Puzhakkal,* (1906) ILR 29 Mad 353.
403. *Associated Hotels of India Ltd v R N Kapoor,* [1960] 1 SCR 368 : AIR 1959 SC 1262; *M N Clubwala v Fida Hussain Saheb,* [1964] 6 SCR 642 : AIR 1965 SC 610 : [1964] 2 SCJ 448; *Lall v Dunlop Rubber Co,* AIR 1968 SC 175; *Konchada R Subudhi v Gopinath,* [1968] 2 SCR 559 : AIR 1968 SC 919 : [1968] 2 SCJ 528; *Errington v Errington,* (1952) 1 KB 290 : [1952] 1 All ER 149 (CA); *Issac v Hotel de Paris Ltd,* [1960] 1 All ER 348 : (1960) 1 WLR 239; *PC Satinath Mukherjee v Sailendra Nath Sen,* AIR 1991 Cal 55 (NOC); *Daya Wati Madan lal v Ravinder Kurnar Sharma,* AIR 1992 P & H 212, p 214; *Gopal Saran v Salganarayan,* AIR 1989 SC 1141, p 1152; *B V D'Souza v Antonio Fausto Fernandes,* AIR 1989 SC 1816, p 1118; *K Ram Mohan Rao v Endowments Commr,* AIR 1989 Kant 192, p 200; *T Shanmugham Pillai v N Rajaraman,* AIR 1986 Ker 173, P 174.
404. *Fachhini v Bryson,* (1952) 1 TLR 1386; *Addiscombe Garden Estates v Crabbe,* (1958) 1 QB 513 : [1957] 3 All ER 563; *Aninha D'Costa v Parvatibai Thakur,* (1965) 67 Bom LR 452; *Sohanlal Naraindas v Laxmidas,* (1963) 67 Bom LR 400, affirmed in (1971) 1 SCC 276.
405. *Puran Singh Sahni v Sundari Bhagwandas Kripalani,* (1991) 2 SCC 180, p 189 following *Sohanlal v Laxmidas Raghunath Gadit,* (1971) 1 SCC 276; See also *Tarkeshwar Sio Thakur Jui v Dar Dass Day & Co,* (1979) 3 SCC 106 : AIR 1979 SC 1669.
406. *H S Rikhy v New Delhi Municipality,* [1962] 3 SCR 604 : AIR 1962 SC 554; *Konchada R Subudhi v Gopinath,* AIR 1968 SC 919.
407. *Ram Niwas v Municipal Board, Nawabganj,* AIR 1976 All 241.

and the true intention behind a facade of a self-serving conveniently drafted instrument is to be gathered from all the relevant circumstances.[408]

Where in a permissive temporary possession of a plot for construction of a nursery, permanent structure were raised for which permission was not granted and consequently allotment was revoked, the licensee is not entitled to any compensation as temporary allotment does not create any right.[409] Occupation of trust property in lieu of donations would not create any rights in favour of the occupants. Where the property belonged to the trust, and no instrument was executed in favour of the claimant, but they were permitted to use the premises and pay water and electricity expenses to the trust, they will be mere licensees.[410] Where pursuant to an agreement between the owner of a building and a company whereby the company was given the building in question for the purposes of establishing an automobile showroom for five years with the monthly fees of Rs one lakh with additional liability on the company to pay taxes, the grant would be a licence as no interest was created in favour of the company in the land.[411] Where the agreement between the parties imposed restrictions against subletting and making modification in shops and provided for security deposits to be returned at the time of the vacating premises, the agreement creating a tenancy and not merely a license.[412] In a Bombay case, it was stated that if an interest in immovable property entitling the transferor to enjoyment is created, it is a lease; if permission to use land without a right to exclusive possession is alone granted, then it is a licence. Marginal variations of this broad statement are possible. On the facts, since an exclusive possession had been given and there was no other circumstance indicating to the contrary, the transfer was held to be a lease, though it was titled "leave and licence agreement".[413] An agreement styled as "agency" may still be a lease. In a Calcutta case, an agreement entered into by the tenant with a company was styled as an agreement of "agency" between the parties. But the occupation of a room in the demised premises was given to the company, and monthly payment was fixed. A *durvan* at the room could be employed by the company alone and the company could place, in the disputed room, any number of its employees it liked, and store in it any amount of goods, it liked. The goods lying in the disputed showroom were worth ₹ 70,000 to ₹ 80,000. It was held that the agreement contained all the elements of a document of lease.[414] An agreement was described as an agreement of "leave and licence". The parties had been described as the "licensor" and the "licensee". There were recitals that the licensor was seized and possessed of, and was otherwise well entitled as the monthly tenant of the workshop premises, being the premises in dispute; and whereas the licensee had approached the licensor to allow him to occupy and use the said premises of workship for a period of five years, the licensor had agreed to allow the licensee to the premises under the said leave and licence of the licensor for a period of five years. It was permitted to the user only for 20 hours a day. It was held that in view of the intention of the parties in the document and the facts and circumstances of the case, the agreement was a licence, and not a lease.[415] Where exclusive possession of the suit property was with the defendant and not with the landlord, it was held to be a lease, and not a

408. *Delta International Ltd v Shyam Sundar Ganeriwalla,* (1999) 4 SCC 545 : AIR 1999 SC 2607.
409. *Sonata Foundation v State of West Bengal,* AIR 2013 Cal 89 : LNIND 2012 CAL 601 : JCNO C 2012 0601.
410. *Sardar Lakhbir Singh v Swargashram Trust,* AIR 2013 Utr 25 : 2014 (1) UC 77.
411. *Dr Sandeep Sharma v Sai Chhaya Autolink (P) Ltd,* AIR 2012 MP 98 : LNIND 2012 MP 21.
412. *Onkar Nath Tiwary v State of Bihar,* AIR 2014 (NOC)180 (Pat).
413. *Mohan Sons (Bombay) Pvt Ltd v Lady Sonno Jamsetji Jeejeebhoy,* AIR 1976 Bom 417 : 78 Bom LR 195.
414. *Abhay Singh v W Evans & Co Ltd,* AIR 1984 Cal 88, pp 91, 92, paras 14 and 17.
415. *Khalil Ahmed Bashir Ahmed v Tufelhussein Samasbhai Sarangpurwala,* AIR 1988 SC 184.

licence.[416] A person who is granted accommodation in a cattle shed at his request, on the condition of payment of repair charges, is a licensee and not a lessee.[417] In *Uttam Chatterjee v UOI,*[418] the grant of licence to use a particular land belonging to railway was for one year. There was no order extending the licence after completion of the period of one year, and no application was filed by the licensee for renewing the same. When the railway authority called upon the licensee to vacate the site after the expiry of one year, it was held that unilateral payment of licence fee by the licensee, without its acceptance by the appropriate authority, would not create any right in favour of the licensee, nor would it nullify the order of the railway authority.

In *Quality Cut Pieces v M Laxmi & Co,*[419] stalls were allotted to various traders in a departmental store. Surrounding circumstances, including want of facility to lock the stalls independently, inability of the stall holders to enter into the building or stores at will, requirement of having to seek management's permission to change the hours of business or merchandise, non-assignability of interest in the stalls, repeated recognition of the agreement to pay fixed percentage of commission, subject to minimum deployment of the stall, such as a watchman, accountant etc. by the management in order to monitor the sales etc., indicated that the stall holders were licensees for reward and not lessees. In a Patna case, the state road transport corporation allowed the plaintiff to run a refreshment room under an agreement that empowered the corporation to inspect and check the manner in which the refreshment room was being run by the plaintiff, and to remove the plaintiffs' employees. It was held that the agreement created no interest in the premises in favour of the plaintiff, and the plaintiff was only a licensee. The fact that the premises were given to the plaintiff, for a term of one year made no difference, since a clause in the agreement required the giving of three months' notice on either side to terminate the agreement.[420]

Where it was provided in the deed that the licensee shall advance to the licensor a daily licence fee of ₹ 500 inclusive of electricity charges of one day, subject to a minimum of ₹ 3,500 per week, and that the licensee shall have no right, title or interest to possess the premises, it was held that the deed was of a licence and not a lease deed, more particularly when the surrounding circumstances indicated that the land on which the building was constructed could not have been transferred or parted with except by the previous consent in writing of the development authority from which it was taken on a perpetual lease.[421]

If it only gives the use of the property in a particular way or on certain terms while it remains in the possession and control of the owner, it will only be a licence.[422] In other words, for a lease there must be a power and intention to hold the property to the exclusion of the grantor. The distinction is sometimes fine. In a Madras case,[423] a document purporting to be a lease by a railway company of plots in a station yard for the purpose of stacking coal, was construed to be a licence. On the other hand, in a very similar Allahabad case,[424]

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416. *Balvant Singji Anand v Bhagwantrao Ganpatrao Deshmukh,* AIR 1980 Bom 333 : (1980) Mah LJ 459; *Permanand Gulabchand & Co v Mooligi Visanji,* AIR 1990 Ker 190, p 194.
417. *Panjabroo Harbaji Kothe v Gajanan Balaji,* AIR 1980 Bom 396.
418. *Uttam Chatterjee v UOI,* AIR 1986 Del 291.
419. *Quality Cut Pieces v M Laxmi & Co,* AIR 1986 Bom 359. See also *Baldev Raj v Veena Chandyoka,* AIR 1985 Del 392.
420. *Prakash Rao v Nihar State Road Transport Corpn,* AIR 1981 Pat 142.
421. *Hind Trading & Manufacturing Co v Didi Motors Pvt Ltd,* AIR 1993 Del 303, p 313.
422. *Wells v Kingston upon Hill Corporation,* (1875) LR 10 CP 402, p 408; *Cory v Bristow,* (1877) 2 App Cas 262, p 276; *Seeni Chettiar v Santhanathan,* (1897) 20 Mad 58; *Secretary of State v Karuna Kanta,* (1908) ILR 35 Cal 82; *Mohipal v Lalji,* (1913) 17 Cal WN 166 : 16 IC 705.
423. *Board of Revenues v South India Railway,* (1925) ILR 48 Mad 368 : 86 IC 668 : AIR 1925 Mad 434.
424. Re *Burmah-Shell Oil Storage and Distributing Co of India Ltd,* (1933) ILR 55 All 874 : 1933 All LJ 749 : 145 IC 674 : AIR 1933 All 735.

a document purporting to be a licence by a railway company to an oil company conferring a right of temporary occupation of plots of land for a petroleum installation was construed to be a lease. In the former case, however, a right of access was reserved by the railway company. It has been observed[425] that genuine relationship of licensor and licensee can conceivably arise in the following circumstances:

(1) A property owner may have an occasion to oblige a relation or friend in need of accommodation and in view of the special relationship may grant the premises for temporary lease without intending to create a lease so that the premises not needed by him at the moment may not remain idle whilst his needy friend or relative suffers avoidable hardship.

(2) An owner of property may suddenly have an occasion to go to some other place for a temporary period and instead of allowing the premises to remain idle he permits someone in whom he has trust to occupy the same to meet the temporary need of the latter which may coincide with his own temporary period of absence.

(3) A property owner may accept someone as a paying guest while he himself retains possession of the property as the principal occupant.

(4) In such cases, even if some occupation fees is charged, it would not matter, as in essence the relationship of licensor and licensee can be spelt out in view of the backdrop.

ILLUSTRATIONS

(1) *A*, the owner of a mews, reserves a space for garaging *B*'s motor car at a monthly rent. There is no demise or transfer of an interest in land. *B* is only a licensee.[426]

(2) *A* grants *B* a lease for two years to tap toddy from palmyra trees in his garden but *B* is not to cut the leaves. The so-called lease creates no interest in immovable property and is only a licence.[427]

(3) *A* lets a plot of land used as a *haat* or market to *B* for a fixed period for a fixed sum. *B* has the right to collect tolls in the market, and covenants to keep the *haat* clear, not to interfere with the rent of any permanent shop, not to make alteration without a leave of *A*, and to give up possession at the end of the term. In spite of the restrictions *B* has sufficient control of the land to make the instrument a lease and not a licence.[428]

(4) The premises belonging to a bank were used for the residence of a manager without obligation to pay anything in return. Held that the manager was a licensee.[429]

A lodger is a man who lives in the house of another, and lodges with him.[430] A lodger is only a licensee if he has no separate apartment;[431] or even if he has a separate apartment, if the terms of the letting show that the landlord retains control over the whole house, e.g. when he provides attendance,[432] or where he has exclusive control of the front door.[433] Normally, an occupier of an apartment in a hotel is in the position of a licensee as the hotel-keeper retains general control of the hotel including the apartment. But this is not a

425. *Bharvad Choota Bhaga v Bharved Jaga Dahya*, AIR 1999 Guj 17, para 18, quoting *Virji Lavji Makwana v Rainbow Sree Shades*, AIR 1979 Guj 178 : 20 Guj LR 352.
426. *Indian Hotels Co v Phiroz*, (1923) 25 Bom LR 84 : 88 IC 316 : AIR 1923 Bom 228.
427. *Natesa Gramani v Tangarelu*, (1915) ILR 38 Mad 883 : 23 IC 102.
428. *Secretary of State v Bhupalchandra*, (1930) ILR 57 Cal 655 : 129 IC 177 : AIR 1930 Cal 739.
429. See *Corpn of Calcutta v Allahabad Bank*, AIR 1949 Cal 105.
430. *Bradley v Bayliss*, (1881) QBD 195, p 216.
431. *Wight v Stavert*, (1860) 2 E & E 721.
432. *Smith v St Michael Cambridge Overseers*, (1860) 3 E & E 383.
433. *R v St Georges Union*, (1871) LR 7 QB 90, p 97; And see *Appah v Parncliffe Investments Ltd*, (1964) 1 WLR 1064 : [1964] 1 All ER 838.

necessary inference, and if evidence of such control is lacking or not produced, he would be held to be a tenant.[434] English decisions which had held that an inmate of a boarding house,[435] and a guest in an inn[436] occupy only as licensees, are good law if evidence of such control exists. In the case of a tenement house, the owner's residence on the premises and the fact that he pays the rates and taxes or that he retains control of the staircase and passages, are not in themselves sufficient to show that the occupier of a flat is not a lease.[437] If the landlord at a tenement house maintains a privy for the common use of the tenants and which is not included in the lease of any one of them, each tenant is only a licensee in respect of the privy.[438]

Questions have arisen as to whether a servant occupying the premises of a master does so as a tenant or a licensee. In *Lall v Dunlop Rubber Co,*[439] the Supreme Court has held that where a servant is required to live in the premises for the better performance of his duties, it is a case of a license known as "service occupation". However, where a servant occupies premises for a purpose other than the better performance of his duties, it would be a case of tenancy.[440] The quarter which is allotted by an employer to an employee is a personal privilege of the employee for greater convenience of the employer's work. As soon as the services are dispensed on account of retirement, the employee is required to hand back the quarter to the employer. It does not create any interest in the quarter as it is only a license.[441] The Supreme Court, however, held that a servant could be a licensee even though he was not in service occupation, and cited with approval the judgment of LJ Denning, (as he then was), in *Torbett v Faulkner,*[442] where it was observed that a servant could be a licensee even if he is permitted to occupy the premises for convenience, or pays the rates, or receives the premises as part of his remuneration. It was in each case a question of ascertaining whether it was intended to confer on the occupant an interest in land. In a case before the Supreme Court, the servant was entitled to occupy the premises free while he was in the service of the landlord in Calcutta, and the landlord was entitled to allot the premises to another if the occupant was absent. The court held it to be a licence.

The distinction between licence and lease came up for consideration in an English case, where it was laid down that the court would be reluctant to infer the grant of a tenancy where no rent is paid, and there exists a domestic relationship. In this case, the deceased landlord employed a woman as an office cleaner. Later, out of sympathy, he installed the woman and her husband in a cottage owned by him. No rent was paid. The landlord visited them daily, took meals with them, and told them that the house would be theirs after his death. On the death of the landlord, his executors took proceedings for possession and the question arose whether there was a lease or merely a licence. It was held that in the circumstance no grant of a tenancy by the landlord could be inferred. He had no intention to give to the woman or her husband, a right to exclude him from the premises. What had

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434. *Associated Hotels v Ranjit Singh,* [1968] 2 SCR 548 : AIR 1968 SC 933 : [1968] 2 SCJ 441.
435. *Wright v Stavert,* (1860) 2 E&E 721; *Ram Prakash v Shambhu Dayal,* AIR 1960 All 395.
436. *Bradley v Bayliss,* (1881) QBD 195, p 216; *Lane v Dixon,* (1847) 3 CB 776, p 784.
437. *Kent v Fittall,* (1906) 1 KB 60.
438. *Lakhmichand v Ratanbai,* (1927) ILR 51 Bom 274 : 101 IC 230 : AIR 1927 Bom 115.
439. *Lall v Dunlop Rubber Co,* [1968] 1 SCR 23 : AIR 1968 SC 175 : [1968] 1 SCJ 644 : [1968] 1 SCA 18.
440. *Mayhew v Suttle,* (1854) 4 E & B 347 Ex Ch; *R v Spurrell,* (1865) LR 1 QB 72; *Smith v Seghill,* (1875) LR 10 QB 422; *Athakutti v Govinda,* (1893) ILR 16 Mad 97; *Murray Bull & Co Ltd v Murray,* (1953) 1 QB 211 : [1952] 2 All ER 1079; *Hughes v Chatham Overseers,* (1843) 5 Man & G 54, p 78; *Dover v Prosser,* (1904) 1 KB 84; *GG in Council v Corpn of Calcutta,* AIR 1948 Cal 8.
441. *Kedhari Singh v DCM,* (1997) 65 DLT 903.
442. *Torbett v Faulkner,* (1952) 2 TLR 659.

been granted was a licence, and not a tenancy. The cases considered included *Cobb v Lane* and *Shell-mex v Manchester Garages.*[443]

The decision of the Calcutta High Court,[444] that a government servant occupying government premises does so as a tenant if residence in such premises is not compulsory, is, it is submitted, not consistent with the law now laid down.

A *burgadar* is a person who enters into a profit-sharing arrangement to cultivate land. He is generally a servant, unless the terms of the contract show an intention to create an interest in the land.[445] A permission to cut or remove trees, or to tap coconut trees is only a licence.[446] Merely because one has been collecting the usufructs from the coconut trees for a number of years, would not change the character of transaction from that of a licence to a lease.[447] Where, however, a document confers for three years a right to cut grass and grants exclusive possession, it creates an interest in land, and is a lease.[448] As intention is the decisive test, it has been held that possession by a former tenant under a compromise decree in an eviction suit would not be that of a lessee, even though the word "rent" was used.[449] In a Madras case, the defendant had been specifically given the right to collect usufruct from 135 coconut trees for one year. At the end of the period, the defendant claimed that he was a lessee, and refused to deliver possession. The plaintiff issued a notice to the defendant to deliver possession and filed a suit. The defendant claimed that no notice under section 106 had been given by the plaintiff. It was held that if a right is created in respect of land for a specific time and the grantee is expected to exploit the land for purposes of his own, then the transaction is one of lease. But where, without creating an interest in land, only the right to collect usufruct from the trees standing on the land is given, the grantee cannot claim to be a lessee. The defendant in this case was not a lessee, but only a licensee.[450] While it is true that the essence of a licence is that it is revocable at the will of the grantor, the provision in the licence that the licensee is entitled to a notice before being required to vacate is not inconsistent with a licence.[451] Other instances of licences are cited below.[452] The essence of a licence is that it is revocable at the

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443. *Heslop v Burns,* [1974] 3 All ER 406 (CA); *Ramuben Bhimji v Padmabai,* AIR 1991 Bom 85, pp 89-90.
444. *GG in Councils v Corpn of Calcutta,* AIR 1948 Cal 8.
445. *Sheikh Pokhan v Rajani Kamal,* 50 IC 285; *Brahmamoyee v Sheikh Munsur,* (1920) 32 Cal LJ 37 : 58 IC 859.
446. *Chhotabhai Jethabhai Patel v State of Madhya Pradesh,* [1953] SCR 476 : AIR 1953 SC 108; *Maqbool Ahmad v Devi,* AIR 1949 All 455; *Din Dayal v Brij Mohan,* AIR 1951 All 384; *Shiv Dutt v Ghasita,* AIR 1953 All 499; *Mohammed Khan v Ramnarayan,* (1955) ILR Cut 593 : AIR 1956 Ori 156; *Daulat Singh v State of Rajasthan,* (1955) ILR 5 Raj 950 : AIR 1956 Raj 33; But see *Shantabai v State of Bombay,* [1959] SCR 265 : [1958] SCJ 1078 : [1958] SCA 727 : AIR 1958 SC 532.
447. *S Srinivasa Iyet v Dakshinamurthi,* AIR 2000 Mad 388, para 8.
448. *Srirangam Municipality v VN Pillai,* AIR 1972 Mad 430 : (1972) 1 Mad LJ 485.
449. *Konchada R Subudhi v Gopinath,* [1968] 2 SCR 559 : AIR 1968 SC 919 : [1968] 2 SCJ 528; *Bhagat Ram v Lilavati Galib,* AIR 1972 HP 125; *Krishna Iyer v Krishna Iyer,* AIR 1972 Ker 216.
450. *Venkatachalapothy Odayar v Rajalakshmi Ammal,* (1981) 1 Mad LJ 11.
451. *M N Chibwala v Fida Hussain Saheb,* AIR 1965 SC 610; *P Narayanan v Managing Director, Kerala Health Research & Welfare Society,* AIR 1991 Ker 306, p 308.
452. *Frank Warr & Co v London County Council,* (1904) 1 KB 713 (use of refreshment rooms in a theatre); *Sweetmeat Automatic Delivery Co v Commissioners,* (1895) 1 QB 484 (automatic machines on a railway station platform); *Wilson v Tavener,* (1901) 1 Ch 578 (agreement to let hoarding for advertisement); *King v David Alien & Sons,* (1916) 2 AC 54 : [1916-17] All ER Rep 268; and *Durjendra Krishna v K Shaw,* (1952) 56 Cal WN 671 : AIR 1953 Cal 147 (advertisements affixed on a wall); *Walton Harvey Ltd v Walker and Homfrays Ltd,* (1931) 1 Ch 274 : [1930] All ER Rep 465 (electric sign on building); *Ramkrishna v Unni Check,* (1893) ILR 16 Mad 280 (grant of right to trap elephants); *M N Clubwala v Fida Hussain Saheb,* AIR 1965 SC 610 : [1964] 2 SCJ 448; *Kuber Nath v Gorakh Prasad,* AIR 1957 All 369 (construction of stalls for shops); *Beant Singh v Cantonment Executive Officer,* AIR 1960 J & K 83 (temporary wooden shed for dry cleaning trade). And see *Mina Ghosh v Daulatram Arora,* AIR 1967 Cal 633; *Arumugha v Angamuthu,* (1965) 1 Mad LJ 170; *TSA Hamid v SA Temple,* AIR 1972 Mad 372; *T K Jecob v Gracykutty,* AIR 1991 Ker 281, p 286; *P Narayanan v Managing Director, Kerala High Research & Welfare Society,* AIR 1991 Ker 306, p 308 (coffee stall).

will of the grantor. A licensee by definition does not create any interest in the property.[453] The question whether a transaction is a lease or licence is to be decided on the basis of pleadings of the parties.[454]

The Calcutta High Court in *Tarak Nath Manna v Nithyananda Saha*,[455] had held that whether an agreement between the parties created the relationship of landlord and tenant or merely that of licensor or licensee was to be decided based on intention of the parties with reference to the relevant provisions of the agreement and other circumstances. Exclusive possession by itself was not a reason for treating the possession of person in possession as that of a tenant. Court has to consider all relevant circumstances of a case. In terms of section 92 of Evidence Act, the terms of a written agreement could not be varied by oral evidence unless the exceptions mentioned therein were fulfilled. The Apex Court in various cases held that when a document of licence was executed between landlord and an occupier, the Court should not be influenced by nomenclature of document and should ascertain the actual status of occupier from the overall circumstances of case as there was a tendency on part of landlords to create tenancy in garb of granting of licence.

In *Radha Sharan Dubey v Ram Niwas*,[456] *A*, who through a registered deed, of assignment of managerial rights executed by the owner *B*, claimed an interest in the property and it was held that *A* is not entitled to continue in possession of the property as his possession was only permissive with the consent of the true owner. The court observed that a person claiming to be in possession of the property cannot seek injunction to continue in possession as against the wishes of the owner and the owner is entitled to mandatory injunction against the licencees, requiring them to remove themselves from the possession of the suit property and held,

1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.
2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.
3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.
4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.
5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.

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453. *Yazdani International P Ltd v Auroglobal Comtrade P Ltd*, 2014 (2) SCC 657 : JT 2014 (2) SC 72 : 2014-3-LW450 : (2014)1 MLJ 879 : 2013 (15) SCALE 410 : 2014 (1) SCJ 736.
454. *Delta International Ltd v Shyam Sundar Ganeriwalla*, (1999) 4 SCC 545 : AIR 1999 SC 2607; followed in *Francis v Sarada*, AIR 2004 Ker 187; *Nirmal Kushwaha v Kailashnath Agarwal*, AIR 2003 All 553 (NOC).
455. *Tarak Nath Manna v Nithyananda Saha*, AIR 2013 Cal 181 : (2013) 2 CALLT 111 (HC) : 2013 (5) CHN (CAL) 461.
456. First Appeal Nos. 55 of 2008, 448 and 472 of 2007, decided on 6 March 2017, High Court of Allahabad.

Enhancement of licence fees is proper even without prior notice to the licensee in light of the agreement continued in the document to this effect.[457]

[458][**106. Duration of certain leases in absence of written contract or local usage.**—(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.]

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457. *Sandesh Subudhi v UOI*, AIR 2017 (NOC) 625 (Orissa).

458. Substituted by the Transfer of Property (Amendment) Act 2002 (3 of 2003), section 2 (w.e.f. 31 December 2002). Prior to its substitution, section 106 read as under.—

106. Duration of certain leases in absence of written contract or local usage.—In the absence of a contract or local law or usage to the contrary, lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

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(1) Amendment

By the Transfer of Property (Amendment) Act, 2002, section 106 was substituted. The section, inter alia, provides that the lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, which may be terminated either by the lessor or the lessee by six months' notice expiring with the end of the year of the tenancy; and a lease of the immovable property for any other purpose shall be deemed to be a lease from month to month, which may be terminated either by the lessor or lessee by fifteen days' notice expiring by the end of the month of the tenancy.[459] The legal position, which has also been reiterated by the Supreme Court in *Mangilal v Sugan Chand*,[460] is that while computing the period of notice, the day on which the notice is served is required to be excluded. The Law Commission of India in its 181st Report on amendment to section 106 has examined the working of this section, and found that a number of suits have been filed in ignorance of this legal position, and these suits have been dismissed on this technicality alone. Such a position leads to serving of a fresh notice and filing of a fresh suit which amounts not only to serious injustice, but also to multiplicity of litigations despite the fact that the defendant had more time available to him than the prescribed period of notice by the date when the suit is filed to evict him, or even by the date of judgment dismissing the suit. Having also taken note of the fact that because of technical reasons, the landlords suffer and the suits are dismissed after long litigation, the legislature with a view to close the loophole and to redress the mischief intended to make appropriate changes in the law. Therefore if the notice was short of the specified period in sub section (1) the notice shall not be deemed to be invalid.[461] It was in the above context that the amendment has been brought about.

(2) Retrospective Operation

Section 3 of the amending Act of 2002 specifically provides that the amended provision shall apply to:

(a) all notices in pursuance of which any suit or proceeding is pending at the commencement of the amending Act; and

(b) all notices which have been issued before the commencement of the amending Act, but where no suit or proceeding has been filed before such commencement.

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459. *Jadab Chandra Das v Sri Sri Hayagriv Madhab*, AIR 2007 Gau 185 : 2008 Supp GLT 321; *Deenar Builders Pvt Ltd v Khodey Distelleries*, AIR 2000 Del 147 : (1999) 82 DLT 809 : (2000) 52 DRJ 372; *Handloom Weavers Co-operative Society v K Venkateshwar Rao*, AIR 2000 Ori 153 : (2000) 90 CLT 384.

460. *Mangilal v Sugan Chand*, AIR 1965 SC 101, p 104.

461. *Shree Ram Mills Ltd, Mumbai v Court Receiver, High Court, Mumbai*, AIR 2011 (NOC) 99 (Bom).

Therefore, the amendment applies to all present as well as future proceedings. "Suit or proceeding" would include appeals, revisions, etc. and hence, at no stage of litigation can the technical pleas as were available under the unamended section 106, can be raised.

(3) Local amendment

Note "Contract, local law or usage", below may be referred.

(4) Nature of periodic tenancy

Note "Periodic lease" under section 105 may be referred.

(5) Implied Duration

The section enacts a rule for the duration of lease in a case not governed by the local law, contract or usage. The section lays down a rule of construction which is to apply when the parties have not specifically agreed upon as to whether the lease is yearly or monthly. On a plain reading of this section, it is clear that legislature has classified leases in two categories according to their purposes, and this section would be attracted to construe the duration of a valid lease in the absence of a contract or local law or usage to the contrary. Where the parties by a contract have indicated the duration of a lease, this section would not apply.[462] What this section does is to prescribe the duration of the period of different kinds of leases by legal fiction—leases for agricultural or manufacturing purposes shall be deemed to be lease from year to year, and all other leases shall be deemed to be from month to month. Existence of a valid lease is a prerequisite to invoke the rule of construction embodied in section 106.[463]

It applies to a case where no period is agreed between the parties,[464] or where the lease being unregistered cannot be looked at to ascertain the agreed period.[465] The presumption as to the period under this rule is not rebutted by the fact that the rent is paid at different periods.[466] But where it appeared on a true construction, or a lease of immovable property that the first payment of rent was to be for a period of 15 months, the lease was for a period of 15 months at least; and there was no scope for applying the presumption contained in section 106.[467] It applied when the tenant is in possession without evidence of the terms of the letting; and also in cases of an implied demise, where entry creates a tenancy at will, converted by payment of rent into a tenancy from year to year or month to month, according to the nature of the holding. In *Ranee Sonet Kowar v Mirza Himmut Bahadoor*,[468] the Privy Council said that where the owner recognises the right of a person in possession by accepting rent from the latter, the tenancy created as such could be terminated by a notice to

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462. *Nabina Chadha v Usha Das*, AIR 2011 Ori 5 : (2010) 110 CLT 836; *KSSASC Trust v S K V Setty*, AIR 2004 SC 3929 : (2004) 8 SCC 717 : 2004 Supp (3) SCR 121; *F C I v Babulal Agarwal*, (2004) 2 SCC 712 : AIR 2004 SC 2926.
463. *Samir Mukherjee v Davinder K Bajaj*, (2001) 5 SCC 259 : AIR 2001 SC 1696; *Oasis Bar and Restaurant v P Umabala*, AIR 2002 AP 465, p 472.
464. *Ram Kumar v Jagadish Chandra*, [1952] SCR 269 : AIR 1952 SC 23; *Bastacolla Colliery Co v Bandhu Beldhar*, (1960) ILR 39 Pat 140 : AIR 1960 Pat 344; *Balwant Singh v Murari Lal*, (1964) All LJ 1033 : AIR 1965 All 187.
465. *Adit Prasad v Chhaganlal*, AIR 1968 Pat 26.
466. *Debendra v Syama Prosanna*, (1907) 11 Cal WN 1124; *Mohendra Nath v Nagendra*, 50 IC 918; *Biseshwar v Pitambernath* 51 IC 44; *Sheikh Akloo v Sheikh Emaman*, (1916) ILR 44 Cal 403 : 33 IC 899; *Thirtha Nath Ghose v Sri Sri Iswar Balmingadeba*, (1956) 61 Cal WN 170; *Nanakram v Nagarmal*, AIR 1956 Ori 95; but see *Ram Kumar v Jagadish Chandra*, AIR 1952 SC 23.
467. *Delhi Motor Co v Basrurkar*, [1968] 2 SCR 720 : AIR 1968 SC 794.
468. *Ranee Sonet Kowar v Mirza Himmut Bahadoor*, 3 IA 92 : (1875-78) ILR 1 Cal 391.

quit. In another case,[469] a tenant in possession under a lease of a house for a term of years which was void for want of registration was described as a tenant at will. This expression was evidently used to denote a periodic tenancy,[470] for the tenant had been in possession paying rent for 10 years, and was obviously a monthly tenant.

Section 106 raises a fiction and indicates a deeming provision in respect of leases which do not fall within the ambit of section 107, para 1. Where a lease is intended to be created for an immovable property for a period from year to year or for any term exceeding one year, or reserving yearly rent, it can be made only by a registered instrument and has, therefore, to be in writing. A lease can, however, be entered into and granted, even in cases where no writing is affected. It follows, therefore, that where no such writing is effected, there is no question of registration. Nevertheless, such a lease may be for a particular purpose, namely, for the purpose of agriculture or manufacture. In such a case, if the lease is not created by an instrument in writing, section 106 will be applicable, and the deeming provision in section 106 (that the leases shall be deemed to be leases from year to year terminable on the part of either lessor or lessee by six months' notice) is applicable. Where there is no written contract, the provisions of section 106 will operate, and section 107 will not be a bar to the raising of such a contention. The fiction or presumption of section 106, requiring the termination notice of a period of six months, will be attracted only where there is a lease for manufacturing purpose, or an agricultural purpose deemed to be from year to year. In other cases, the lease will be deemed to be a lease from month to month, terminable on the part of either the lessor or lessee by 15 days' notice.[471] However, a lease for the manufacturing process is deemed to be a lease from year to year, but the same is subject to the contract to the contrary between the parties. The landlord and the tenant can mutually agree to create a tenancy for manufacturing process for a period of less than a year. Only in the absence of this kind of contract the lease for manufacturing purposes would be deemed to a lease from year to year. The same can be created by a registered document in view of section 105.[472] A manufacturing lease which is not from year to year does not require six months' notice of termination. It will fall in the second half of section 106, requiring 15 days' notice of termination.[473] An unregistered lease for manufacturing purpose cannot be deemed to be a yearly lease for the purpose of notice of termination, in view of the provisions contained in section 107 of the TP Act.[474] For the purpose of section 106, what is relevant is the purpose for which the lease is obtained at the time when the lease was obtained. A subsequent change of use, would not entitle a lessee to take advantage of section 106. The purpose of the lease must be found, and ascertained with reference to the time when the lease was brought into existence.[475]

Where the lease was for a single cane crushing season for a period of nine months, and the rent stipulated was not annual rent reserved, it was held that, though the lease was for manufacturing process, the presumption under section 106, that the lease is from year to year, could not be raised.[476]

(6) Contract, Local Law or Usage

The presumption under this section is that the lease is from year to year or month to month, according to the nature of the property, and is terminable by six months' or 15 days'

469. *Ram v Sameswari,* (1925) 42 Cal LJ 71 : 98 IC 98 : AIR 1925 Cal 1171.
470. See Note, "Periodic leases", under section 105.
471. *Ruprao Nagarao Madulkar v Murlidhar Dagduseth Dabhade,* (1982) Mah LJ 104.
472. *Inder Sain Bedi v Chopra Electricals,* (2004) 7 SCC 277.
473. *SJD Bhagat Trust v Ram Swarup Jain,* AIR 1995 SC 2982.
474. *TIHE v Harvinder Singh,* (1997) 65 DLT 30.
475. *Ruprao Nagarao Madulkar v Murlidhar Dagduseth Dabhade,* (1982) Mah LJ 104.
476. *Kothapalli Sreeramullu & Co v The Krishna Gur and Khandasari Sugars,* AIR 1994 AP 206.

notice, as the case may be.[477] A stipulation that the rent would be payable monthly would raise a presumption that the tenancy was from month to month;[478] but no question of such presumption can arise where rent has not been accepted.[479]

Where a tenancy is created and the lessees enter into possession on payment of rent to the lessors, and the purpose of the tenancy is neither agricultural, nor manufacturing, such lease may be taken to be a lease from month to month.[480] Unless there is some indication to the contrary, the term "ordinary tenant" would in Calcutta mean a monthly tenant, even though there were no references to payment of monthly rent.[481] However, this presumption may be rebutted by local usage, or local law, or express contract. Usage or local law, generally governs agricultural tenancies and to such tenancies the section does not apply, unless made applicable by notification under section 117. As to monthly leases of houses in Bombay, there is a usage requiring a month's notice to quit.[482] There is no such usage in Calcutta.[483] In accordance with the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948,[484] and the Bombay Land Revenue Code, 1966,[485] the landlord is required to issue a notice stipulating six months period and not three months period. A notice issued giving three months' time period would be illegal.[486]

There is a vast difference between rights of a tenant under the Rent Act and the rights of the landlord. The right of the statutory tenant to pay rent not exceeding standard rent or the right to get standard rent fixed is protective rights and not vested rights. On the other hand, the landlord has rights recognized under the law of contract and the Transfer of Property Act which are vested rights and which are suspended by the provisions of the Rent Act. The day the Rent Act is withdrawn, the suspended rights of the landlord would revive.[487]

In Punjab, where the TP Act is not in force, it was held[488] that a monthly tenant is entitled to 15 days' notice terminating with the month of tenancy. But, it has also been held in later decisions,[489] that the rule embodied in section 106 is a technical rule, not applicable as a rule of justice, equity and good conscience. In a later case, it has been held that in Punjab, 15 days is the minimum reasonable period for notice to quit, but, it need not necessarily terminate strictly with the end of the month of the tenancy.[490] The provision as to notice to quit applies to cases where the parties are not regulated by their own contract. So, a provision in a lease enabling the landlord to resume possession on payment of the cost of

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477. *UOI v Additional District Judge, Vth Kheri,* 2010 (3) ALJ 164; AIR 2010 (NOC) 742 (All); *Handloom Weavers Co-operative Society v K Venkateshwar Rao,* AIR 2000 Ori 153.
478. *Baidyanath v Onkarmal,* AIR 1938 Cal 656 : (1938) ILR 2 Cal 261 : 42 Cal WN 598; *Bagchi v Morgan,* AIR 1937 All 36; *Ram Kumar v Jagadish Chandra,* [1952] SCR 269 : AIR 1952 SC 23.
479. *Ramayan Saran v Patna Improvement Trust,* AIR 1972 Pat 7.
480. *Anwarali v Jamm Lall Roy,* (1939) ILR 2 Cal 254 : 43 Cal WN 797 : 186 IC 625 : AIR 1940 Cal 89.
481. *Pralhadrai v Commr of Port of Calcutta,* AIR 1939 PC 11.
482. *Bhojabhai v Hayem Samuel,* (1898) ILR 22 Bom 754.
483. *Profulla Chandra v Nanda Lal,* (1935) 39 Cal WN 1069.
484. Bombay Tenancy and Agricultural Lands Act, 1948Act 67 of 1948. See sections 3 and 90.
485. Bombay Land Revenue Code, 1966Act 41 of 1966, see sections 83, 84, 84IA.
486. *Savarga Bhaktibhai Dullabhai Sthapit Bhukta Patidar v Prabhubhai Dahyabhai Bhakta,* AIR 2011 (NOC) 186 (Guj).
487. *Coal India Limited v Apeejay House Private Ltd,* AIR 2013 Cal 66.
488. *Rattan Sen v Sm Krishna Kaur,* 141 IC 513 : AIR 1933 Cal 134.
489. *Mehra (CL) & Sons v Kharak Singh,* (1968) 70 Punj LR 55; *Sawaraj Pal v Janak Raj,* (1960) ILR 1 Punj 440 : 70 Punj LR 720 : AIR 1969 Punj 26; disappvg *Rattan Sen v Sri Krishna Kaur,* AIR 1933 Cal 134.
490. *Chiranjit Lal v Narain Singh,* AIR 1972 P & H 432, following *Bhaiya Ram v Mahavir Parshad,* AIR 1969 Punj 110.

building, erected by the tenant, dispensed with the necessity of notice to quit.[491] Similarly, where the tenancy is created on basis of agreement specifying[492] the period of tenancy, such tenancy automatically gets terminated by efflux of time and no notice under section 106 is required to be served prior to the filing of the suit.

Both the period of the lease and the length of notice may be determined by the contract.[493] If the contract provides for a different period, the requirement of 15 days' notice in section 106 does not apply.[494] It has, however, been held that a term requiring the lessee to give a month's notice did not affect the right of the lessor to terminate the lease on 15 days' notice under this section.[495] Again, the contract may provide that the tenancy may be terminated by notice before the end of the month, or other period of the lease.[496] However, the contract must be a valid one. So where a lease of land from year to year was not registered, a clause requiring six months' notice to quit was inoperative.[497] A condition in a lease that the land was to be vacated whenever needed without notice may be a superadded condition, and may not be a part of the contract.[498] An undertaking by a tenant to vacate the premises by a fixed date is a "contract to the contrary" disentitling him to a notice of termination in the terms of section 106. If a notice is given by the landlord to the tenant to vacate as promised, it could not be construed as a notice to termination which should comply with section 106. The landlord was entitled to damages from the date when the tenant was to vacate as promised, and not merely from the date specified in the notice issued by him on the tenant's failure to vacate as undertaken.[499]

With reference to section 106, a Kerala ruling has laid down that, where there is a stipulation in the lease that the lessee shall surrender the premises on demand, then the lease is determinable at will, and there is "contract to the contrary" within the meaning of section 106,[500] but a provision containing an undertaking by the tenant to surrender the premises on demand, is not a "contract to the contrary" within the section.[501]

According to the Madras view, however, where the contract was that the tenant should surrender the property when required, the provision as to notice under section 106 cannot apply to it. In any case, the notice to quit in the instant case was valid.[502] Where the agreement between the parties is to the effect that the tenancy should be determinable by either party at any time, there is clearly a "contract to the contrary" within the meaning of section 106.[503] A tenancy terminating with efflux of time does not require a quit notice for its

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491. *Mohindra Nath v Radha Prosanna,* 47 IC 19.
492. *Nabina Chadha v Usha Das,* AIR 2011 Ori 5 : (2010) 110 CLT 836 : (2010) II ILR-CUT 494.
493. *Bhola Nath v Raja Durga,* (1907) 12 Cal WN 724 (two months' notice); *Raj Behari v Kailas,* (1915) 22 Cal LJ 78 : 30 IC 887 (notice according to the Bengali calendar); *Sahib Dayal v Dhanpat,* 75 IC 458 : AIR 1923 Lah 281 (a week's notice); *Munshi Ram v Sain Dass,* AIR 1959 J & K 87; *Madhav Rao v Bhagwandas,* AIR 1961 MP 138.
494. *Rawal Hardeo Singh v State of Rajasthan,* AIR 1981 Raj 280.
495. *Sister Louise v Jotindra Nath,* (1956) 61 Cal WN 231 : AIR 1957 Cal 475.
496. *Rure Khan v Ghulam,* 75 IC 1034 : AIR 1924 Lah 643; *Ram Nath v Badri Nath,* 106 IC 537 : AIR 1928 Lah 348; *Saik Kasam v Haji Jusuf,* 78 IC 445 : AIR 1924 Nag 720.
497. *Sheikh Akloo v Sheikh Emaman,* (1917) ILR 44 Cal 403 : 33 IC 899; *Debendra v Syama Prosanna,* (1906) 11 Cal WN 1124; *Kodali Bapayya v Yadavalli Venkataratnam,* (1952) 1 Mad LJ 227 : AIR 1953 Mad 884; *Harish Chand v Ram Chander Garg,* AIR 1985 Delhi 123 (NOC).
498. *Vithoba v Sholapur Municipality,* AIR 1947 Bom 241; *Moosa Kutty v Thekka,* 110 IC 398 : AIR 1928 Mad 687; *Kelu v Ammad Kully,* (1910) Mad WN 794 : 8 IC 362; *Kuda Baksh v Abid Hussain,* (1909) 12 OC 279 : 3 IC 873.
499. *Krishnan Servai v Arulmighu Kalliamman Temple,* AIR 1983 Mad 142.
500. *V Sidharthan v Pattiorti Ramadasan,* AIR 1984 Ker 181.
501. *Mehta & Co v Lalen,* (1974) KLT 89 : (1974) KLJ 105.
502. *K Nasir Basha v T C Charities,* AIR 1976 Mad 120 : (1976) 1 Mad LJ 156.
503. *Uda Ram v Tej Karan,* AIR 1975 Raj 147.

determination. Where the rent note was issued for a period of eleven months, insistence on giving of a notice terminating tenancy would be merely superfluous.[504]

(7) Contract to the Contrary

Where it was clearly stated in the rent note that the land was taken on lease for the manufacture of cotton cords for one year and the rent was to be paid according to the English calendar every month, it was held that even though the object of the lease was the manufacture of cotton cords, the parties intended to create a monthly lease, the duration of which was one year. Even if a fresh contractual tenancy had come into existence by the lessor accepting rent (after the expiry of one year), it could not be said that a lease from year to year came into existence. The provision for payment of monthly rent was a "contract to the contrary" within the meaning of section 106.[505]

Notice under this section is not necessary, and a mere demand will suffice if the lease is on condition that the land demised should be surrendered whenever required[506] or under certain conditions.[507] It has also been held that when the rent notice provides that in case the lessee fails to pay the agreed rent, the lessor would be entitled to evict the lessee, no question of notice arises.[508] Such stipulations amount to a contract to the contrary, constituting a waiver of the lessee's right. It has been held in some cases that such waiver can be express, implied, or even oral;[509] but, some cases have taken the view that to constitute a waiver such a stipulation must be express.[510] For proof of waiver of the landlord's notice to the tenant to surrender possession, clear evidence is required.[511] Where a lease determines by efflux of time, and there is no allegation of holding over, the tenant remains merely a tenant at sufferance, and a notice under section 106 is not necessary.[512] There are as many as eight modes given in section 111 of the TP Act by which the tenancy is determined. There are seven other modes of determination of tenancy, apart from service of notice and determination "on the expiration of a notice to determine the lease" under clause (h) of section 111 in terms of section 106 of TP Act. Such a lease expires on the last day of the terms, and the lessor or defendant enabled to reversion, might enter without any notice or any other formality.[513] A similar view was also taken in another case, wherein it was held that, notice under section 106 is not required where the tenancy has come to an end by efflux of time.[514]

(8) Notice

Notice to quit under section 106 is a technical rule. It should not be construed in a pedantic and impractical way so as to pick holes and find fault with the notice. The aim of the interpretation should be only to ascertain whether the person receiving the notice has understood the same. A liberal construction would always enable to do practical justice to the cause. The court should construe the quit notice, in such a way that it should not be defeated

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504. *Kishan Lal v Shiv Charan Sharma*, AIR 2017 (NOC) 349 (Raj).
505. *Abdulahed Moulvi v Gulamahmed Gulamnabi Barodiwala*, AIR 1975 Guj 1.
506. *Omwati Singh v Bharat Heavy Electricals Limited*, AIR 2017 MP 100 : 2017 (2) JLJ 270 : 2017 (3) MP LJ 237; *Moosa Kutty v Thekka*, 110 IC 398 : AIR 1928 Mad 687; *Kelu v Ammad Kully*, (1910) Mad WN 794 : 8 IC 362; *Kuda Baksh v Abid Hussain*, (1909) 12 OC 279 : 3 IC 873.
507. *Parol Mammoo, Timber Merchant v Camp Bazar Palli Sabha, Cannanore*, AIR 2001 Ker 20, para 12 : (2000) 2 Ker LJ 688.
508. *Amar Singh v Hoshiar Singh*, AIR 1952 All 141.
509. *Batoo Mal v Rameshwar Nath*, AIR 1971 Del 98.
510. *Keshavlal v Bai Ajawali*, AIR 1953 Sau 119; *Fakir S Das v S Rajguru*, AIR 1972 Ori 26.
511. *Mangal Sen v Kanchhed Mal*, AIR 1981 SC 1726.
512. *Gordhan v Alli Bux*, AIR 1981 Raj 206.
513. *UCO Bnak v Amarnath Jindal*, (1998) 72 DLT 73.
514. *PS Bedi v Project & Equipment Corpn of India*, AIR 1994 Del 255 : (1994) 28 DRJ 680.

by inaccuracies in the language of the notice especially in matters of the description of the premises, the name of the tenant or the name of the landlord or the date of expiry of the notice. The rule has been to make lame and inaccurate notices sensible where the recipient cannot have been misled as to the intention of the giver. A liberal construction is put upon a notice to quit, so that it is not defeated by minor errors. Notice to quit may, notwithstanding erroneous particulars, be still good and effective so long as the recipient is not misled. Still it has to be remembered that it is for the benefit of lessees and so, the construction which deprives a tenant of the minimum period of notice stipulated in the section is not permissible.[515] A notice must be with respect to the leased property and should contain a sufficient and appropriate description of the same, but where the boundaries were correctly described but the area stated was incorrect due to a bonafide mistake, the notice would be valid.[516]

Notice undoubtedly must furnish requisite basis on which the claim was made, but notice is not a part of cause of action although it is a condition precedent for the commencement of a suit. As a matter of fact, the notice is first step in litigation when the cause of action is complete. It only provides a mode of procedure for getting a relief in respect of cause of action, and does not constitute the relief itself. A statutory notice although essential provisionally for a valid suit does not make it a part of the cause of action in the suit itself.[517] Where the dispute related to whether the tenancy was as per the English calendar month or Bengal calendar month and the tenant had made an admission in his earlier title suit that rent was paid as per English calendar month, his subsequent assertion to resist eviction on the ground of improper quit notice by production of rent receipts issued by erstwhile landlady that tenancy was as per Bengal calendar would not be accepted more so as the landlady had died and she was not examined during her lifetime.[518]

(9) Notice After Decree

In a suit for the ejectment of tenant, where the landlord obtains decree for ejectment, it amounts to the termination of tenancy. Notice under section 106 is not necessary.[519] In absence of grounds in advance notice would not debar the landlord from getting eviction and he would be entitled to a decree of eviction.[520]

(10) Notice Whether Necessary Where Rent Control Act Applicable

The Supreme Court, in its decision of 1979 by a judgment of seven judges, overruling a number of its earlier decisions and several rulings of the High Courts, have held that, in order to get a decree or order for eviction against a tenant under a state rent control Act, it is not necessary to give notice under section 106. Determination of the lease in accordance with the TP Act is unnecessary and is a mere surplusage, because the landlord cannot evict the tenant even after such determination of the tenancy. Making out a case under the rent control Act for eviction of the tenant is, by itself, sufficient and it is not obligatory for the proceedings to be founded on a determination of the lease by notice under section 106. The

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515. *Kizhakke Kuruvatteri Sankaran Nambiar v Thirumangalathmeethal T M Thambayi Pillai,* AIR 2004 Ker 135, para 5 following *Jacob v Saleem,* (1989) 1 Ker LT 248.
516. *Syed Zaved Ali Sabzposh v Awadh Kishore Lal,* AIR 2010 (NOC) 830 (All) : 2010 (3) ALJ 639.
517. *Kamla Bakshi v UOI,* AIR 2004 J&K 65, para 9.
518. *Mritunjoy Sett v Jadunath Basak,* AIR 2011 SC 2496 : (2011) 11 SCC 402.
519. *Ram Singh v Nathi Lal,* AIR 1983 Del 114. See also *Rattan Lal v Vardesh Chander,* AIR 1976 SC 588 : [1976] 2 SCR 906 : (1976) 2 SCC 103.
520. *Surinder Kumar v Mahant Gomati Das,* AIR 2017 (NOC) 787 (P&H).

object of the section is merely to terminate the contract, which the overriding rent Acts do not permit to be terminated.[521]

The Supreme Court has held that,[522] even after the termination of the contractual tenancy, the landlord, under the definitions of the rent Acts, remains a landlord and a tenant remains a tenant because of the express provision made in the enactment that a tenant means "a person continuing in possession after the termination of the tenancy". Yet another important feature of the rent Acts is that either by way of a non obstante clause or by necessary implication, these enactments have done away with the law contained in section 108 of the TP Act dealing with rights and liabilities of the lessor, and the lessee. The difference between the positions obtained under the TP Act and the rent Acts in the matter of determination of a lease is that under the TP Act, in order to recover possession of the leased premises, determination of the lease is necessary, because, during the continuance of the lease the landlord cannot recover possession of the premises, while under the rent Acts, the landlord becomes entitled to recover possession only on the fulfillment of the conditions laid down in the relevant sections. He cannot recover possession by determining the tenancy. Nor can he be stopped from doing so on the ground that he has not terminated the contractual tenancy, unless such a requirement is also laid down in the rent Acts itself.

Where exemption was granted from the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, to religious and charitable institutions, it was held that a civil suit could be filed by such institutions for recovery of possession on the basis of tenancy, after issuing notice to quit under the TP Act.[523] A Full Bench of the Karnataka High Court considering the decision of the Supreme Court in *Dhanpal Chettiar* has held that the observations of the Supreme Court were only with reference to the mode of determining the lease by issuance of a notice in accordance with section 106 of the TP Act, and it is not possible to read this decision as laying down the principle that the entire contractual relationship stands substituted by the statutory relationship under the rent Acts for all purposes, and that the rent Acts have done away with the concept of lease, and the interest created by a valid contractual lease.[524]

(11) Uttar Pradesh Amendment

Section 106 has been amended in Uttar Pradesh by Uttar Pradesh Act 24 of 1954. The words "expiring with the end of a year of tenancy" and "expiring with the end of a month of tenancy" have been deleted, enabling termination at any time after giving the requisite notice. The period of notice of a tenancy from month to month has been raised to 30 days.

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521. Ibid; *Malina Mondal v Puspa Rani Dasi,* AIR 1991 Cal 291, p 293; *Govindamma v Murugesh Mudaliar,* AIR 1991 Kant 290, p 296; *State of Madhya Pradesh v Meena Sharma,* AIR 1992 MP 30, pp 32, 33; *Pal Singh v Sunder Singh,* (1989) 1 SCC 444, p 452; *Bhola Nath Das v Bholanath Boaral,* AIR 1985 Cal 367, p 390; *Satpal v Hiralal,* (1981) 3 SCC 127; *Krishnadeo Narayan Aggarwal v Ram Krishan Rai,* (1982) 3 SCC 230; *Veena Ram v Ishrati Amanullah,* AIR 1986 Pat 207, p 210; *General Secretary, DC Centre Rumtek Monastery v Denzong Cinema Ltd,* AIR 1985 Sikkim 17, p 19; *Jiwan Ram v Tobgyal Wanyhuk,* AIR 1985 Sikkim 10, p 11; *Nikhil Chandra Sen v Ajit Chandra Mullick,* AIR 1984 Cal 31, p 34; *Sarvankumar v Sohan Lal Rao,* (1984) Rajdhani LR 622 : AIR 1985 Delhi 13 (NOC).
522. *Majati Subba Rao v P V K Krishna Rao,* AIR 1989 SC 2187, p 2190; *Govindamma v Murugesh Mudaliar,* AIR 1991 Kant 290, p 296.
523. *Idol of Shri Kannika Parameswari Amman v The Educational Trustees Co Ltd Madras,* AIR 1990 Mad 337, p 346.
524. *Sri Ramkrishna Theatres Ltd v General Investments & Commercial Corpn Ltd,* AIR 1993 Kant 90, p 97 (case law discussed); see *Ramesh Chand v Dayawati Gupta,* (1982) 1 SCC 414.

(12) Agricultural Purposes

The section, though it refers to agricultural leases, does not apply to them unless made applicable by notification under section 117.

Most agricultural tenures in India prevailed before the TP Act and are regulated not by TP Act, but by local Acts or custom. A holding under the custom of *utbandi* in Bengal, is merely a tenancy at will which can be terminated by verbal demand for possession.[525] Some agricultural tenancies are not derivative tenures at all. The Madras High Court said that there was absolutely no ground for laying down that the rights of *ryots* in *zamindaris* invariably, or even generally, had their origin in express or implied grants made by the *zamindars*.[526] Again in *Nidhee Kristo Bose v Nistarinee Dossee*,[527] J Markby compared a tenant in a Bengal *zamindari* to a freeholder paying a quit rent to the lord of the manor. In *Bibee Sahadwa v Smith*[528] J Phear said that the right of the occupancy *ryot* was similar to an easement or a *profit a prendre*, This description was applied by J Mahmud to a proprietary tenant in the United Provinces.[529] In *Ranee Sonet Kowar v Mirza Himmut Bahadoor*,[530] the Privy Council refused to treat a *mokarari* tenure as a lease, and held that on the death of the grantee without heirs, the estate did not revert to the *zamindar*.

(13) Manufacturing Purposes

The expression "manufacturing purpose" is used in its popular dictionary meaning and means the making of articles of trade and commerce by means of machinery.[531] There must be a transformation into a different article or material having a distinctive name, character or use, or even fabricating a previously known article by a novel process. The alteration in the material must be such, that a new and different article having a distinctive name, character, or use emerges.[532] If the main or substantial purpose was manufacturing, the lease is for manufacturing purpose; and whether it should be the exclusive purpose has been left open by the Supreme Court.[533] Where the object of the lease, was the sale of sawn timber, the cutting of the timber with the aid of the saw, plays only a very minor part and it was held that this was not a lease for manufacturing purposes.[534] Similarly, if a log of timber is sawn and made into different sizes of wood for sale on the suit land, it cannot be said that there has been such a transformation that the original character of the raw material is lost and thus this kind of operation is not a manufacturing process for the purpose of section 106 of the TP Act.[535]

The onus of proving that the lease is for manufacturing purposes is on the lessee. The Supreme Court has held that a lease granted for running a flour mill, wherein wheat was transformed by a process which involved both labour and machinery, is a lease for a

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525. *Surendranath Sarkar v Poornachandra Mukherji*, (1933) ILR 60 Cal 681 : 37 Cal WN 335 : 146 IC 55 : AIR 1933 Cal 609.
526. *Venkatanarasimha v Dandamudi Kotayya*, (1897) ILR 20 Mad 299; cf *Cheekati Zamindar v Ranasooru*, (1900) ILR 23 Mad 318; *Narayana Ayyangar v Orr*, (1903) ILR 26 Mad 252; *Venkatachala Goundan v Rungaratnam*, (1913) 24 Mad LJ 571 : 20 IC 374; *Moore v Makhan Singh*, 53 IC 180; *Veeranan v Annaswami*, (1911) 21 Mad LJ 845 : 12 IC 1.
527. *Nidhee Kristo Bose v Nistarinee Doossee*, (1872) 21 WR 386.
528. *Bibee Sahadwa v Smith*, (1874) 12 Beng LR 82.
529. *Deoki Nandan v Dhian Singh*, (1885) ILR 8 All 467, p 470.
530. *Ranee Sonet Kowar v Mirza Himmut Bahadoor*, (1876) ILR 1 Cal 391 : 3 IA 92.
531. *Joyanti Hosiery Mills v Upendra Chandra*, (1946) 50 Cal WN 441 : AIR 1946 Cal 317.
532. *Sri Iswar Sridhar Jiew v Anup Lal Sharma*, AIR 1975 Cal 174 : (1975) ILR (2) Cal 704.
533. *MacKertich C v Steuart & Co Ltd*, AIR 1970 SC 839 : (1971) 3 SCC 39; reversing *Steuart & Co Ltd v MacKertich*, AIR 1963 Cal 198.
534. *Denon Type v John M Punnan*, (1974) KLT 304 : (1974) 1 KLJ 51.
535. *Bachulal Sah v Gita Timber Co*, AIR 1996 Ori 3.

manufacturing purpose.[536] The judgment reviews the case law and approving the Calcutta[537] and Mysore[538] view, lays down the tests for determining whether a lease is granted for the purpose of "manufacturing process" as under:

(i) A certain commodity must be produced.

(ii) The process of production must involve either labour, or machinery.

(iii) The end product which comes into existence after the manufacturing process is complete, should have a different name and should be put to a different use. In other words, the commodity should be so transformed as to lose its original character.

Where the manufacture of cards and card-board boxes is merely incidental to the main business of printing, the lease cannot be said to be for manufacturing purposes.[539] A bakery[540] or pottery business is a manufacturing process and hence, notice for six months is necessary.[541] A manufacturing process by which grain is ground into flour amounts to manufacture within the meaning of section 106.[542] Subsequent use to which the leased premises are put is not material; the nature of the tenancy for the purpose of section 106 is to be ascertained from the purpose for which the letting was originally made. The fact that the municipal licence states that the leased premises was used for storing iron does not lead to the inference that the storing was for the purpose of a manufacturing process.[543] Where the issue is whether the lease is for residential or manufacturing purposes within section 106 the evidence regarding user at the time when the lease was brought into being is relevant. Evidence relating to a subsequent period, even if it shows a change in user, is of no avail for determining the purpose of the lease.[544] The expression "manufacturing purpose" in the section means the purpose of making, or of fabricating articles or materials by physical labour or skill or by mechanical power usable as such. Where the manufacture of spare parts was incidental to the main purpose of disposal of vehicles in order to repair or re-condition, then the dominant purpose of the lease would still have to be regarded as storage and re-sale, and not as a manufacturing purpose.[545]

In *Shivnarayan Laxminarayan Joshi v State of Maharashtra*,[546] the Supreme Court held that the retreading of old tyres does not bring into being a commercially distinct or different entity. Sounding a note of caution, it was observed that definitions of "manufacture" given in other enactments, such as, in the Factories Act or the Excise Act should not be blindly applied while interpreting the expression "manufacturing purposes" in section 106 of the TP Act. In some enactments, for instance in the Excise Act, the term "manufacture" has been given an extended meaning by including in it "repairs" also.

If the object of the lease is not exclusively manufacture, then six months' notice is not required. Where the letting out of the premises was for a multiple purpose, it could be for manufacturing, residential or any other purpose (such as the carrying on of a trade), and

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536. *Idandas v Anant Ramchandra Phadke*, AIR 1982 SC 127 : (1982) 1 SCC 27.
537. *Jayanti Hosiery Mills v Upendra Chandra Das*, AIR 1946 Cal 317.
538. *John Augustine Peter Mirande v N Datha Naik*, AIR 1971 Mys 365.
539. *Kunj Behari v Acharya Hari*, AIR 1975 Raj 138.
540. *Prasanna v S Nagalaxmi*, AIR 2010 Kant 66 : (2010) 1 KCCR 631.
541. *Sureshwar Pandit v Asma Khatoon*, AIR 1995 Gau 41.
542. *Umrao Mal v Heera Lal*, AIR 1973 Raj 337 : 1973 WLN 357.
543. *Sri Iswar Sridhar Jiew v Anup Lal Sharma*, AIR 1975 Cal 174.
544. *Kishan Chand v Sayeeda Khatoon*, AIR 1983 AP 253, para 12.
545. *Allenbury Engineers (Pvt) Ltd v Shri Ram Krishna Dalmia*, [1973] 2 SCR 257 : AIR 1973 SC 425 : (1973) 1 SCC 7 : [1974] 2 SCJ 38.
546. *P C Cheriyan v Barfi Devi*, (1980) 2 SCC 461, p 465.

there was no exclusive purpose of manufacturing involved in the lease and a monthly rent was settled from the very beginning, then the lease cannot be said to be one which falls under the first part of the section, and 15 days' notice would be valid in the circumstances.[547] If the lessee, to the knowledge of the lessor, required and used the land for manufacturing purposes, then, in the absence of a contract, he is a yearly tenant, and entitled to six months' notice.[548] A tenancy for residential purposes and for stacking timber, is a tenancy for a commercial purpose, and is governed by the TP Act.[549] When a lease was taken for a store room, but the lessor started a manufacturing process on the premises, the lease was not held to be a lease for manufacturing purposes.[550] The onus of proving it to be a manufacturing lease is on the tenant.[551] The preparation of sweets[552] has been held not to be a manufacturing activity. A lease for running a flour mill,[553] or making steel trunks,[554] or making bricks out of clay,[555] have been held to be manufacturing purposes, but not where the stalks of the fodder were cut with the help of the fodder cutting machine into pieces of smaller size,[556] or cut into chaff so that they may become readily marketable or easily eatable by the cattle.[557] A lease partly for agricultural and partly for manufacturing purposes only requires a notice of 15 days.[558]

(14) Notice to Quit in Periodic Tenancies

A tenancy at will is terminated by a demand, express or implied, by a determination of the will, ie, by any act which is inconsistent with the will to continue the tenancy.[559] If, on the terms of the *kabuliyat*, the tenant was at liberty to quit at will, it must be held that the tenancy was terminable at the will of the landlord also, and he can terminate it by a valid notice to quit.[560]

A tenant holding under a rent note, which is inadmissible for want of registration, is a tenant at will, and no notice is necessary to determine the tenancy. A demand for possession is sufficient.[561] A tenant at sufferance is not entitled even to a demand for possession. This distinction is based on the principle that ejectment can only be brought for unlawful or tortuous detention; and when possession of the land has been obtained by the consent of the owner, such possession cannot ordinarily be deemed wrongful until at least a demand for possession has been made and refused.[562] Notice is not necessary for leases for a fixed term which determine by the efflux of time,[563] and that is so whether the time is absolutely

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547. *Umrao Mal v Heera Lal,* AIR 1973 Raj 337.
548. *Jicks & Co v Joosab Mohomad,* (1924) ILR 48 Bom 38 : 82 IC 791 : AIR 1924 Bom 115; *Rupeswari Debi v Lokenath Hosiery,* (1962) 66 Cal WN 414 : AIR 1962 Cal 608.
549. *Himatsingka Timber Ltd v Kumadini Dutta,* AIR 1952 Assam 100.
550. *Manzoorali v Lal Devi,* (1951) All LJ 154 : AIR 1951 All 396; see also *Sati Prasanna v Md Fazal,* AIR 1952 Cal 320.
551. *Ramesh Chandra v Surya Properties,* (1957) 97 Cal LJ 1 : AIR 1957 Cal 198.
552. *Brohmananda Das v Nagendra Chandra,* AIR 1954 Cal 224.
553. *Beharilal v Chandrawati,* (1966) All LJ 358 : AIR 1966 All 541.
554. *Kali Kunwar v Haridas,* AIR 1969 Ass & N 134.
555. *Devi Chand Balkrishna Sonwane v Kisan Shreepati Dhumal,* AIR 1981 Bom 226 : 1981 MhLJ 744.
556. *Oriental Laboratory v AK Singh* CA, 482 of 1965 dated 17 September 1965.
557. *Umrao Mal v Heera Lal,* AIR 1973 Raj 337 : 1973 WLN 357.
558. *LA Sounders v Corpn of Calcutta,* (1955) 93 Cal LJ 354 : AIR 1955 Cal 169.
559. *Rajendranath v Bassider,* (1877) ILR 2 Cal 146; *Janki v Kanhaiyalal,* 159 IC 316 : AIR 1936 Oudh 102.
560. *Narain Kumar v Onkar Nath Agarwal,* AIR 1973 All 257.
561. *Gur Prasad v Hansaraj,* AIR 1946 Oudh 144; *Akash Ganga Builders & Engineers Pvt Ltd v G P Seth HUF,* AIR 1999 Del 362, para 13.
562. *Deo Nandan v Meghu Mahton,* (1907) ILR 34 Cal 57, p 63.
563. *S Rajdev Singh v Punchip Associates Pvt Ltd,* AIR 2008 Del 56.

certain,[564] or certain with reference to some future event.[565] Filing of eviction suit under the general law in itself is a notice to quit on the tenant.[566] Where the lease for right of pisciculture was initially for seven years and during its continuance extended by two years, it was held that no notice under section 106 was necessary, and such lease would be determined by efflux of time under section 111 (a) of the TP Act.[567]

Section 106 does not apply where the lease is for a specific period of eleven months; in such a situation the notice is implicit in the rent note itself.[568] The tenant in a Madras case was fully aware that the lease period expired on 31 May 1974. Therefore, the question of giving a further notice to vacate under section 106, TP Act, did not arise.[569] The Supreme Court has held that once the period of lease expires, the relationship of landlord and tenant ceases, and the tenant becomes a trespasser and, therefore, there is no question of service of any notice under section 106.[570] In *V C Srinivasan v Kamaraj Charity*,[571] the original lease agreement, that was renewable, was for a period of 11 months and provided three months intimation prior to vacate the premises. After the expiry of the lease agreement the tenant continued to occupy the property and kept on paying the rent which was received by the owner. It was held that the owner had therefore, waived the quit notice and by his act exhibited his intention to treat the tenancy/lease as subsisting, and the suit filed by him for his eviction was not sustainable in the eyes of law.

A tenancy from year to year or from month to month does not come to an end by the effluxion of time. It does not come to an end except on expiration of notice to quit.[572] An unregistered lease of a house for non-residential purposes for a term, may be presumed to be one from month to month.[573] It has been held that a notice to quit is necessary where a tenant is holding over under section 116.[574] However, the Andhra Pradesh High Court has held that in case of a tenant holding over, it is not permissible to raise the plea as to non-compliance of section 106 notice.[575] The date of commencement of the tenancy is the most relevant factor in determining the validity of the notice of termination under section 106. Where there is clear proof of holding over after the expiry of the original term, notice is absolutely necessary.[576] Where a lessee remains in possession of immovable property after the expiry of the term of the lease, and the lessor accepts rent from him, the tenant becomes a

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564. Transfer of Property Act, 1882, section 111 (a); *Pooran Chand v Motilal*, AIR 1964 SC 461; *Gokul Chand v Shib Charan*, (1912) 9 All LJ 574 : 13 IC 59; *Hakim Mohmd Fazihzaman v Anwar Hussain*, (1932) All LJ 126 : 139 IC 828 : AIR 1932 All 314; *Kundan Lal v Deepchand*, (1933) All LJ 682 : 146 IC 762 : AIR 1933 All 756; *Janardhanan Chandran v Govindan Shanmughan*, AIR 1990 Ker 46 (NOC).
565. Transfer of Property Act, 1882, section 111 (b); *P S Bedi v Project Equipment Corpn of India Ltd*, AIR 1994 Del 225.
566. *Nopany Investments (Pvt) Ltd v Santokh Singh, (HUF)*, AIR 2008 SC 673 : (2008) 2 SCC 728.
567. *Naryan Ch Rana v Balasore Municipal Corpn*, AIR 1991 Ori 179, p 182.
568. *Harnamjit Singh v Hans Raj*, (1976) 78 Punj LR 467.
569. *S Rajan v Devi Cine Proprietor Mfg Co*, (1982) 1 Mad LJ 79.
570. *Shanti Devi v Amal Kumar Banerjee*, (1981) 2 SCC 199 : AIR 1981 SC 1550; *B Chitra Ramacharandas v National Remote Sensing Agency*, AIR 2001 AP 20, p 22; *Prithi Raj Bhalla v Industrial Cables (India) Ltd*, AIR 2002 Del 339, para 15; *A Rajeswari v Brundaban Mohapatra*, AIR 2003 Ori 104 (NOC) : 2002 AIHC 3858; *Narayan Rana v Balasore Municipal Council*, AIR 2001 Ori 1 : (2000) 2 Orissa LR 367.
571. *V C Srinivasan v Kamaraj Charity*, SA No 121 of 2014, decided on 20 February 2017, High Court of Madras; 2017 SCC Online Mad 11543.
572. Transfer of Property Act, 1882, section 111 (h); *Muthusami Pillay v Srinivasier* (1902) 12 Mad LJ 194; *Ali Mohd Khan v Vijay Tulsi*, AIR 1986 J & K 26, p 28. See note "Nature of Periodic Tenancy."
573. *Sardar Amar Singh v Surinder Kaur*, AIR 1975 MP 230 : 1975 JLJ 667 : (1975) 2 MPLJ 633.
574. *Abdul Hamed Rawther v Balakrishna*, AIR 1970 Ker 40; *Khadiru v Mythean Kunju*, AIR 1972 Ker 63; *Baldeo Prasad v Jwali Mistry*, AIR 1984 All 106 (NOC).
575. *Y V V Jaganadha Gupta v Vejju Venkateswara Rao*, AIR 2002 AP 369, para 36 : (2002) 3 Andh LT 67.
576. *Madhavan Vydiar v Janaki*, AIR 1973 Ker 278.

tenant holding over. In the absence of an agreement to the contrary, the tenancy so created under section 116 can be terminated in the manner provided by section 106, depending on the purpose of the lease.[577] However, by mere acceptance of rent for the period subsequent to the notice without prejudice to the respective rights of the parties, notice to quit cannot be deemed to be waived.[578] The above noted decision was based on a previous judgement of the Supreme Court wherein, it was held that mere acceptance of rent from a lessee would not manifest the intention of the lessor to renew the lease. Something more than mere payment and acceptance of rent would be necessary to assert that the lessor assented to the lessee continuing in possession, and the lessor intended renewal of the lease.[579] Further, merely by accepting an amount of ₹ 14,000 for a period subsequent to the date of termination of tenancy when, in the body of the letter tendering the amount, it was not specifically stated to be on account of rent and not accompanied by any subsequent payment or acceptance till the date of filing of this suit, an inference of the notice of termination having been waived by the plaintiffs cannot be drawn.[580]

No question of notice under this section arises in the case of a permanent lease; or in the case of a lease which is determined by forfeiture.[581] However, under the amended section 111(g), the lessor must give notice of his intention to determine the lease. Where the relationship of landlord and tenant between the parties has been created not by a lease, but by a decision of a court, no question of serving notice to quit arises.[582] In the case of a tenant holding under a periodic lease which has not been otherwise determined, a suit for eviction cannot be maintained, unless a valid notice to quit has been served before the suit.[583] If the tenant falsely sets up a permanent tenancy in the suit, that will not cure the defect of want of notice to quit.[584] But notice to quit is not necessary if the tenant has denied the landlord's title before suit,[585] but not if such a denial is after the suit.[586] This is not because the disclaimer works as a forfeiture, but because it is evidence of an election to put an end to the tenancy, and supersedes the necessity for notice.[587]

The fact that in a suit for eviction, the tenant denies the landlord's title does not dispense with notice,[588] but where the tenant raises the question of the validity of notice and resists a

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577. *Munni Devi v State of Uttar Pradesh,* AIR 1977 All 386 : 1977 AWC 651.
578. *Omwati Singh v Bharat Heavy Electricals Limited,* AIR 2017 MP 100 : 2017 (2) JLJ 270 : 2017 (3) MP LJ 237; *Ram Pistons & Rings Ltd v Banwari Lal,* (1998) 46 DRJ 175.
579. *Sardarilal v Preetam Singh,* AIR 1978 SC 1518 : (1979) 4 SCC 1 : (1979) 1 SCR 111.
580. *Vijayshree Commerical (P) Ltd v Tika Jagjit Singh Bedi,* (1996) 38 DRJ 66.
581. *Thackerakavil v Noor Mahomed,* (1921) 41 Mad LJ 265 : 66 IC 48 : AIR 1922 Mad 349.
582. *Sazawar Khan v Satyendra Lal,* AIR 1942 Cal 406 : 46 Cal WN 464 : 201 IC 443.
583. *Rajindra Nath v Bassider,* (1877) ILR 2 Cal 146, differing with *Hem Chunder Ghose v Radha Pershad,* (1875) 23 WR 440; which was, however, followed in *Ram Lal Patak v Dina Nath,* (1896) ILR 23 Cal 200; *Abdulla v Subbarayyar,* (1878) ILR 2 Mad 346, p 351; *Purshotam v Dattatraya,* (1886) ILR 10 Bom 669; *Abu Bakar v Venkataramana,* (1895) ILR 18 Bom 107; *Dodhu v Madhavrao,* (1894) ILR 18 Bom 110; *Kishori Mohut v Nund Kumar,* (1897) ILR 24 Cal 720; *Gunoo v Shri Dev,* (1901) ILR 26 Bom 360; *Hemangini v Srigobinda,* (1902) ILR 29 Cal 203, dissenting from (1896) ILR 23 Cal 200; *Narasimha Chari v Gopala Ayyangar,* (1905) ILR 28 Mad 391; *Farzand Ali v Motilal,* 62 IC 421.
584. *Subba v Nagappa,* (1889) ILR 12 Mad 353; *Vengu v Ragata,* (1896) 6 Mad LJ 59; *Vithu v Dhondi,* (1891) ILR 15 Bom 407; *Unhamma v Vaikunta,* (1894) ILR 17 Mad 218; *Peria Karuppan v Subramanian,* (1908) ILR 31 Mad 261.
585. *Gopalarao v Kishore,* (1885) ILR 9 Bom 527; *Haidri v Nathu,* (1895) ILR 17 All 45; *Kathijakutti v Kuthussa,* (1910) 20 Mad LJ 415 : 5 IC 924 *Anandamoyee v Lakhi Chandra,* (1906) ILR 33 Cal 339; *Ratneshwar v Maongali Chutrani,* AIR 1951 Assam 70; *Gopaldas v Hyderabad Municipality,* AIR 1949 Sind 1; *Abdul Qawi v Sabira Bibi,* AIR 1984 All 78 (NOC).
586. *Ramayan Prasad v Gulaboo Kuer,* AIR 1967 Pat 35.
587. *Maharaja of Jeypore v Rukmini,* (1919) ILR 42 Mad 589, p 597 : 46 IA 109 : 50 IC 631 : AIR 1919 PC 1.
588. *Rambaran Paswan v Kala Devi,* AIR 1974 Pat 333.

suit for ejectment, the landlord is entitled to withdraw the notice even though he had given one, and is not estopped from doing so.[589] If a tenant evicted without notice to quit, sues for possession claiming as full owner and that claim fails, he cannot turn round and claim to be restored to possession for want of notice.[590] Where a tenancy was for a year, but the rent payable was six-monthly, and the tenancy was evidenced by a document which was unregistered, it was held that the tenancy was from month to month, and six months' notice was not necessary for its termination.[591]

If the object of the lease is not a manufacturing one, then the holding over under section 116 creates a month to month tenancy terminable by 15 days' notice under section 106.[592] Where there is a lease for a fixed period which has expired, and there is no allegation of the lessee holding over, no notice under section 106 is necessary.[593]

Before going into the question of the validity of a notice under section 106, it is necessary for the court to decide first whether section 106 is at all attracted, and that, parties could not by their pleadings alter the intrinsic character of the lease, or bring about a change of the rights and obligations flowing therefrom.[594] In case of joint tenancy, notice to one of the joint tenants is sufficient notice as against the other joint tenants and, it is not necessary to give any separate notice to each tenant.[595] However, the notice to quit must be addressed to all in order to rope in all the other tenants in the ejectment suit.[596]

Once the proceedings initiated under Tamil Nadu Buildings (Lease and Rent Control) Act goes, all such steps taken towards instituting the eviction proceedings also would go including the notice issued. Therefore, when the plaintiff contemplates to initiate a fresh proceeding under the relevant provisions of the Code of Civil Procedure by filing a suit for eviction of the tenant, the specific notice as contemplated under section 106 is a must, and only in such event, the other side, ie, the tenant would be in a position to get ready within such time contemplated by law either for eviction acting in consonance with the notice, or for opposing the same.[597]

In a suit for eviction, since the relationship of the landlord and the tenant had already come to an end and was terminated with the help of the service of an earlier notice, the plaintiffs were not permitted to maintain a suit for eviction on the basis of a second notice under section 106 of the Act without cancelling earlier notice.[598] Where the tenancy is duly terminated/determined between the parties after the service of notice and the tenant accepting the receipt of notice there is no illegality on part of the trial court in passing a decree of eviction against the tenant. Thus such a tenant is not entitled to any protection against such eviction.[599] A mere service of notice ipso facto would not result in termination of lease on grounds of breach of conditions of lease deed. Where the lease was executed by the Waqf Board, the board is required to approach the civil court for ejectment of the lessee. The jurisdiction of the civil court is not barred in respect of a civil dispute relating to Waqf

589. *P Ratnam v Vimalchandra,* AIR 1973 Bom 111.
590. *Lalu Gagal v Bai Motan Bibi,* (1893) ILR 17 Bom 631.
591. *Baldeo Prasad v Dasrath Lal,* (1954) ILR Nag 957.
592. *Dattonpant v Vithalrao,* (1975) 2 SCC 246. Overruled on another point in *Dhanpal Chettiar v Vesadai Ammal,* AIR 1979 SC 1745.
593. *Shanti Devi v Amar Kumar Banerjee,* AIR 1981 SC 1250 : (1981) 2 SCC 199.
594. Ibid; *Sudarshan Trading Co Ltd v L D D Souza,* AIR 1984 Kant 214, p 218.
595. *Emilia Tinoco v S N God,* AIR 1997 Bom 319.
596. *Amal Krishna Aditya v GC Das,* AIR 1998 Cal 221.
597. *Kazhugumalai Raja v Rajapalayam Palayapalayam Boopalarajaptti Illathar Samuga Pothu Nala Fund,* AIR 2004 Mad 267, para 13.
598. *Chandan Samanta v Bijay Kumar Jana,* AIR 2017 (NOC) 303 (Cal).
599. *Central Arya Road Transport v Saroj Thakkar,* AIR 2018 (NOC) 1 (Cal).

property. Thus, in case of a lease executed by the waqf board, suit for eviction of the lessee of waqf property can be adjudicated by the civil court.[600]

(15) Form and Construction of Notice to Quit

The section requires the notice to be in writing and signed.[601] Where the landlady was not sure which of the sister concerns was her tenant, and gave notice to one of the concerns with an endorsement that copy of the notice was also to be sent to the other concern but the endorsement was not signed, though the notice was signed by her counsel, it was held that non-signing of endorsement was only an irregularity which did not vitiate the notice.[602] The notice terminating the tenancy must be in respect of the property leased, and not in respect of only a portion of the lease. If the tenant occupies land or property other than the leasehold property, he is not to be treated as a tenant in respect of such excess land or premises, unless there is any such contract, and in the absence of any such contract, the said occupation would be that of a trespasser and, or an unauthorised occupant.

Splitting up of the tenancy by the unilateral act of the landlord or tenant is not permissible.[603] The notice must extend to all the premises.[604] The landlord cannot break up the tenure.[605] A notice for a fraction of holding is ineffective.[606] It is not even good for the portion concerned.[607] However, an accidental omission to mention a part of the demised premises in a notice which has been clearly understood has been upheld.[608] The question whether the whole of the premises occupied by the tenant is included in the notice or in the suit for ejectment, is one of fact and if the tenancy is not split up, the notice would be valid.[609] The reference, in the notice to quit, to the leased premises would include a reference to any land appurtenant to the same, whether it is named as a fair (small compound) or described in any manner. Its non-mention will not render the notice invalid.[610] Where there was a substantial difference between the accommodation mentioned in the notice and the accommodation actually let to the tenant and it was not a case of mere mis-description of the accommodation let to the tenant, the Supreme Court held that the notice did not validly terminate the tenancy.[611]

The notice need not state to whom possession is to be given; but if it does, it should do so with certainty. Notice to quit does not require any ground to be stated.[612] A notice to quit must not be construed strictly. A notice given on 12 September requiring the tenant to vacate on or before 30 September is valid, notwithstanding the fact that it should have required him to vacate on or before 1 October.[613] The rule has been to make lame and

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600. *Guramardeep Singh v Ved Vyas,* AIR 2018 P&H 42.
601. See cases cited in *Deo Nandan v Meghu,* (1907) ILR 34 Cal 57, p 64.
602. *Roxy Enterprises Pvt Ltd v Aruna Raina,* AIR 1994 Del 256 (NOC).
603. *Ghasi Ram v Jagat Narain,* AIR 1976 All 221.
604. *Bhimaram v Hura Soondery,* (1921) 33 Cal LJ 516; *Durga Chum v Pandub,* (1921) 33 Cal LJ 518; *Chandra Mohun v Bissesswar,* (1892) 1 Cal WN 158; *Kabil Sardar v Chunder Nath,* (1892) ILR 20 Cal 590; *Bodordoia v Ajijuddin Sarkar,* (1930) ILR 57 Cal 10 : 120 IC 455 : AIR 1929 Cal 651.
605. *Ram Kanie v Gunesh,* (1921) 33 Cal LJ 513 : 64 IC 550.
606. *Harihar Banerji v Ramsashi Roy,* (1919) ILR 46 Cal 458 : 45 IA 222 : 48 IC 277 : AIR 1918 PC 102.
607. *Atal v Kedar,* (1921) 33 Cal LJ 515 : 64 IC 551.
608. *Cacacie v Safdar Ali,* (1953) 57 Cal WN 567 : (1953) AC 585. See illustration (1) below.
609. *Permanand v Anandi Bai,* AIR 1974 Raj 65.
610. *Duabhai v Ramniklal,* AIR 1975 Guj 213 : 16 Guj LR 824.
611. *Chimanlal v Mishrilal,* (1985) 1 SCC 14, p 17 (in context of section 12(l)(a) of the Madhya Pradesh Accommodation Control Act, 1961).
612. *Amarendra Nath v Bhibu Bhushan,* AIR 1952 Cal 773. See also *Nagendra Nath v Jyotesh Chandra,* AIR 1952 Cal 221.
613. *Bawa Singh v Kangan Lal,* AIR 1952 Punj 423; *Ganga Prasad v Prem Kumar,* (1949) ILR All 414 : AIR 1949 All 175.

inaccurate notices sensible where the recipient cannot have been misled as to the intention of the giver. In a Calcutta case, the notice of ejectment mentioned that the notice was issued under section 102 of the TP Act read with section 13(b) of the West Bengal Premises Tenancy Act. By mistake, section 102 of the TP Act was mentioned instead of section 106. It was held that, the notice could not be regarded as invalid, merely because it was stated to be issued under section 102. A notice was to be viewed not with the purpose of giving it a meaning which would invalidate it, but with the purpose of seeing that the notice be properly interpreted as valid.[614] The Supreme Court has held that a notice to quit must be construced not with the desire to find faults in it, which would render it defective, but it must be construed *ut res magis valeat quam pereat*,[615] (that an act may avail, rather than perish). "The validity of a notice to quit", as pointed out by the LJ Lord Justice Lindely[616] "ought not to turn on the splitting of a straw". It must not be read in a hyper-critical manner, nor must its interpretation be affected by pedagogic pendantism or over refined subtletly, but it must be construed in a common sense way.[617] A notice to quit should be interpreted in a way so as to ascertain whether the person receiving the notice understood the same,[618] and should not be construed in a hair-spilt manner so as to find out loopholes in such notice. From the notice it must be apparent that the landlord wants to terminate the tenancy and the minimum period of such notice has been complied with. Where on the facts, it was found that even though it was not specifically mentioned that the "tenancy was determined", it was evident that the lessor wanted to determine the tenancy by giving notice and hence, the tenancy was validly terminated.[619] In a Calcutta case, the tenant, by his letter of termination of tenancy, informed the landlord that the lease of two years for the aforesaid flat will expire on 28 February 1977 and on the said date, "we would vacate the aforesaid flat and would deliver the same to you". In an ejectment suit instituted by the landlord, it was argued on behalf of the tenant, that the tenant's letter proceeded on the basis that the lease would expire on a certain date and that, in this particular case, the two years' lease was effected by an unregistered instrument and therefore, amounted only to a monthly tenancy. The supposition on the basis of which the notice was given being wrong, it was not a valid notice. This argument was, however, not accepted by the court.[620]

A notice to quit is not to be constructed either liberally, or strictly. It must, however, clearly and unambiguously convey the intention of the landlord to terminate the tenancy, and that in case of tenancy from month to month, it will be terminable by 15 days' notice expiring with the end of a month of the tenancy. The notice can certainly leave the choice with the tenant as to when he considers his tenancy to commence and end, and that it should be terminable by 15 days' notice expiring with the end of that month of the tenancy.[621]

In a notice under section 106 of the TP Act, two requirements must be fulfilled:

(i) It should give 15 days' notice;

(ii) expiring with the end of the month of tenancy.

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614. *Bal Kissen Shaw v Kanupada Bhowmick*, AIR 1985 Cal 129.
615. *Bhagbandas Agarwalla v Bhagwandas Kanu*, AIR 1977 SC 1120 : (1977) 2 SCC 646; *B Chitra Ramachandradas v National Remote Sensing Agency*, AIR 2001 AP 20, p 22.
616. *Side Botham v Holland*, (1895) 1 QB 378.
617. *Hariahar Banerji v Ramsashi Roy*, 45 IA 222.
618. *Raja Ram Soni v Krishna Prasad Singh*, AIR 1973 Gau 17.
619. *Andhra Pradesh Handloom Weavers Co-operative Society Ltd Hyderabad v K Venkateshwar Rao*, AIR 2000 Ori 153.
620. *Bengal Electric Lamps Works Ltd v SC Sinha*, AIR 1983 Cal 389, pp 400, 401.
621. *State Bank of India v A K Gupta*, (1992) 47 DLT 317.

In the instant case, the notice terminated the tenancy from the date of issue of the notice which was held to be not valid. It also gave 15 days notice to vacate, this period of 15 days also did not expire with the end of the month of tenancy. Since both the conditions of section 106 were not fulfilled, the notice was held to be invalid. It was held that notice under section 106 of the TP Act is essential, and must be strictly complied with.[622] In *M N Dastur v Dhruves Chandra Chakraborty*,[623] *A* was the owner of the suit premises and created a tenancy in favour of *B* in 1957 at a monthly rent of ₹ 475, with monthly rent payable according to English calendar month on and from January 1, 2009. *B* paid rent month by month and *A* accepted it. On 19 April 2010 *A* gave a notice to quit under section 106 of the TP Act wherein he asked the appellant to vacate the premises "by end of May 2010". *B* did not comply and a suit for eviction was filed on July 15, 2010. He tried to point out that the notice required the tenant to "hereby" vacate the suit premises and therefore was contrary to the 15 day requirement under section 106, the Court observed that the notice was issued on 19 April 2010 and the appellant was requested to vacate the premises by the end of May 2010. The suit itself was filed after one and a half month on 15 July 2010. Therefore, even if it is assumed that there was inaccuracy in the language of the notice, there was no misleading construction of the same. Even otherwise, the Court pointed out that in view of the amended section 106(3) of the TP Act, merely because of a short fall in the period of notice, the notice shall not become invalid.

A liberal construction is, therefore, put upon a notice to quit in order that it should not be defeated by inaccuracies either in the description of the premises,[624] or the name of the tenant,[625] or the name of the landlord,[626] or the date of the expiry of the notice.[627] The Privy Council has said that these English authorities are applicable to cases arising in India and that they establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and, further, that they are to be construed, not with a desire to find faults in them which would render them defective, but to be construed *ut res magis valeat quam pereat.*[628] However, a liberal construction must not ignore the fact that the provision is for the benefit of lessees, and a

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622. *Kanta Manocha v Hindustan Paper Corp*, (1998) 74 DLT 493.
623. *M N Dastur v Dhruves Chandra Chakraborty*, (2016) 4 CALLT 328 (HC) : (2017) 4 WBLR (Cal) 607; see also *Park Street Properties (Pvt) Ltd v Dipak Kumar Singh*, AIR 2016 SC 4038 : 2016 (8) SCALE 327 : 2016 (8) SCJ 305.
624. *Shama Churn v Wooma Churn*, (1898) ILR 25 Cal 36; *Girdharilal v Purnendu Narayan*, AIR 1939 Cal 291 : 68 Cal LJ 481 : 182 IC 8.
625. *Doe v Spiller*, (1807) 6 Esp 70.
626. *Harmond Properties Ltd v Gajdzis*, [1968] 3 All ER 263 : (1968) 1 WLR 1858 (CA).
627. *Sidebothan v Holland*, (1895) 1 QB 378; *Gnanaprakasam v Vaz*, (1931) 60 Mad LJ 293 : 131 IC 621 : AIR 1931 Mad 352; *Tika Ram v Deoji Maharaj*, (1934) All LJ 674 : 152 IC 189 : AIR 1934 All 787; *Gayaprasad v SC Munilal*, AIR 1952 Nag 101; *Riyasat Ali v Mirza Wahid*, (1965) All LJ 607 : AIR 1966 All 165; *Ram Bandhan v Guddar Ram*, (1971) All LJ 483 : AIR 1971 All 485.
628. *Harihar Banerji v Ramsashi Roy*, (1919) ILR 46 Cal 458 : 45 IA 222, p 225 : 48 IC 227; *Mangilal v Suganchand Rathi*, [1964] 5 SCR 239 : AIR 1965 SC 101 : (1964) SCC 83; *Secretary of State v Madhu Sudan Mukherji*, (1932) 36 Cal WN 918 : 141 IC 833 : AIR 1933 Cal 260; *Utility Articles Mfg v Raja Bahadur Motilal Mills*, AIR 1943 Bom 306; *Gayaprasad v S C Munilal*, AIR 1952 Nag 101; *Aidew Sandigne v RR Bharadaj*, AIR 1956 Assam 96; *Vishnu Namjoshi v Laxminarayan*, AIR 1959 MP 293; *Gulabchand v Kurji Bhagwanji*, AIR 1962 Guj 229; *Lachminarayan v Shillong General Public*, AIR 1967 Ass & N 16; *Ayisabeevi v Aboobacker*, AIR 1971 Ker 231; *Kamalaksha V v Keshava*, AIR 1972 Ker 110. See also *Bhagabandas Agarwalla v Bhagwandas Kanu*, AIR 1977 SC 1120, p 1122; *P P Subba Raja v E S Gurusamy*, AIR 1989 Mad 321, p 328.

construction which deprives the tenant of the minimum period of notice stipulated in this section, is not permissible.[629]

ILLUSTRATION

A had leased to *B* two bhigas, two and a half *cottahs* of *bastu* land in the *char* of standing in the name of "*N* bearing a yearly *jamma* of ₹ 2500. *A* gave notice to quit describing the land as *bastu* land in the *char* of *R* standing in the name of *N* and bearing a yearly *jamma* of ₹ 2500 describing the boundaries correctly but erroneously stating the area to be six *cottahs*. *B* must have known that *A* could not have intended to give a bad and ineffective notice for a fraction of the holding. It was a bona fide mistake which did not mislead *B*. The notice was therefore valid.[630]

The landlord who gives notice must manifest the intention that, from a certain date the relationship of lessor and lessee shall come to an end. Whether this was the intention, will by and large, depend on the tenor of the notice.[631]

ILLUSTRATIONS

(1) *A* let a house to *B* on 1 July. On 11 December of the same year, *A* gave notice to *B* as follows:—"If the house you occupy is not vacated within a month from this date, I will file a suit against you for ejectment as well as for recovery of rent at an enhanced rate." This was not a valid notice but merely a request to vacate accompanied by a threat.[632]

(2) *A* let three shops to *B* and then gave *B* notice saying that as other persons were offering a higher rent, "you are informed by this notice that if from the first *Aswin*, if you want to keep the shops you shall have to pay ₹ 2700 a month." The notice was insufficient either to determine the tenancy or to enhance the rent.[633]

If the notice fixes a lawful date for the termination of the tenancy, it does not matter if the tenant is described as a trespasser,[634] or that words of warning are added such as a threat by the landlord to increase the rent.[635] This is because "a notice otherwise sufficient is not made insufficient by its being accompanied by something else". If the intention of the notice is manifest, namely, to call upon the tenant to vacate premises, the fact that there is also a demand to pay the arrears of rent does not invalidate the notice.[636] However, it is not necessary that there should be a default in the payment of rent for termination of tenancy and the requirement of section 106 would be satisfied if the lessor has given a notice expressing an intention that the lease shall stand terminated on expiry of period mentioned in the notice.[637] A notice by the landlord that he is no longer willing to continue the tenancy and requiring the tenant to vacate the house and to give possession on the expiry of 30 days

629. *Mangilal v Suganchand Rathi*, AIR 1965 SC 101.
630. *Harihar Banerji v Rwnsashi Roy*, (1919) ILR 46 Cal 458 : 451 A 222 : 48 IC 277 AIR 1948 PC 102.
631. *Hiranand v Umaid Raj*, AIR 1973 Raj 120.
632. *Bradley v Athinson*, (1885) ILR 7 All 899. But see *Ahmad Ali v Jammal Uddin*, (1963) All LJ 567 : AIR 1963 All 581; *Sunder Lal v Ram Krishan*, (1960) 58 All LJ 152 : AIR 1960 All 544; *Farooq Ahmed v M Bux Singh*, AIR 1972 All 155.
633. *Sakhi Chand v Ram Chandra*, (1912) 16 Cal LJ 561 : 15 IC 906.
634. *Ram Charan v Hari Charan*, (1908) 7 Cal LJ 107; *Secretary of State v Madhu Sudar Mukherji*, (1932) 36 Cal WN 918 : 141 IC 833 : AIR 1933 Cal 260.
635. *Ahearn v Bellman*, (1879) 4 Ex D 201; *Ganga Das v Ananda Chandra*, (1909) 13 Cal WN 146 : 2 IC 548; *Adolphe Shrager v Emma Price*, (1907) 12 Cal WN 1059; *Shankar Lal v Babu Ram*, (1921) ILR 43 All 330 : 60 IC 842 : AIR 1921 All 194; *Bhagwana v Shib Sametri*, 78 IC 651 : AIR 1925 All 199. But see *Chidda Ram v Naru Mal*, (1964) All LJ 1105 : AIR 1965 All 323.
636. *Suraj Prasad v Kusumlata Sinha*, AIR 1973 All 198.
637. *Syed Mustajab Hussain v Additional District, Judge*, AIR 2012 (NOC) 344 (All).

after receipt of the notice, and indicating that in default, a suit for ejectment will be filed, is not defective.[638]

In another case, the relevant portion of the notice to quit read that, in default of payment of rent during the period aforesaid after occupation of the shop for a period of full 30 days, you must vacate the shop and put it in possession of the plaintiff... On expiry of the said period, your status would be that of a trespasser only and you will be liable to ejectment. It was held that the notice was valid. It satisfied the requirements of section 106.[639]

A notice to a monthly tenant to come to fresh terms with the landlord by the end of *Asar*, failing which the tenancy will be determined from the first *Sraban*, has been held to be a good notice.[640] A notice to quit or in default to pay an enhanced rent operates as a notice to quit with an offer of a new tenancy at an enhanced rent, and if the tenant continues in occupation, he is taken to have acquiesced in the proposal to pay enhanced rent,[641] but not where the lessee has replied contesting the demand.[642] A contrary view was taken in *Sabir Hussain Khan v Serajul Huq*,[643] in which it was held that it could not be laid down that the tenant was liable to pay the enhanced rent. He would, however, be liable to pay damages for use and occupation. The Oudh court has held that even if a notice to quit is invalid to determine the tenancy, yet it may be effective to enhance the rent and if the tenant continues in possession, he is liable to pay enhanced rent.[644] This view is supported by the decision of the Nagpur High Court.[645] This case was approved in later case where the tenant was held not to be liable as he had protested.[646] However, it is submitted that if the notice to quit is invalid and the tenant continues in possession under the existing lease, then, the tenant is not liable to pay enhanced rent.

(16) Length of Notice

The section fixes six months for yearly, and 15 days for monthly tenancies created by implied demise, and appears to assume that it is the proper notice for all yearly and monthly tenancies.[647] The month is reckoned according to the calendar by which the tenancy is regulated.[648] In the absence of any evidence suggesting that the date of commencement of a tenancy was altered on a transfer of the landlord's rights, it would be the date of tenancy as in force between the tenant and the previous owner. The mere fact that after purchase of the house, the tenant and the purchaser landlord entered into an agreement for an enhanced rent from a certain date, does not mean that the tenancy was to be governed by the date of

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638. *Sita Ram v Moti Lal*, AIR 1976 All 70; *Jaggo v Sardar Gurmukh Singh*, AIR 1974 All 250.
639. *Sushila Devi v Manohar Lal*, AIR 1985 All 178.
640. *Dhanirani v Bholanath*, (1942) 47 Cal WN 207.
641. *Roberts v Hayward*, (1828) 3 C & P 432; *Madan Mohan v Bohra Ram Lal*, (1934) 1934 All LJ 421 : 153 IC 432 : AIR 1934 All 115.
642. *Mohammed Ninaye v Neelacandan*, AIR 1960 Ker 216; *Zahoor Ahmad v State of Uttar Pradesh*, (1965) All LJ 275 : AIR 1965 All 326.
643. *Sabir Hussain Khan v Sarajul Huq*, (1951) All LJ 192 : AIR 1951 All 853.
644. *Baboo Lal v Mohammad Askari*, 89 IC 578 : AIR 1926 Oudh 78.
645. *Nandlal Bhimji v Anant Govind*, 189 IC 895 : AIR 1940 Nag 140.
646. *Mohammad Noor v Mirza Ashiq Beg*, (1933) ILR 9 Luck 112 : 145 IC 647 : AIR 1933 Oudh 465.
647. *Gopinath Mukherjee v Uttam Bharti*, AIR 2009 Cal 58 : (2009) 1 Cal LT 290, (; *Manathanath Kumhammet v KTCT Unnimoideen Kutty*, AIR 2009 Ker 43 : (2008) 3 KLJ 861 : (2009) 106 RD 770; *Prasanna v S Nagaluxmi*, AIR 2010 Kant 66 : (2010) 1 KCCR 631; *Savarga BhaktibaiDullabhai Sthapit Bhakta Patidar v Prabhubhai Dahybhai Bhakta*, AIR 2011 (NOC) 186 (Guj); *Shree Ram Mills Ltd, Mumbai v Court Receiver, High Court of Mumbai*, AIR 2011 (NOC) 99 (Bom).
648. *Haridas v Upendra*, (1912) 16 Cal LJ 74 : 16 IC 937; *Debendra v Syama Prosanna*, (1906) 11 Cal WN 1124; *Raj Behari v Kalias*, (1915) 22 Cal LJ 78 : 30 IC 887; *Seoti Bibi v Jagannath*, (1920) 18 All LJ 854 : 57 IC 593; *Banarsilal v Bhagwan*, AIR 1955 Raj 167; following *Ahmad Ali v Jyotsna Kumar*, AIR 1952 Cal 19.

purchase of property.[649] Where the landlord gave one month notice to terminate the tenancy under section 106, the same would be valid.[650]

The year or month of the tenancy at the end of which a notice under section 106 should expire, is not the calendar year or month in which the notice is given. The period (whether it be the year or the month) is the period calculated with reference to the commencement of the tenancy. Where there is an express or implied contract that the period in a lease from year to year or month to month should be reckoned according to Bengali year and not according to British calendar, a notice expiring with end of the year or the month of the tenancy calculated according to the Bengali calendar will be sufficient to terminate the tenancy.[651] Payment of rent by calendar month may be some, or even an important, indication that the tenancy is month to month according to the calendar month. However, by itself, it is not sufficient for holding that the tenancy was from the first day of the month to the last day, when receipt has been given indicating that tenancy commenced from a particular day of the month.[652]

The 15 days must be clear days. So, a notice to quit on the 30th *Falgun* served on the 15th *Falgun,* is inadequate.[653] In the case of a monthly tenancy, a notice of two months instead of 15 days has been held to be valid.[654] Similarly, a notice issued for more than 15 days does not become invalid if coincides with the end of the month.[655] The notice is given at the peril of him who gives it, and if it is given for the proper length of time, that need not be expressed on the face of the notice. A lessee is entitled to remain on the premises leased till the midnight of the last day of the tenancy.[656] The notice in a Patna case purported to terminate the tenancy on 31 January 1965 and required possession to be delivered on or before 31 January 1965. The tenant would be entitled to continue in possession till the midnight of 31 January and the notice, it was held, fulfills the requirements of section 106.[657]

(17) Computation of Period

By the amending Act of 2002, a new sub-section (2) providing for computation of period has been inserted. Opening with a non-obstante clause, the section provides that the period of six months or fifteen days, as the case may be, shall commence from "the date of receipt of notice". By the words, "Notwithstanding anything contained in any other law for the time being in force", the provision has an overriding effect on the general rule embodied in other laws that for the purpose of computation of a period, the date from which such period is to be taken, shall be excluded.[658]

(18) Notice not to be Invalid

Sub-section (3) is a new provision which has been inserted by the amending Act of 2002. It provides for a legal fiction that a notice under sub-section (1) would not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under

649. *Indubhushan v Haribhajan Singh,* AIR 1976 Pat 282.
650. *Kubra Khatoon v Allahtala Malik Waqf Masoom Hasan, Amroha,* AIR 2018 (NOC) 212 (All).
651. *Haridas Tapadar v Sailendra Chandra De,* AIR 1953 Ass 202.
652. *McGaffin v LIC,* AIR 1978 Cal 123 : 81 Cal WN 629.
653. *Mangilal v Suganchand Rathi,* [1964] 5 SCR 239 : AIR 1965 SC 101 : (1964) SCC 83 approving *Subadini v Durga Charan,* (1901) ILR 28 Cal 118; and see *Natho v Sital Prasad,* AIR 1969 Pat 310.
654. *Secretary of State for India v Madhu Sudan Mukherji,* (1932) 36 Cal WN 918 : 141 IC 833 : AIR 1933 Cal 260.
655. *Chowdrani Mahadevan v Schandrashekhar,* AIR 2002 Kant 406.
656. *Ananta Ojah v Hazi Osimuddin,* AIR 1952 Ass 132; *Banchhanidhi Samantrai v Lachminaram,* (1949) ILR Cut 284 : AIR 1950 Ori 1; *Motilal v Kailash Narain,* AIR 1960 MP 134.
657. *Baijnath Pandit v Narvada Devi Kejariwal,* AIR 1973 Pat 286.
658. See for instance, Limitation Act, 1963, Article 12 (1).

that sub-section, if a suit or proceeding is filed after the expiry of the period mentioned in that sub-section. This sub-section is another attempt to eliminate technical pleas raised by the lessee to invalidate the notice and defeat the provisions of section 106. By this amendment, even though a notice might be a for a period less than six months in a year to year tenancy or less than fifteen days in a month to month tenancy, yet it would be valid if the suit or proceeding is initiated after the expiry of the said six months or fifteen days, as the case may be.

(19) Date of Expiry of Notice

The entire law relating to date of expiry of notice has undergone change after the amending Act of 2002. Prior to the amendment, one of the technical pleas raised by the lessee was the failure of six months period expiring with the end of the year of tenancy, or fifteen days period expiring with the end of the month of tenancy. For instance, in a year to year tenancy from 1 January to 31 December, if a six-months notice was issued on 1 March, it would expire on 31 August which did not expire with the end of the year of tenancy, ie, 31 December. It was this technical plea alone that the notice was held to be invalid and hence, the entire process of issuing fresh notice and filing of suit was required to be started *de novo*. This caused grave injustice to the lessors.

To prevent this situation, the amending Act of 2002 has deleted the words "expiring with the end of a year of the tenancy" as regard year to year tenancy, and the words "expiring with the end of a month of the tenancy" with respect to month to month tenancy. The effect of the amendment is that the notice sent in the above instance would be a valid notice though it expires on 31 August itself, and the lessor can file a suit anytime thereafter. Further, the amendment, by virtue of section 3 of the amending Act of 2002, applies retrospectively and hence, is applicable to all suit and proceedings at any stage. Therefore, this technical plea is no more available to the lessee. The law in India, however, prior to the amendment as understood from the judicial pronouncements is given hereunder.

The notice must terminate the tenancy at the end of the year or month of the period of the lease. It should expire on the last day of that period, otherwise it is invalid.[659] On the expiry of the period prescribed in the notice or in the statute, ie, section 106, the lease becomes inoperative and the lessor acquires the right to have the tenant ejected, and to take possession in due process of law.[660] Where the monthly tenancy commenced on 20 September, the month of tenancy would be the 20th of each month to the 19th of the following month, and a notice which expires on 31 August is not valid.[661] Where a notice in writing had granted 15 days time for terminating the monthly tenancy, and also clearly stated that the period of notice would expire at the end of *Kartik*, ie, the end of tenancy month, the notice was held to be valid under section 106.[662] A notice purporting to terminate the tenancy at once, but giving the tenant a month's time to vacate

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659. *Shaikh Sona Ullah v Troylukho Nath*, (1897) 2 Cal WN 383; *Hemangini v Srigobinda*, (1920) ILR 29 Cal 203; *Mahomedally v Abdulla*, (1925) 27 Bom LR 102 : 94 IC 631 : AIR 1925 Bom 167; *Kikabhai v Kalu*, (1898) ILR 22 Bom 241; *Seoti Bibi v Jagannath*, (1920) 18 All LJ 854 : 57 IC 593; *Sahtawan v Mohan Singh*, (1896) All WN 51; *Doe d Spicer v Lea*, (1809) 11 East 312; *Rahmat Ullah v Md Hussain*, AIR 1940 All 444 : (1940) All LJ 502 : 191 IC 223; *Gooderham & Works Ltd v Canadian Broadcasting Corpn*, AIR 1947 Cal 66 : AIR 1949 PC 90; *Bathavon Rural District Council v Carlile*, (1958) 1 QB 461 : [1958] 1 All ER 801; *MPSRT Corpn v Indore Division Bus Association*, AIR 1987 MP 205, p 207; *F J Fernandis v A P Cardoza*, AIR 1984 Kant 226, p 228.

660. *Vasantkumar Radhakishan Vora v Board of Trustees of the Port of Bombay*, AIR 1991 SC 14, p 18.

661. *Bimolendu v Firm Mitra & Ghosh*, AIR 1973 Cal 515.

662. *Asman Ali Laskar alias Jamir Uddin v Forjan Ali Barbhuiya*, AIR 1991 Gau 58, p 59, distinguishing *F J Fernandis v A P Cardoza*, AIR 1984 Kant 226 where in the notice it was stated that the lease in respect of the suit premises had been terminated at the end of the tenancy month which would expire after the end of 15 days from the date of service of notice

has been held to be invalid.[663] A notice stating that the tenancy is terminated "hereby" is valid, as it does not terminate the tenancy at once.[664] The expression "hereby" used in a notice means "through this notice"; it does not mean "from today". The word "hereby" used in business correspondence does not connote the point of time, but means "through" (this document). When it is said that the tenancy is "hereby" terminated, it means that the tenancy is terminated through the notice.[665] According to the Rajasthan High Court also, "hereby terminated", when used in a notice to terminate a tenancy, cannot be read to mean "terminated forthwith". The notice in this particular case, in view of its ambiguous language, could only be interpreted to mean that the landlord indicated to the tenant that he wanted to synchronise the act of termination of tenancy with the act of delivery of vacant possession thereof—either on 31 October, or on the day on which the tenant considered that his month of tenancy expired.[666] On the other hand, the Andhra Pradesh High Court has held that where the notice stated that the tenancy in favour of the tenant was "hereby" terminated and requested of the tenant to vacate by the end of the month by which date the tenancy expired, failing which, appropriate steps for eviction of the tenant would be taken in a court of law, the notice, was not according to law, and was in contravention of section 106 read with section 111 (h).[667] Thus, if the tenancy is a monthly tenancy beginning with the first day of each month, a notice by the tenant on 9 June that he would leave in a month's time is invalid, for although it gave more than 15 day's notice, it did not terminate the tenancy at the end of the month.[668] On the other hand, in the case of a tenant holding over on the expiry of a yearly tenancy according to the Bengali calendar, a notice on the 16th *Baisak* requiring the tenant to quit on the 31st *Baisak* is valid.[669] This rule has been applied in Punjab.[670] If the tenancy begins in the middle of the year, yet, if the rent is paid at the end of each calendar year, the tenancy will be according to that year, and a notice expiring with the end of such calendar year will be valid.[671]

Where a lessee enters the premises in the middle of a quarter by agreement and pays for the broken quarter a proportionate rent, and thereafter, on the regular quarter days, the lease commences on the first day of such quarter which follows his entry and a notice to quit must be given accordingly. In this particular case, the quarters were according to the English calendar month, and a notice terminating the tenancy on the last day of September was valid.[672] However, in a monthly tenancy beginning on the 6th of each month with rent payable on the 5th of the next month, a notice to quit given on 30 June for the end of July was invalid, as it did not expire on the last day of the period of the tenancy.[673] But, a lease which provides that a tenant may leave on a particular day or on such day on which he considers the tenancy to expire, is a valid condition.[674]

The date of expiry of a tenancy depends upon the date of its commencement, and that again depends upon whether the lease is expressed to begin from or on a certain day. But to

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663. *Hakim Z Islam v Mohd Rafi,* AIR 1971 All 302.
664. *Laxmi Devi v Chandramani,* AIR 1971 All 506.
665. *Mohammed Haji v Umanand Kamath,* AIR 1975 Ker 26.
666. *General Auto Agencies v Hazari Singh,* AIR 1976 Raj 56.
667. *Yerrabhothula Krishna Murthy v Addepatti Subba Rao,* AIR 1988 AP 193.
668. *Bijay Chandra v Howrah Amta Railway,* (1923) 38 Cal LJ 177 : 72 IC 98 : AIR 1923 Cal 524; *Ganesh Das v Jamuna Das,* AIR 1945 Pat 385.
669. *Gobinda Chandra v Dwarka Nath,* (1915) 19 Cal WN 489 : 26 IC 962 : 20 Cal LJ 455.
670. *Chunni Lal v Chuni Lal,* 79 IC 957 : AIR 1923 Lah 659.
671. *Arunachella v Ramiah Naidu,* (1907) ILR 30 Mad 109; *Ismail Khan Mahomed v Jaigun Bibi,* (1900) ILR 27 Cal 570; *Doe d Halcomb v Johnson,* (1806) 6 Esp 10.
672. *Lalbhai Ramjibhai v A V Seth,* AIR 1974 Cal 362.
673. *Bengal National Bank v Janaki Nath Roy,* (1927) ILR 54 Cal 813 : 104 IC 484 : AIR 1927 Cal 725.
674. *Pahlad Das v Ganga Saran,* (1952) All LJ 24 : AIR 1952 All 32 : affd (1957) All LJ 804 : AIR 1958 All 774; *Virajman Mandir v Chuttan Lan,* AIR 1963 All 54.

avoid this subtlety, it has been held that a notice may be given expiring on anniversary of the commencement of the tenancy.[675] This is the effect of section 110, and Privy Council has held that, when a lease for years commencing from the first day of a month ends, according to the rule in section 110, on the first day of a month, and the tenant holds over as a monthly tenant, the monthly tenancy expires at midnight on the first of each succeeding month, so that a notice of the 1 February 1928, which treated the tenancy as expiring on the 1 March 1928, is valid.[676] But where a lease of seven years was expressed to commence from 1318 Bs and to end by the end of 1324 Bs, it has been held, that the lease ended on the last day of 1324 Bs. and not on the midnight of the first day of 1325 Bs and consequently, the holding over as a monthly tenant began on the first day of *Baisak* 1325 Bs, and a notice to quit on the last day of *Asar* was valid.[677] A notice one day short of the proper time is invalid.[678] A notice to quit on or before a date, being a date on which the tenancy expires, is a good notice to quit.[679] So also, a notice to quit requiring a tenant to quit on a certain date or "on such date as your then current month of tenancy will end" was held a valid notice to quit.[680]

In *State Bank of India v Ashok Kumar Gupta and ors,*[681] the last para of the notice stated as under:

> I therefore call upon you to please vacate the premises and hand over for its vacant possession to my clients by the end of 31 May 1989 ie on the expiry of your tenancy month failing which legal action for your ejectment from the premises will be taken against you at your cost and liability. If, however, according to you, your tenancy be ending on any other date than as mentioned above, then you should please treat your tenancy terminated on the close of such date of your tenancy month which will expire after the expiry of 15 days of the service of this notice on you and you should please vacate and deliver vacant position of the premises to my clients on the expiry of that date on which your tenancy comes to an end according to you.

It was held that the notice in question leaves a choice with the tenant. It meets the requirement of section 106 of the TP Act, the impugned notice, therefore, validly terminated the tenancy which was a tenancy from month to month.

The date of commencement of tenancy is not altered by the mere purchase of the premises by another person, and remains the same as it was between the lessee and the previous owner.[682] The effect of such a notice is, first, to give the tenant notice to determine the tenancy on the date named and, second, to make the tenant an offer to accept a

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675. *Sidebotham v Holland,* (1895) 1 QB 378; *Ram Palak v Bilas Mahton,* (1951) ILR Pat 1155 : AIR 1952 Pat 69; *Bathavon Rural District Council v Carlile,* (1958) 1 QB 461 : [1958] 1 All ER 801.
676. *Benoy Krishna Das v Salsiccioni,* 59 IA 414 : 37 Cal WN 1 : 56 Cal LJ 319 : 63 Mad LJ 685 : 35 Bom LR 6 : 1933 All LJ 423 : 141 IC 514 : AIR 1932 PC 279; *Rahmat Ullah v Md Hussain,* (1940) All LJ 502 : 191 IC 223 : AIR 1940 All 444; *Dharani Baid v Sadhu Charan,* AIR 1956 Assam 20; *Bhagwan Das v UOI,* AIR 1961 J & K 39.
677. *Dev Das Bela v Abdul Gani,* (1938) ILR 2 Cal 134 : 67 Cal LJ 291 : 42 Cal WN 443 : 177 IC 880.
678. *Susil Chunder Neogy v Birendrajit Shaw,* (1934) 38 Cal WN 782 : 153 IC 673 : AIR 1934 Cal 837; *Bholanath v Raja Durga,* (1907) 12 Cal WN 724; *Charu Chandra v Bankim Chandra,* (1938) 42 Cal WN 1115; *Sabitri Sundari v Jalekha Bai,* AIR 1947 Cal 244.
679. *Ismail Dada v Bai Zuleikabai,* (1944) ILR Bom 361 : 46 Bom LR 244 : AIR 1944 Bom 181; *Bharat Sahu v Gadadhar Das,* AIR 1956 Ori 128; & see *Panchoo Singh v Bala Sahai,* (1957) ILR 7 Raj 734 : AIR 1958 Raj 306.
680. *Ganga Prasad v Prem Kumar,* (1949) ILR All 414 : AIR 1949 All 173; *Chhaju Mal v Om Prakash,* AIR 1959 J&K 80; *Mohanlal v Vijai Narain,* (1960) ILR 10 Raj 1392 : AIR 1961 Raj 136; *Jotindra Nath v Malai Ram,* AIR 1953 Cal 352; *Madanlal v Manakchand,* AIR 1971 Raj 55.
681. *State Bank of India v Ashok Kumar Gupta,* (1992) 47 DLT 317.
682. *P Ratnam v Vimalchandra,* AIR 1973 Bom 111.

determination of the tenancy on any earlier date of the tenant's choice, on which the tenant should give up possession of the premises.[683]

The expression "by" a certain date means "on or before" that date.[684] Notice to quit "within" a month or "within" 30 days have also been upheld.[685] A notice requiring the tenant to vacate the accommodation "within a month" means that he should not take more than a month to do so. It does not mean that he will vacate within less than a month. A notice calling upon the tenant to vacate premises within 30 days of the service of the notice is in accordance with section 106.[686] It is not indispensably necessary that the notice must mention that the tenancy is being terminated. Calling upon the tenant to vacate the premises tantamounts to terminating the tenancy.[687]

It is usual after mentioning the date of the anniversary of the tenancy to add in the alterative some such general words as "at the end of the year of the tenancy which will expire next after the end of one-half year from the date of the service of this notice."

(20) Notice by Whom and to Whom

Notice to quit may be given by the lessor or by the lessee. The lessor includes the person in whom the legal reversion is vested, ie, the heir, transferee, executor and administrator. The landlord who, during the currency of a yearly or monthly lease, grants a lease to a third person for a term of year, cannot give notice to quit after the commencement of such lease for years, as his immediate reversion is then transferred to the tenant for years.[688]

One of the co-owners is competent to serve notice terminating tenancy. He is competent to maintain a suit in pursuance of such notice. Where one of the co-owners was collecting rent on behalf of all owners and was functioning for all purposes as a landlord, a notice issued by him alone terminating the tenancy, was valid.[689] Where all the trustees executed a *mukhtarnama* expressly authorising the *mukhtar* (agent), not only to institute legal proceedings, but also to give all notices on their behalf, and the lease was granted by the trustees of the land belonging to the trust through their *mukhtar*, a notice under section 106, terminating the tenancy, issued by the *mukhtar*, would be valid.[690] Similarly, when an advocate sends the notice on behalf of the respondent, he acts as an agent on behalf of the respondent.[691]

Notice enures for the benefit of the successor-in-title of the lessor or lessee giving it.[692] Where all the co-landlords gave the notice and one of them died before the expiry of the

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683. (1946) 1 KB 215, [1946] 1 All ER 133; *Gulabchand v Kurji*, (1962) 3 Guj LR 113.
684. *Easthaugh v Macpherson*, [1954] 3 All ER 214 : (1954) 1 WLR 1307; *Ram Chandra v Lala Dulchand*, AIR 1958 All 729.
685. *Ram Swarup v Brij Nandan*, AIR 1963 All 366; *Shri Nath v Gopi Chand*, AIR 1964 All 416.
686. *Suraj Prasad v Kusumlata Sinha*, AIR 1973 All 198.
687. *Kunj Behari v Acharya Hari*, AIR 1975 Raj 138; for a contrary view as to the expression "within", see *Mehta & Co v Lalen*, (1974) KLT 89 : (1974) KLJ 105.
688. *Wordsley Brewery Co v Haiford*, (1903) 90 LT 89; *Manickam Pillal v Ratnasami Nadar*, (1917) 33 Mad LJ 684 : 43 IC 210; *Adolphe Shrager v Emma Price*, (1907) 12 Cal WN 1059; *Parbhu Ram v Tekchand*, (1919) ILR 1 Lah 241 : 53 IC 865.
689. *Giriraj Kishore v Trilokinath Vimal*, AIR 1988 All 305.
690. *Prem Prakash Johar v His Highness Sri Maharaja Vibhuti Narain Singh Bahadur, Varanasi*, AIR 1989 All 51.
691. *M R Gupta v V B Mogul*, AIR 1997 SC 2437 : (1997) 5 SCC 329.
692. *Doe d Egremont v Forwood*, (1842) 3 QB 627. This proposition was approvingly quoted in *Vasant Kumar Radha Kishan Vora v Board of Trustees of the Port of Bombay*, (1991) 1 SCC 761 : AIR 1991 SC 14, p 18 overruling *Gurumuruthappa v Chickmunisamappa*, AIR 1953 Mys 62.

notice period, the lessees cannot ask for a fresh notice from the legal heirs of the deceased.[693]

One of the co-sharer cannot initiate action for eviction of the tenant from the portion of the tenanted accommodation, nor can he sue for his part of the rent. The tenancy cannot be split up either in estate or in rent, or any other obligation, by the unilateral act of one co-owner. If however, all the co-owners or the co-lessors split by partition amongst themselves the demised property by metes and bounds, and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion and can deal with the portion, not only as the tenant, but also as individual owners/lessor.

The English rule as to joint lessors was followed in the Bombay case of *Ebrahim Pir Mahomed v Cursetji*,[694] where the parties were not Hindus, but whereas, the English rule as to joint lessors is that the lessee holds the whole so long as he and all the lessors shall please, the rule under Hindu law was that the relation created by contract with several joint landlords continues, until there exists a new and complete volition to change it. Accordingly, one of several joint owners, whether joint tenants or tenants in common, cannot determine the tenancy, and notice to quit must be given by all.[695] A notice is mandatory for terminating a single tenancy. Where a single tenancy devolves on multiple heirs, a notice of termination served on one of them acting on behalf of others is capable of terminating the tenancy.[696] However, where one co-sharer has been acting as the manager on behalf of all the other co-sharers, and has been collecting the rent on their behalf, he can give a valid notice on behalf of all.[697] Where the tenancy has been determined by a joint notice, the withdrawal of some of the joint lessors from a suit for possession will not prevent the other co-plaintiffs from obtaining their shares.[698]

A lessee includes the legal representative, or the assignee of the tenant.[699] Upon the death of the original tenant, subject to any provision to the contrary either negating or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. It is a single tenancy which devolves on the heirs, and there is no division of the premises or of the rent payable therefore. In such circumstances, notices terminating tenancy under section 106 of the TP Act, addressed to and served upon one of the heirs of the original tenant, who paid rent and acted on behalf of all the heirs of the original tenant could not be said to be insufficient.[700] There is no provision contrary to the above noted principle of joint tenancy of heirs in case of death of the original tenant, in Muslim personal law.[701] A notice given by a landlord not in his own capacity, but on behalf of somebody else, is bad.[702] So also, a notice given by a tenant to his sub-tenant after his own tenancy is terminated.[703]

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693. *Royal Stationery Supply House v Azizul Haque*, AIR 1973 Cal 363.
694. *Ebrahim Pir Mahomed v Cursetji*, (1887) ILR 11 Bom 644.
695. *Gopal Ram v Dhakeshwar Pershad*, (1908) ILR 35 Cal 807; *Gholam Mohiuddin v Khairan*, (1904) ILR 31 Cal 786; *Radha Proshad v Esuf*, (1881) ILR 7 Cal 414; *Balaji v Gopal*, (1879) ILR 3 Bom 23; *Vagha v Manilal*, (1935) 37 Bom LR 249 : 156 IC 898 : AIR 1935 Bom 262; *Arun Chandra v Panchu Modok*, AIR 1957 Ass 70; *Valiyavetti Konnoppan v K Manikkam*, AIR 1968 Ker 228.
696. *Mamata Panigrahy v Hemalata Dalai*, AIR 2017 Orissa 122.
697. *Indu Bhusan Bose Choudhary v Haribhajan Singh*, AIR 1976 Pat 282.
698. *Dwarka Nath v Kali Chunder*, (1886) ILR 13 Cal 75; *Sri Raja Simhadri v Prattapatti*, (1908) ILR 29 Mad 29, p 34; *Jerman Gomez v Ram Kumar Kaibarta*, (1934) 58 Cal LJ 133 : 149 IC 559 : AIR 1934 Cal 127.
699. *Ress d Mears v Perrot*, (1830) 4 C & P 230 (notice to widow of deceased tenant).
700. *H C Pandey v G C Gaul*, AIR 1989 1470; *Radheshyam Modi v Jadunath Mohapatra*, AIR 1991 Ori 88, p 91; *Munni v Zareena Begum*, AIR 2004 All 246.
701. *S A Wali Quadri v Sadar Anjuman-e-Islamia*, AIR 2000 AP 417, para 12.
702. *District Board of Tippera v Sarafatali*, AIR 1941 Cal 408 : 73 Cal LJ 281 : 195 IC 594.
703. *Biraja Sundari v Mahamaya Sen*, AIR 1941 Cal 399.

A landlord cannot give notice to a sub-tenant, but a person who comes into occupation in place of the tenant will be presumed to be an assign, and notice may be given to him. Notice may be given by an agent authorised in this behalf. Accordingly, notice to quit may be given by a general agent in charge of an estate, but not by a *cestui que trust,* unless he is in management of the estate; nor by a mere rent collector, unless he has been specially authorised;[704] also by an agent having special authority; but the authority must appear on the face of the notice so that the tenant may know that he may safely act upon it.[705] A notice given by the lawyer of the lessor, is valid.[706] So also, is a notice given by the sons of a joint family lessor, where the father is dead.[707] A notice by an unauthorized agent cannot be subsequently ratified,[708] as it must be binding when served. The Calcutta High Court has held that an agent having power to sue in ejectment, has power to give notice.[709] A notice directed to "RC Pal" who was the managing director of the lessee company called "RC Pal Ltd", is valid.[710]

Where the tenants are joint, a notice to one is sufficient.[711] In joint tenancy, notice on any one of the tenants is valid, and a suit impleading one of them as a defendant is maintainble. A decree passed in such a suit is binding on all the tenants.[712] A notice to quit addressed to all the tenants, but served on one of them, is sufficient; the provision applies not only to joint tenants, but also to tenants in common.[713] Where the heirs of the lessee held over the lessee's death, it was held that even if a contractual tenancy came into existence, it was a joint tenancy in favour of all the heirs, and a notice to quit served on any one of them was a proper notice.[714] The position of the various heirs is that of co-tenants and not joint tenants, and if the landlord does not serve notice on all the heirs, the petition for ejectment cannot be maintained.[715] The Allahabad High Court however, has held, that the principle, that notice to one of the joint tenants validly terminates the tenancy, cannot be applied to tenants in common. The right of tenancy, being a property, passes on inheritance according to the share of each heir in the case of tenants in common.[716] Similarly, a notice could be served on the *karta* on behalf of all the members and a refusal by the *karta* should be treated as a refusal on behalf of all of them.[717]

In a case from Andhra Pradesh, certain premises were let out to a company and were in the occupation of its director. Notice to quit was given to its director who replied to it without raising any objection as to its validity as a notice to the company. It was held that he

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704. *Faizubhai Mahmadbhai v Balkrishna,* AIR 1979 Guj 9; Cf *Mishrimal Chhogalal v N B Patel,* (1963) 65 Bom LR 15.
705. *Bhagwana v Shib Sametri,* 78 IC 651 : AIR 1925 All 199; *Vinod Sagar v Vishnubhat,* AIR 1947 Lah 388; *Ranumal v Mun Council,* AIR 1972 Raj 55.
706. *Dwarka Nath v Gayatri Devi,* (1961) All LJ 353; *Dulal Chandra v Umesh Chandra,* AIR 1966 Ass & Nag 93.
707. *Fateh Chand v Brij Bhushan,* AIR 1957 All 801; *Pyarelalsa v Garanchandsa,* AIR 1965 MP 1.
708. See Indian Contract Act, 1872, illustration (b) to section 200.
709. *Bodordoja v Ajijuddin,* (1930) ILR 57 Cal 10 : 120 IC 455 : AIR 1929 Cal 651.
710. *Tulsiram Shaw v RC Pal Ltd,* AIR 1953 Cal 160; *Dwarka Prasad v Central Talkies,* AIR 1956 All 187.
711. *Kanji v Trustees of Port of Bombay,* AIR 1963 SC 468; *Ashok Chintaman Juker v Kishone Pandurang Mantry,* (2001) 5 SCC 1; *Shri Nath v Saraswati Devi,* AIR 1964 All 52; *Roshan v Purshottam Lal,* AIR 1965 All 287; *Tata Iron & Steel Co v Abdul Ahad,* AIR 1970 Pat 338; *SA Wali Quadri v Sadar Anjuman-e-Islamia,* AIR 2000 AP 417; *Shree Ram Goyal v Jitendra Kumar Gupta,* AIR 2010 (NOC) 743 (All); 2010 (2) ALJ 557.
712. *Ashok Chintaman Juker v Kishone Pandurang Mantry,* (2001) 5 SCC 1, para 11.
713. *Ajit Kumar Roy v Satya Bala Dutt,* AIR 1973 Cal 339 : 78 Cal WN 19.
714. *Abdulahed Moulvi Abdulsamad v Gulamahmed Gulamnabi Bardoliwala,* AIR 1975 Guj 1. See however, *Praveen Kumar v VII Addl District Judge, Meerut,* AIR 1994 All 153, p 156 : 1994 Civil CC 649.
715. *Ganga Pershad v Tribeni Devi,* AIR 1976 Del 145.
716. *Ramesh Chand Bose v Gopeshwar Pd Sharma,* AIR 1977 All 38.
717. *Budha v Bedariya,* AIR 1981 MP 76.

could not contest its validity in the litigation.[718] A notice of terminating tenancy received by the tenant also in his capacity as a general power of attorney of other tenants was held to be service on all tenants.[719] There is no statutory pre-condition of service of a notice on an unauthorised occupant before bringing a suit for recovery of possession against him.[720]

(21) Acceptance of Defective Notice

A notice to quit, even if it is defective, can be accepted by the landlord. After such acceptance, the tenant will be estopped from challenging its validity.[721] This defective notice of termination of the lease would terminate the tenancy if accepted by the lessor, and the lessee is estopped from denying its validity on the ground that it was not a notice expiring with the month of tenancy,[722] or that the notice is invalid, and cannot be relied upon by the landlord as a ground for eviction. The Bombay High Court has however held that if the notice is invalid, it does not terminate the tenancy and the landlord, on discovering this invalidity on the allegations made in the defendant's statement, can withdraw the suit and file a suit without permission of the court.[723] In *Calcutta Credit Corp v Happy Homes,*[724] the Supreme Court considered the validity of a notice to quit accepted and acted upon by the lessor even though it was defective. Justice Shah (as he then was) held that a notice not in compliance with section 106 because it does not expire at the end of the period of the lease, or was of a shorter duration than that prescribed, may be accepted by the other party; and, if it is so accepted and acted upon, the party serving the notice will be estopped from denying its validity. It is submitted that the same principle would apply if the recipient of the notice, having accepted and acted upon a defective notice seeks to contend that it is invalid, provided, of course, that the party serving the notice can show that he acted upon such notice, and materially altered his position to his prejudice. A notice under section 106 can be waived by the tenant,[725] but the plea of want of notice cannot be raised at a late stage of the litigation, and the failure to raise the objection at an early stage would mean that the notice has been waived by the tenant.[726]

(22) Service of Notice

Notice to quit may be served

(1) personally; or

(2) by post; or

(3) at the residence; or

(4) in the last resort by being affixed to the property demised.

Personal service

Personal service may be on the agent of the party if duly authorized, such as an officer of a corporation, or the solicitor of the party.[727] If served on a duly authorized agent it is

718. *H C Gupta v K V Ramana Rao,* AIR 1985 AP 193.
719. *Abdul Sattar v Rameshwar,* AIR 1992 SC 2065, p 2066.
720. *Krishna Prakash v Dilip Harel Mitra Chenoy,* AIR 2002 Del 81, para 25 : (2001) 93 DLT 777.
721. *Dipak Kumar Ghosh v Mira Sen,* AIR 1987 SC 759 : (1987) 1 SCC 562.
722. *Sibendra Nath Kanjilal v Ganes Chandra Basu,* AIR 1985 Cal 269, p 272 : 89 CWN 608; See also *Mozam Shaikh v Ananda Prasad Bhadra,* AIR 1942 Cal 341.
723. *P Ratnam v Vimalchandra,* AIR 1973 Bom 111 : 1973 MhLJ 72.
724. *Calcutta Credit Corp v Happy Homes,* [1968] 2 SCR 20 : AIR 1968 SC 471 : [1968] 2 SCJ 291 : [1968] 1 SCA 319.
725. *Bhagat Singh v Delhi Development Authority,* AIR 1988 Del, 174, p 176.
726. *Ram Pratap v Biria Cotton Spinning and Weaving Mills Ltd,* AIR 1973 Del 124 : (1972) 8 DLT 351 : 1972 RLR 37.
727. *Bhojabhai v Haymen Samuel,* (1898) ILR 22 Bom 754.

immaterial that the agent does not communicate it to the party.[728] If a notice to quit is sought to be delivered personally to the tenant but, the tenant refuses to accept the same, it is nevertheless valid service.[729] It is not necessary that the notice should be served by delivery to a member of the tenant's family, or by affixation.[730] Where the tenant evades the receipt of notice and hence the landlord sent the notice through speed post at the correct address, but the same was returned as not claimed, it would amount to service of notice.[731] Service on one joint tenant is prima facie evidence that it has reached the other joint tenant.[732] In a Calcutta case,[733] the court seemed to think that the express provisions of this section superseded this presumption, and that it is necessary in order to bind even a joint tenant that the notice must be addressed to and served on him in one of the ways mentioned in the second clause of that section.Howerver, this was dissented from in a later case,[734] following a dictum of the Judicial Committee in *Harihar Banerji v Ramsashi Roy.*[735]

Service by post

Service by post is a form of personal service which is expressly authorised by the amending Act 20 of 1929. The posting in due course of a letter raises a presumption that it has reached the addressee—section 114 illustration (f) of the Indian Evidence Act. Accordingly, the posting of a notice to quit raises a presumption of service. This was so held in cases[736] before the amendment of the section. Section 27 of the General Clauses Act, 1897 enacts that, unless the contrary is proved, service shall be deemed to have been effected by properly addressing, preparing and posting by registered post, a letter containing the notice. Service may also be proved by proof of posting, and the production in court of the envelope with the endorsement of the postal officer stating the refusal of the addressee to receive the letter.[737] If the letter has been delivered, it does not matter if postal receipt is signed by anyone other than the addressee.[738] In an Allahabad case,[739] notice was sent by post and left at the defendant's shop which was the subject of the demise, but not at his residence. This was not a valid service, for the letter did not reach the addressee.[740] But it has been held that if posted to the correct address, it is valid and need not be sent to the residence of the tenant.[741]

The words "sent by post" in section 106 do not mean sent by registered post alone, nor does section 27 of the General Clauses Act, 1897 provide that if the ejectment notice is sent

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728. *Harihar Banerji v Ramsashi Roy,* (1919) ILR 46 Cal 458 : 45 IA 222 : 48 IC 277.
729. *Paritosh Bhowmick v Nandadulal Kar alias Goswami,* AIR 2012 (NOC) 192 (Cal).
730. *Thakur Chandra Nandi v Arun Kumar,* AIR 1986 Cal 249.
731. *K Sajjan Raj v Gopi Setty Chandra Mouli,* AIR 2011 (NOC) 411 (AP).
732. *Rajoni Bibi v Hafisonnissa,* (1900) 4 Cal WN 572; *Harihar Banerji v Ramashashi Roy,* 48 IC 277.
733. *Bejoy Chand v Kali Prasanna,* (1925) 29 Cal WN 620, p 623 : 87 IC 708 : AIR 1925 Cal 752.
734. *Bodordoja v Ajijuddin,* (1930) ILR 57 Cal 10 : 20 IC 455 : AIR 1929 Cal 651.
735. *Harihar Banerji v Ramsashi Roy,* (1919) ILR 46 Cal 458 : 45 IA 222 : 48 IC 277 : AIR 1918 PC 102.
736. *Jogendro v Dwarka Nath,* (1888) ILR 15 Cal 681; *Lootf Ali v Pearee Mohun,* (1871) 16 WR 223; *Rajoni Bihi v Hafisonnissa,* (1900) 4 Cal WN 572; *Ismail Khan v Kali Krishna,* (1902) 6 Cal WN 134, p 137; *Subadini v Durga Charan,* (1901) ILR 28 Cal 118; *Gobinda Chandra v Dwarka Nath,* (1915) 20 Cal LJ 455 : 26 IC 962; *Harihar Banerji v Ramsashi Roy,* 45 IA 222 : 48 IC 277.
737. *Paritosh Bhowmick v Nandadulal Kar alias Goswami,* AIR 2012 (NOC) 192 (Cal); *Jogendra v Dwarka Nath,* (1888) ILR 15 Cal 681; *Durga Nath v Rajendra Narain,* (1913) 17 Cal WN 1073 : 20 IC 363; *Girish Chandra v Kishore,* (1919) 23 Cal WN 319 : 54 IC 5; *Sushil Kumar v Ganesh Chandra,* (1957) 62 Cal WN 193 : AIR 1958 Cal 251; *Saibalini v Snehlata,* (1960) 65 Cal WN 690; *Chanda Bahu v Chaugani Ram,* (1963) All LJ 25 : AIR 1963 All 250; *Sri Nath v Saraswati Devi,* AIR 1904 All 52; *Punun Mal v Durga Singh,* AIR 1967 J & K 141; *Amina Khatoon v Johra Bibi,* AIR 1971 All 372. See *Jankiram v Damodhar,* AIR 1956 Nag 266; Contra, *Vaman v Khanderao,* (1935) 37 Bom LR 376 : 156 IC 1020 : AIR 1935 Bom 247.
738. *Harihar Banerji v Ramsashi Roy,* 45 IA 222 : 48 IC 277.
739. *Gokul Chand v Shib Charan,* (1912) 9 All LJ 574 : 13 IC 59.
740. *Chandmal v Bachraj,* (1883) ILR 7 Bom 474.
741. *Sukumar v Naresh Chandra,* AIR 1968 Cal 49.

by post, it must be sent by registered post alone. To a notice sent by ordinary post, the presumption under section 27 of the General Clauses Act does not apply, but the presumption under section 114 of the Indian Evidence Act, 1872 would apply, though the court would be at liberty to see if the presumption has been rebutted on the facts.[742] Even a notice posted by ordinary post would raise a presumption under section 114 of the Evidence Act;[743] this presumption is rebuttable, but is not rebutted by a mere denial of receipt,[744] especially, when the similar notices sent on earlier occasions on the same address were admittedly received.[745] Similarly, where a notice is posted by registered mail, due service would be presumed, or a notice terminating the tenancy sent by "Registered AD Post" at the correct address of the tenant, if received by somebody else other than the tenant himself, is still deemed to be duly served on the tenant[746] even if the postman who made the endorsement is not examined.[747] The presumption of service of notice cannot be raised, if the postal receipt does not contain the full address of the tenant.[748] When the notice was issued specifying properly the door number of the suit premises without proper specification of boundaries, the notice would not be bad for want of proper description of property.[749] In *Mumtaz Khan v Bhanwar Lal,*[750] the landlord sent a notice dated 10 November 2003 by registered AD post to the tenant terminating the lease under section 106 of the Transfer of Property Act with effect from 1 December 2003 but the said notice returned back with the postal remark that said "unclaimed". The court held that mere tender of notice at his given address was thus sufficient to presume the "receipt" of the same or service of the same on the tenant. In a termination of tenancy by servicing notice, the landlord adopted various modes of services for effecting service of notice, ie, certificate of posting and by registered post, the tenant did not deny service of eviction notice neither in pleading nor in defence, the service of notice would be deemed to be valid and sufficient on account of failure of the tenant to prove that the notice was not duly served on him.[751] Where the notice was sent by speed post demanding payment of rent and house tax and the residential address of the tenant was not in dispute, this notice was re-directed to the place of business of tenant from residential address it was held that the virtue of speed post is no less than a notice send by registered post, and the plea of the tenant that there was no service would not be accepted.[752]

The presumption of service of a letter sent by registered post can be rebutted by the addressee, by appearing as witness and stating that he never received such letter, and that the acknowledgement due does not bear his signature, or by his statement on oath that the postman never came to him with a notice, nor did he refuse to accept it,[753] if such statement of the addressee is believed, the burden would then shift on the plaintiff to satisfy the court of the service of such letter, by leading evidence in the court of law. The court in facts and circumstances of a case, may not consider such denial by the addressee as truthful, and in that case denial alone would not be sufficient to rebut the presumption. But, if there is

742. *Jitendra Nath v Bijoy Lal Das,* AIR 1976 Cal 476.
743. *Sushil Kumar v Ganesh Chandra,* (1958) 62 Cal WN 193 : AIR 1958 Cal 251; *Sukumar v Naresh Chandra,* AIR 1968 Cal 49; *Achamma Thomas v E R Fairman,* AIR 1970 Mys 77; *Fitter Peera Saheb v Balachamira Rao,* AIR 1972 Mys 14.
744. *Sushil Kumar v Ganesh Chandra,* (1958) 62 Cal WN 193 : AIR 1958 Cal 251; *Sukumar v Naresh Chandra,* AIR 1968 Cal 49.
745. *Green View Radio Service v Laxmibai Ramji,* AIR 1990 SC 2156, p 2158 : (1992) 4 SCC 497, p 500.
746. *Interocean Shipping v Lt Col YR Puri,* (1991) 45 DLT 221.
747. *Gange Ram v Phulwati,* (1970) All LJ 336 : AIR 1970 All 448.
748. *United Commercial Bank v Bhimsain Makkija,* (1994) 1 RCR 479.
749. *Shanmugam v Henna,* AIR 2011 Mad 177 : (2011) 1 LW 929.
750. *Mumtaz Khan v Bhanwar Lal,* 2015 (3) CDR 1329 (Raj) : LNIND 2015 RAJ 198.
751. *Biswanath Karmakar v Ramakrishna Ghosh,* AIR 2017 (NOC) 888 (Cal).
752. *Jaswant Kaur v Additional District Judge Court no 1, Faizabad,* AIR 2018 (NOC) 92 (All).
753. *Shiv Dutt Singh v Ram Dass,* AIR 1980 All 280.

nothing to disbelieve the statement of the addressee, then it would be a sufficient rebuttal of presumption of service of such a letter or notice, sent to him by registered post.[754] Where it was found that registered notice sent to the office of the tenant was never returned and another registered notice sent to the residence was returned with the endorsement "refused", it was held that notice was duly served.[755] Similarly, if it is proved that the plaintiff sent three notices by registered post, and there was no rebuttal on behalf of the defendant company who was the tenant, as regards the notice served on the company, the service of notice would be presumed.[756] Where the postman went to the tenant's house with a registered notice, but was informed by the tenant's brother that the tenant was out of station and the brother refused to supply the address of the tenant and an endorsement of "refusal" was made by the postman, it was held that the endorsement was wholly illegal, as there was no tender of the service of the notice to the tenant himself. In the absence of a tender, it is illegal to hold that the notice had been "refused" by the tenant. There was, therefore, no service of the notice on the tenant under section 106.[757] The Supreme Court, however, has upheld a finding that a notice received by a younger brother of the tenant, who used to sit in the demised shop, was validly served.[758] Similarly, where the notice sent by registered post was tendered to the addressee and, at his request, it was delivered to his son, and it was accepted by the son, the service was good and sufficient.[759]

A registered letter was sent to the tenant at his correct address, but the letter was returned with the endorsement "not found". Having regard to the facts, it was held that the tenant had notice of the proceedings,[760] but not where it came back with an endorsement "not present".[761]

The question whether the presumption of service under section 114 of the Indian Evidence Act, 1872 or under section 27 of General Clauses Act, 1897, is rebutted or not, is always a question of fact and the court should decide having regard to all the surrounding circumstances, and the conduct of the parties concerned. A quit notice was sent by a registered post, and the tenant in his written statement, did not dispute the service of notice on him, and stated that the notice sent by the landlord was fictitious and without any basis, and did not satisfy the requirement of section 106. It was held that under the circumstances, half-hearted denial of service of notice by tenant was not sufficient to displace the onus to rebut the presumption of service.[762]

It has been held that the evidence regarding refusal of notice must be very clear and convincing having regard to the drastic consequences of deemed service of notice on the lessee. Thus, a notice sent under certificate of posting, though presumed to have reached the tenant, was held not to be a legal and valid service as contemplated by section 12(2) of the Bombay Rent Act, read with section 106 of the TP Act and section 27 of the General Clauses Act.[763] Where the statute does not specify additional or alternative mode of service beyond postal service, there can be no warrant for importing into the statute, a method of service on the lines of the provisions of the Code of Civil Procedure. A notice sent through

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754. *Green View Radio Service v Laxmibai Ramji,* AIR 1990 SC 2156, p 2157 : (1992) 4 SCC 497, p 500; *Kulkarni Pattern Pvt Ltd v Vasant Baburao Ashtekar,* AIR 1992 SC 1097.
755. *Sushil Sharma v 13th Additional District Judge, Gaziabad,* AIR 2000 All 249 : (2000) 2 AWC 1408.
756. *Kulkarni Patterns Pvt Ltd v Vansant Baburao Ashtekar,* (1992) 2 SCC 46, p 50 : AIR 1992 SC 1092.
757. *Shamim Ahmad Ali v Azizul Rahman Khan,* AIR 1974 All 354.
758. *Rameshwar Lal v Raghunath Das,* (1990) 4 SCC 729, p 730.
759. *Permanand v Anandi Bai,* AIR 1974 Raj 65.
760. *AEK Kaliappa Nadar v SVKR Amirthavalavandammal,* AIR 1973 Mad 255 : (1973) 1 Mad LJ 126.
761. *Ramanand v Mulakh Raj,* AIR 2010 (NOC) 921 (P&H).
762. *Sushila Devi v Manohar Lal,* AIR 1985 All 178.
763. *Oza Kumbhar Naran Ala v Meta Nanalal Jethabhai,* AIR 1988 Guj 5; *Mahant Madhavrajji v Ambalal Nagarji Naik,* (1985) Guj LR 361.

registered post was returned undelivered. Immediately thereafter, the landlord caused a copy of the notice to be affixed to one of the doors of the demised premises in the presence of two inhabitants of the locality. It was held that such a "substituted" service is not a necessary or permissible requirement of the statute. It would, at the most, show the landlord's bona fides. Therefore, it must be held that the landlord has complied with the statutory requirements if he sends a notice correctly addressed to the tenant by registered post.[764] Where a notice by registered post is returned with endorsement "refused" it is not always necessary to examine the Postman who tried to effect the service. A bald statement that registered letter was not tendered to him without any material evidence in support would not be sufficient to rebut the presumption of law regarding service of letter. When there is no evidence to rebut presumption of service of notice, the notice was valid and presumed to be served.[765] In another case, quit notice was served by registered post with acknowledgment due which was returned after seven days with endorsement "not claimed". Endorsement "not claimed" to be treated as due service as the tenant and his daughter worked at the post office and it was difficult to believe that the said notice had escaped their attention.[766]

Publication in newspaper

Publication of a notice in a local newspaper is not sufficient service.[767]

Telegraphic notice

Section 106 does not contemplate a telegraphic notice. Under section 106, the notice must be "signed" by the landlord or his agent, and it is that notice which must reach the tenant. In the case of a telegraphic notice, it is true that when it was tendered to the telegraphic office, the telegram must have contained the landlord's signature. But the copy which the tenant receives would not contain his signature. The name of the sender is only typewritten in the telegraphic notice. Hence, a telegraphic notice is not a valid notice under the section.[768]

Service at residence

Service at residence is effected by delivery to a servant or a member of the other party's family. Under the section, such service is equivalent to service on the party himself. The words "or to one of his family or servants at his residence", provide an alternative mode of service, and not one available only if personal service is impossible.[769] Merely leaving notice at the tenant's residence without delivery to his wife or servant is not sufficient;[770] nor delivery to the wife at a place where she did not reside with her husband.[771]

Affixing to the property

Service of notice under section 106 by the affixation of a copy of the notice to a conspicuous part of the property let out, is permissible, only if tender or delivery of such notice personally to the tenant (or to one of his family members or servants at this residence) is not practicable. This is the last resort if the other modes of service fail, and this form of service is invalid if personal

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764. *Madan & Co v Wazir Jaivir Chand,* AIR 1989 SC 630; *A Govindraj Goud v Vikranthi & Co,* AIR 2004 AP 395 : (2004) 3 ALD 95.
765. *Vandana Gulati v Gurmeet Singh alias Mangal Singh,* AIR 2013 All 69 : 2013 (2) ADJ 281 : 2013 (2) ALJ 628. : 2013 (96) ALR 896 : 2013 2 AWC 1143 All : 2013 119 RD 789.
766. *Radha Kishan v Smt Radha Devi,* AIR 2014 (NOC) 587 (Raj).
767. *Kedar Nath v Madhu Sudan,* (1923) 37 Cal LJ 478, p 480 : 75 IC 105 : AIR 1923 Cal 682.
768. *Gnanamuthu v Most Rev Justin Diraviam,* (1976) 1 Mad LJ 358; *Maduri Satyanarayana v Singamsetti Veerabhadraswamy,* AIR 1990 AP 169, p 170.
769. *Doe d Neville v Dunbar,* (1826) Moore H 10; *Liddy v Kennedy,* (1871) LR 5 HL 134; *Tanham v Nicholson,* (1872) LR 5 HL 561.
770. *Doe d Blair v Street,* (1834) 2 Ad El 328.
771. *Biseswar Roy v Pitambernath,* 51 IC 44; *Guanmal v Kanwar Lal,* AIR 1971 Raj 273.

service or service at the residence is not shown to have been impossible.[772] Thus, where the tenant went out of India without a separate residential address, and service of the notice personally upon her, or one of her servants or relatives at her residence, was neither possible or practicable, it was held that service by affixation at the disputed premises was justifiable.[773]

In a suit for ejectment on the ground of the rent having fallen into arrears, the trial court held that the notice under section 106 had been validly served on the tenant, by affixing a copy of the notice to a conspicuous part of the property let out. However, there was no finding of the trial court that the tender or delivery of notice personally to the tenant (or to one of his family members or servants at his residence) was not practicable. It was held that the notice terminating the tenancy could not be said to have been validly served on the tenant. In the absence of a valid notice terminating the tenancy served on the tenant, the decree for ejectment (and also for mesne profits) could not be sustained.[774]

(23) Applicability of Rent Acts

So long as the provisions of rent control Acts are not made applicable to a particular area, the rights and obligations of the landlord and tenant are to be governed by the provisions of the TP Act. In case the proceedings for eviction are initiated by filing a suit before the civil court before the provisions of the rent control Act become applicable to the suit premises, then the provisions of the Rent Act will have no application to such pending eviction proceedings.[775] Thus, eviction can be sought just by delivering a notice under section 106 of the TP Act, even if the lessee pays rent with utmost promptitude as default in payment of rent is a ground for eviction under the Rent Control legislations.[776]

In the state of Sikkim, the relationship of landlord and tenant is governed by the provisions of rules of 1949 and the requirement of notice is prescribed under it, therefore the issuance notice under section 106 of the TPA is not necessary.[777] Where the content of the lease deed revealed that purpose of creation of tenancy was for residential purpose and the premises were situated within the Kolkata Municipal Corporation, the tenancy would be governed by the provisions of the TPA and not by the West Bengal Premises Tenancy Act, 1997.[778]

The issue which arises for consideration is whether eviction can be sought on the ground of personal necessity set out in the rent control Acts to a subsisting fixed-term lease. A Full Bench Karnataka High Court in *Sri Ramakrishna Theatres Ltd v General Investments and Commercial Corporation Limited*[779] had held that a landlord is not entitled to an order of eviction for reasons enumerated under section 21 of the Karnataka Rent Control Act, 1961 in case of a fixed-term lease where the lease has not expired on the date on which the application for eviction was filed. Subequently, another Full Bench of the Karnataka High Court, in *Bombay Tyres International Ltd v K S Prakash*[780] in view of the decision of the Supreme Court in *Shri Lakshmi Venkateshwara Enterprises (P) Ltd v Syeda Vajhiunnissa*

772. *C F Seaward v Drew,* (1898) 67 LJ (QB) 322.
773. *J McSaffin v LIC,* AIR 1978 Cal 123; *D Ennis v Calcutta Vyapar Pratisthan Ltd,* AIR 1991 Cal 152, p 158.
774. *Chhedi Lal v Munnu Sardar,* AIR 1983 All 274.
775. *Nandlal v Motilal,* (1977) 3 SCC 500; *Mansoor Khan v Motiram Harebhan Kharat,* (2002) 5 SCC 462 : AIR 2002 SC 2396.
776. *Taste Hotels Pvt Ltd v Medisetty Jayasri & ano,* AIR 2012 AP 4 : (2011) 5 ALD 508.
777. *Ram Narayan Prasad v Benu Kumar Mukhia,* AIR 2018 Sikkim 5 : 2017 (2) RCR (Rent) 68.
778. *Jaswant Kaur v Additional District Judge Court no 1, Faizabad,* AIR 2018 (NOC) 92 (All).
779. *Sri Ramakrishna Theatres Ltd v General Investments and Commercial Corporation Limited,* AIR 1993 Kant 90 : (1992) 2 Kar LJ 158.
780. *Bombay Tyres International Ltd v K S Prakash,* (1994) 2 SCC 671 : (1994) 1 SCALE 789.

Begum[781] declared the decision in *Sri Ramakrishna Theatres Ltd* as no longer good law. The Supreme Court has now in *Laxmidas Bapudas Darbar v Rudravva*[782] while overruling *Shri Lakshmi Venkateshwara Enterprises* and *Bombay Tyres* and approving *Shri Ramakrishna Theatres* has laid down the following propositions:[783]

(i) On expiry of period of the fixed-term lease, the tenant would be liable for eviction only on the ground enumerated in clauses (a) to (p) of sub-section (1) of section 21 of the Karnataka Rent Control Act.

(ii) Any ground contained in the agreement of lease other than or in addition to the grounds enumerated in clauses (a) to (p) of sub-section (1) of section 21 of the Karnataka Rent Control Act shall be inoperative.

(iii) Proceedings for eviction of a tenant under a fixed-term contractual lease can be initiated during subsistence or currency of the lease only on a ground as may be enumerated in clauses (a) to (p) of sub-section (1) of section 21 of the Karnataka Rent Control Act, and it is also provided as one of the grounds for forfeiture of the lease rights in the lease deed, not otherwise.

(iv) The period of fixed-term lease is ensured and remains protected except in the cases indicated in the preceding paragraph.

Institutions, like trusts, which are exempted from the provisions of rent control legislations can file suits for evictions directly under section 106 after terminating the tenancy in the manner provided therein.[784] The Supreme Court in *Bhatia Cooperative Housing Society Ltd v D C Patel*[785] has held that exemption under rent control legislations is not conferred on the relationship of landlord and tenant, but on the premises itself making it immune from the operation of the Act. Following the Supreme Court decision, the Madhya Pradesh High Court[786] has held that immunity from operation of the Madhya Pradesh Accommodation Control Act, 1961 is in respect of the premises, and not with respect to the parties. If a tenant in municipal premises, lets out the premises to another, a suit by the tenant for ejectment of his tenant and arrears of rent would not be governed by the said Act as the premises are exempt under section 3(i)(b) of the Act, though the suit is not between the municipality as landlord and against its tenant. This view has been affirmed by the Supreme Court in *Parwati Bai v Radhika.*[787] The same court earlier, in *Lal Chand v District Judge, Agra*[788] held that in case of reconstruction of a building, it is exempted from the provisions of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Control Act, 1972 for a period of 10 years as mentioned in section 2(2) of the said Act and hence, suit for eviction can be filed after giving a notice under section 106.

(24) Applicability to Sick Industrial Undertakings

Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 inter alia provides that notwithstanding any other law, no suit for recovery of money shall lie or proceeded with except with the consent of the Board, but the filing of an eviction petition on

781. *Shri Lakshmi Venkateshwara Enterprises (P) Ltd v Syeda Vajhiunnissa Begum,* AIR 1997 Kant 311 : (1997) 2 Kar LJ 1.
782. *Laxmidas Bapudas Darbar v Rudravva,* (2001) 7 SCC 409.
783. Ibid, para 18.
784. *Betibai v Nathooram,* (1999) 6 SCC 368.
785. *Bhatia Cooperative Housing Society Ltd v D C Patel,* AIR 1953 SC 16 : [1953] 4 SCR 185.
786. *Radheylal Somsingh v Ratansingh Kishansingh,* 1977 MP LJ 335.
787. *Parwati Bai v Radhika,* AIR 2003 SC 3995 : (2003) 5 JT 34.
788. *Lal Chand v District Judge, Agra,* (1999) 8 SCC 351 : AIR 2000 SC 141; *Om Prakash Gupta v Dig Vijendrapal Gupta,* (1982) 2 SCC 61 : AIR 1982 SC 1230; *Ramesh Chandra v Additional District Judge,* (1992) 1 SCC 751 : AIR 1992 SC 1106.

ground of non-payment of rent cannot be regarded as filing of a suit for recovery of money. If a tenant does not pay the rent, then the protection which is given by the rent control Act against his eviction is taken away and with the non-payment of rent, order of eviction may be passed. It may be possible that in view of the provisions of section 22, the trial court may not be in a position to pass a decree for the payment of rent, but when an application under section 11(4) is filed, the trial court in effect has given an opportunity to the tenant to pay the rent, failing which the consequences provided for in the sub-section would follow. An application under section 11(4), or under any other similar provision cannot be regarded as being akin to a suit for recovery of money.[789]

(25) Special Legislation

The effect of this section as of section 108(q) and section 111, has been for all practical purposes superseded by special legislation in certain places to give protection to tenants against enhancement of rent and eviction.

The provisions of section 106 of TP Act, being a part of general law, may be invoked to the extent, not in conflict with a provision in a special law such as West Bengal Premises Tenancy Act, 1956.[790] The general principles under the Act are not applicable when there are statutory provisions under the special enactment for acquiring rights in the forest land. The general principles under the TP Act, cannot apply in view of the language of section 22 of the Forest Act.[791]

(26) Objection as to Validity of Notice

An objection as to validity or infirmity of notice under section 106 should be raised specifically and at the earliest, else it will be deemed to have been waived even if there exists one. On facts, it was held that the notice does not suffer from any infirmity since the receipt of notice has been admitted in the written statement, and no objection as to its validity has been raised.[792] Where two valid notices were issued by the landlord for eviction, the tenant cannot refute eviction on the ground that landlord did not have exclusive title over the property, more so after admittance of the tenancy.[793] Where the plea of want of notice under section 106 was raised four years after the parties had proceeded to trial and led evidence on the basis that no such notice was required, it was held that notice must be deemed to have been waived.[794] Where no objection was taken in the written statement and no issue was framed in the trial court, the objection as to validity of notice was not permitted to be taken for the first time in the appellate court,[795] or even at the stage of arguments.[796] Prior to ascertaining the validity of a notice, the court has to ascertain whether section 106 is at all applicable.[797] Service of notice under section 106 is not necessary in cases of lease of fixed duration since the tenancy expires by efflux of time, and in such cases mere denial of receipt of notice would not help the tenant.[798] If a specific and definite time period is fixed as the

789. *Gujarat Steel Tube Co Ltd v Virchandbhai B Shah,* (1999) 8 SCC 11, para 9, following *Shree Chamundi Mopeds Ltd v Church of South India Trust Association,* (1992) 3 SCC 1.
790. *D Ennis v Calcutta Vyapar Pratisthan Ltd,* AIR 1991 Cal 152, p 156.
791. *Ahikutly Paul v State,* AIR 1995 Kerala 291.
792. *Parwati Bai v Radhika,* AIR 2003 SC 3995 : (2003) 12 SCC 551.
793. *Musaraf Hussain v Hazara Bibi,* AIR 2012 (NOC) 42 (Ori).
794. *Ram Pratap v Birla Cotton Spinning & Weaving Mills Limited,* AIR 1973 Del 124.
795. *Yelamarti Veera Venkata Jagannadha Gupta v Vejju Venkateswara Rao,* (2002) 4 Andh LT 448, p 451 : 2002 AIHC 3498.
796. *Kadavandi Krishna Chari v Diocese of Guntue Society, RCM,* AIR 2003 AP 340, para 9.
797. *Shanti Devi v Amal Kumar Banerjee,* (1981) 2 SCC 199 : AIR 1981 SC 1550.
798. *Rajiv Saluja v Bhartia Industries Ltd,* AIR 2003 Del 142, p 145; *Champakalata Mohanty v Amaranjan Mohapatra,* AIR 2011 Ori 136.

term of the lease, the lease would automatically come to an end by efflux of time limited thereby as provided under section 111(a) and no notice is required to determine such a lease. After expiration of term fixed by the lease, a lessee continuing in possession in absence of an assent by lessor will only be a tenant by sufferance and can be sued for ejectment at any time without any previous notice or demand of possession, as being a trespasser and not as a tenant holding over.[799] Where the notice to quit made a reference to section 106 and section 111(g), but if the substance was looked into, the appropriate section cited should have been section 111(h) instead of section 111(g), the mention of an incorrect provision would not exclude the jurisdiction of the Rent Tribunal and the notice would be deemed to be valid.[800] Similarly, where the lessor issued a notice specifying the date of determination of lease and to vacate the property, the plea of the lessee that alternative case could not be made out in a single notice would not be tenable more specifically as the second part of the notice had mentioned that the lease is not determined by efflux of time.[801]

(27) Alternative Pleas

It is open to the landlord to sue the tenant on alternative pleas.[802]

(28) Suppression of Decree

Where in the execution proceedings in a decree for eviction, the tenant pleaded that he had delivered the possession to the attorney of the landlord who permitted him to continue in possession as a licensee, the decree for eviction could not be said to be superseded by such an agreement, since the decree for eviction was passed against the tenant in his capacity as tenant of the premises in question, and he could have, if at all, avoided that decree only by getting a fresh lease of that premises, and not as a licensee which cannot have the effect of avoiding, superseding or substituting the decree.[803]

(29) Arbitration clause

If lease agreement having ended and there being no fresh agreement thereafter, arbitration clause contained in it shall not be held to operate as a bar to suit. In *Master Pieces Furniture Pvt Ltd v K Lakshma Reddy*,[804] it was held that the dispute in suit was not covered by arbitration clause in lease agreements as those lease agreement themselves did not survive.

(30) Position of person holding on to possession after notice under section 106

When a tenant failed to exercise his right to get the renewal of lease in respect of the demised premises, the determination of tenancy of the demised premises under section 106 is perfectly legal and valid. After termination of the tenancy, if he continued in possession of the property as a tenant of holding over, his status is that of a trespasser and not as tenant, and he becomes liable to pay mesne profits by way of damages.[805]

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799. *Champakalata Mohanty v Amaranjan Mohapatra*, AIR 2011 Ori 136.
800. *National Textiles Corporation (DP&R) Ltd v Rent Control Appellate Tribunal, Jaipur*, AIR 2011 (NOC)374 (Raj).
801. *Hoare Miller & Co Ltd v Bank of India*, AIR 2011 Cal 239.
802. *Pratap Narain v Juggi Lal Kamlapat Iron & Steel Co*, AIR 1975 All 73.
803. *Sultana Begum v Premchand Jain*, AIR 1997 SC 1006.
804. *Master Pieces Furniture Pvt Ltd v K Lakshma Reddy*, AIR 2014 AP 56 : 2014 (1) ALD 375 : 2014 (1) ALT 773.
805. *Ram Bharosey Lal Gupta (D) by LRs v Hindustan Petroleum Corp Ltd*, 2013 (9) SCC 714 : JT 2013 (6) SC 542 : 2014 (1) MhLj 617 : 2014 (1) MPLJ 257 : 2013 (6) SCALE 232.

[806]**107. Leases how made.**—A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

[807][All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

[808][Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:]

Provided that the State Government may [809][***] from time to time, by notification in the Official Gazette, direct that lease of immovable property, other than leases from year to year or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]

Synopsis

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(1) Amendments

The second paragraph of the section was substituted for the original by the amending Act 6 of 1904. The original paragraph was "All other leases of immovable property may be made either by instrument or by oral agreement." That Act which made registration compulsory, came into effect on 11 March 1904.

The third paragraph was inserted by the amending Act 20 of 1929.

(2) Creation of Leases

Section 107 prescribes the procedure for execution of a lease between the parties. Under the first paragraph of this section, a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent, can be made only by registered instrument, and remaining classes of leases are governed by the second paragraph, ie, all other leases of

806. As to limitation to the territorial operation of section 107, *see* section 1, *supra*, section 107 extends to every cantonment—*see* section 287 of the Cantonments Act, 1924 (2 of 1924).
807. Subs. by Act 6 of 1904, sec. 5, for the original paragraph.
808. Ins. by Act 20 of 1929, sec. 55.
809. The words "with the previous sanction of the Governor General in Council" omitted by the A.O. 1937.

immovable property can be made either by registered instrument, or by oral agreement accompanied by delivery of possession.[810]

The section enacts the mode in which leases may be made, and for that purpose divides them into two classes:

A.—Leases from year to year,

Leases for a term exceeding a year,

Leases reserving a yearly rent.

B.—Other leases, ie, generally from month to month or for a term of a year or less than a year.

Leases in class A can only be made by registered instrument.[811] Leases in class B may be made either by registered instrument, or by oral agreement accompanied by delivery of possession. This section does not apply to an agreement for lease. It is sufficient if it is signed by the lessee only.[812]

The Registration Acts of 1877 and 1908 make the same division, the registration of leases in class A being compulsory—section 17(l)(d)—and the registration of leases in class B being optional.

All leases not covered by section 107, first paragraph, may be made either by oral agreement on delivery of possession, or by registered document. A lease, the registration whereof is not compulsory under section 17(l)(d) of the Registration Act, becomes compulsorily registrable if reduced into writing by virtue of the second paragraph of section 107 read with section 4(2) of the Act.[813] A lease for a period of one year falls within the expression "all other leases" in section 107, and can be entered into by oral agreement, accompanied by delivery of possession.[814]

Barring the proviso which enables the state government to relax the conditions, the above section consists of three paragraphs. The second paragraph contains an exception to the first paragraph. The wording of the first paragraph shows that it is mandatory that if a lease is to be created for any term exceeding one year, it can be made "only by a registered instrument". If the instrument is not registered, the corollary is that no lease exceeding one year is created at all. Such an instrument, if not registered, cannot be admitted as evidence in view of section 17 of the Registration Act, either for proving the terms of the lease, or otherwise.

As for the third paragraph of section 107 of the TP Act, the only requirement is that execution of the lease through a registered instrument shall be a joint endeavour of both lessor and lessee. The said paragraph in the section was introduced by the Transfer of Property (Amendment) Act, 1929. The reason for introducing the aforesaid paragraph in the said section was to settle the conflict of opinion expressed by different High Courts regarding the validity of a lease made through a rent note signed by the lessee alone. The Allahabad High Court has held the view that a lease can be created only by an instrument signed by both the lessor and the lessee, while Madras High Court took a contrary view. Both views received approval by different High Courts. In the light of the said conflict, the legislature thought it fit to resolve it by introducing the third paragraph in this section. A close reading

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810. *Samir Mukherjee v Davinder K Bajaj,* (2001) 5 SCC 259 : AIR 2001 SC 1696.
811. *Janki Devi Bhagat Trust Agra v Ram Swarup Jain,* (1995) 5 SCC 314 : AIR 1995 SC 2482; *V Murlidhar v S Anjaiab Goud,* AIR 2007 AP 347 : (2007) 5 ALD 559 : (2007) 6 ALT 779; *Bandu Machinery Pvt Ltd v Om Prakash Sikka,* AIR 2009 Del 33 : (2008) 105 DRJ 267.
812. *Radhabai v Nayadu,* (1950) ILR Nag 799 : AIR 1951 Nag 285.
813. *Sardar Amar Singh v Surinder Kaur,* AIR 1975 MP 230.
814. *Gordhan v Ali Bux,* AIR 1981 Raj 206.

of the third paragraph indicates that there is no stipulation that the instrument must be signed by both parties. The requirement is that when the lease is made by a registered instrument, "such instrument shall be executed by both the lessor and the lessee." What is underlined in it, is that the creation of a lease is not a unilateral exercise of one of the parties, but a bilateral endeavour of both the lessor and the lessee.

In *Black's Law Dictionary,* the word "execute" means "to complete; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill the command or purpose of." In *Words and Phrases* (permanent edition), the word "execute" means "to complete as a legal instrument; to perform what is required to give validity to." An instrument is usually executed through multifarious steps of different sequences. At the first instance, the parties might deliberate upon the terms and reach an agreement. Next, the terms so agreed upon would be reduced to writing. Sometimes, one party alone would affix the signature on it and deliver it to the other party. Sometimes, both parties would affix their signature on the instrument. If the document is required by law to be registered, both the parties can be involved in the process without perhaps obtaining the signatures of one of them. In all such instances, the instrument can be said to have been executed by both parties thereto. If the instrument is signed by both parties, it is presumptive of the fact that both of them have executed it, of course it is only a rebuttable presumption. Similarly, if an instrument is signed by only one party, it does not mean that both parties have not executed it together. Whether both parties have executed the instrument will be a question of fact to be determined on evidence, if such a determination is warranted from the pleadings of the particular suit. Merely because the document shows only the signature of one of the parties, it is not enough to conclude that the non-signing party has not joined in the execution of the instrument.[815]

Execution of lease would be doubtful when the deed was in nature of a rent receipt and the terms and conditions of lease were not stated and the boundaries of land leased were vaguely stated. Moreover, such a lease deed that is unregistered cannot be used for a collateral purpose thus it cannot be sued for proving the possession of the claimant.[816]

(3) Sections 106 and 107

According to a judgment of the Delhi High Court, from the mere fact that no registered instrument is available, one can immediately construe a "contract to the contrary" within the meaning of section 106, ie, a contract to create a lease of a kind that can be created without a registered instrument. Thus, if the lease is for agricultural or manufacturing purposes, and there is no registered instrument, that fact itself is conclusive to establish a contract to the contrary. On this line of reasoning, there can never be a conflict between sections 106 and 107. Section 106 is deemed to provide for a lease that (according to section 107) can be created only by a registered instrument. Non-existence of a registered instrument will itself attract the opening words of section 106, by implying a "contract to the contrary", and in this manner, the two sections become fully reconciled. Further, in this case, rent was payable monthly and not annually, and from this also, the conclusion can follow that the tenancy was from month to month.[817] This view has been approved by the Supreme Court in *Samir Mukherjee v Davinder K Bajaj*[818] wherein it was held that there is non conflict between sections 106 and 107 and for application of section 106, a valid year to year lease shall be deemed to exist only when it is created by a registered instrument.

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815. *Rajendra Pratap Singh v Rameshwar Prasad,* AIR 1999 SC 37.
816. *Radha Sharan Dubey v Ram Niwas,* AIR 2017 (NOC) 828 (All).
817. *Jagat Taran Berry v Sardar Sant Singh,* AIR 1980 Del 7; *P P Subba Raja v E S Guruswamy,* AIR 1989 Mad 321, p 327.
818. *Samir Mukherjee v Davinder K Bajaj,* AIR 2001 SC 1696.

There can be no lease for fixed term for a period of more than a year, if the same is entered into orally or by any unregistered deed, and in those cases, the presumption about duration of lease under section 106 will apply.[819] Where the duration of the lease as depicted from the deed was eight years, but it was unregistered, it would be unenforceable in a court of law and would be presumed to be on month to month basis.[820] Such a lease cannot be admitted in evidence but can be used for a collateral purpose.[821] In a proceedings for eviction against the tenant, the lease deed was executed for a period of 11 months and was further renewed for a period of four months. The tenant did not deny the execution of the tenancy and his own signatures, and it as held that mere absence of signatures of the landlord on the deed would not prove fatal for avoiding the terms and conditions of the lease. This unregistered lease deed, was not required by law to be compulsorily registered and therefore would be admissible in evidence. An eviction based on this unregistered lease deed would be proper.[822]

(4) Reserving a Yearly Rent

The reservation of a yearly rent creates a presumption that the lease is from year to year; but this presumption may be rebutted, having regard to the other parts of the instrument.[823] As the sections, both of TP Act and the Registration Act, refer to leases from year to year, as well as to leases reserving a yearly rent, it would appear that registration is necessary whenever the rent is reserved yearly.[824] The section also has no application to a lease reserving a yearly rent, but containing a clause enabling the lessee to surrender possession at will, for this is a tenancy at will.[825] However, it has been held that the expression "reserving a yearly rent" refers to a lease which, on its proper construction, is a lease from year to year.[826] Lease of a fishery for more than one year must be registered, since fishery is immovable property.[827]

In view of section 107, para 1, a lease for a period exceeding one year, can be executed only by a registered instrument executed by both the lessor and the lessee. In the absence of a registered instrument, the lease shall be deemed to be "lease from month to month".[828] The provisions of this section cannot be circumvented by setting up a case of permanent tenancy on the basis of oral evidence, or under an unregistered instrument.[829]

A lease for 11 months on monthly rent, created on the basis of a *kabuliyat* signed by the lessee, need not be registered.[830]

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819. *Gurbax Singh v Harminderjit Singh,* AIR 2018 (NOC) 136 (P&H); *Punjab National Bank v Ganga Narain Kapur,* AIR 1994 All 221, p 236.
820. *Kempahanumiah v Ms Allied Motors Service Station,* AIR 2012 Kant 100.
821. *Om Prakash Thakur v Niranjanlal,* AIR 2012 MP 112.
822. *Sudhir Kumar v Uma Shankar,* AIR 2017 (NOC) 926 (Pat).
823. *Sheikh Akloo v Sheikh Emaman,* (1917) ILR 44 Cal 403 : 33 IC 899; *Sarat Chandra v Jadab Chandra,* (1917) ILR 44 Cal 214 : 37 IC 956; *Durgi Nikarini v Gobordhan Bose,* (1915) 19 Cal WN 525 : 24 IC 183; *Govinda Chandra v Dwarka Nath,* (1915) 19 Cal WN 489 : 20 Cal LJ 455 : 26 IC 962; *Wilkinson v Hall,* (1837) 3 Bing (NC) 308; *Atherstone v Bostock,* (1841) 2 Man & G 511; *Periaswami v Arunjadeswarswami Temple,* (1967) 1 Mad LJ 93 : AIR 1967 Mad 257.
824. *U Thin Sin v Kokye,* AIR 1941 Rang 117; *Adinath Bhattacharya v Krishna Chandra,* (1943) ILR 1 Cal 34 : 47 Cal WN 127 : 209 IC 279 : AIR 1943 Cal 474; *Udaya Pratap v Gourachundra Dyani,* AIR 1937 Mad 656.
825. *Mathai v Koohouseph,* (1956) 2 Mad LJ 75.
826. *Jivraj Gopal v Atmaram,* (1890) ILR 14 Bom 319; *Khuda Bakhsh v Sheo Din,* (1886) ILR 2 All 405.
827. *Bihar Eastern Gangetic Fishermen Co-operative Society Ltd v Sipahi Singh,* [1978] 1 SCR 375 : AIR 1977 SC 2149 : (1977) 4 SCC 145.
828. *Burmah Shell Oil Distributing v Khahi Midhat Noor,* AIR 1988 SC 1470 : (1988) 3 SCC 44.
829. *Gyasi Ram v Ram Chandra Singh,* AIR 1978 All 376.
830. *Narain Kumar v Onkar Nath,* AIR 1973 All 257.

A lease of immovable property from year to year or for a term exceeding one year, under section 107 can be made only by a registered instrument, and any lease of this kind would be void unless it is created by a registered instrument. All other leases of immovable property may be made either by a registered instrument, or by an oral agreement accompanied by the delivery of possession. An oral lease for manufacturing purposes cannot be deemed to be a lease from year to year for the purposes of notice of termination, in view of the provisions contained in section 107 of the TP Act. In the case of lease for manufacturing purposes, the absence of registration itself would imply that the parties entered into a contract to the contrary, and without any registered instrument tenancy would be deemed to be from month to month, and not from year to year for which 15 days' notice will be a valid one.[831] A lease of a pond belonging to a *gram panchayat* for a period of 10 years by an oral agreement was held to be illegal as the lease was for a term exceeding one year, and could have been created only by a registered instrument.[832] In view of the specific provisions of the TP Act, the letter or any oral evidence in support of the letter spelling out any understanding between the parties cannot give rise to a lease for a period of three years, as a lease has to be through a registered document.[833]

Generally, the tenant is not expected to demand from the landlord, the issue of a rent receipt for payment of the amount. After all, it is a relationship of confidence between the landlord and the tenant, unless there is a specific contract in this behalf.[834]

(5) Oral Agreement Accompanied by Delivery of Possession

If possession is given, an oral lease for a year is valid.[835]

A lease of immovable property for a term not exceeding one year and not reserving a yearly rent, can be made by an oral agreement accompanied by the delivery of possession. Even if the rent note is executed by the lessee in such a case and is not registered, the law does not require that it should be executed by both the lessor and the lessee. It may be that a unilateral act of the lessee may not create an interest in his favour and, therefore, no valid lease came into existence merely by the rent note. But if, pursuant to the rent note, the lessee is put in possession by the lessor, there will be a valid transfer of interest in his favour.[836] An oral agreement of lease accompanied by delivery of possession, if valid for more than one year, by delivery of possession for the first year, and thereafter the lessee continuing in possession with the assent of the lessor, becomes a tenant by holding over under section 116 of TP Act.[837] Such a lease being created by the operation of law is binding, even though the provisions of section 107 have not b een complied with.[838] When a lease is made by oral agreement accompanied by delivery of possession, no estate passes until the lessee enters into possession.

Where leases have been made by registered instrument or where the necessity for delivery of possession has been dispensed with by notification, terms take effect without actual entry.[839]

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831. *Samir Mukherjee v Davinder Kumar Bajaj,* (1998) 44 DRJ 673; *Cavery Baptist Church v Yegalla Vevekananda,* AIR 2003 AP 64 (NOC) : (2002) 4 Andh LT 164.
832. *Massdak Hossain v State of West Bengal,* AIR 1998 Cal 270.
833. *Goodyear India Ltd v B B Jain,* (1998) 75 DLT 620.
834. *Neki v Satnarain,* AIR 1997 SC 1334.
835. *Alakan v A R A Arumugam,* 146 IC 640 : AIR 1933 Rang 262; *Lala Babu Lal v Pt Jungia Sarad,* (1957) 55 All LJ 507 : AIR 1958 All 32.
836. *Abdulahed M Abdul Samad v G G Bardoliwala,* AIR 1975 Guj 1.
837. *Alauddin Ahmed v Aziz Ahmad,* 148 IC 684 : AIR 1934 Pat 369 affirming 144 IC 788; *Mohammad Mossa v Jaganund Singh,* 20 IC 715; *Alakan v ARA Arumugam,* 146 IC 640 : AIR 1933 Rang 262. And see *Indramoni Devi v Snehlata Dutt,* (1954) 59 Cal WN 1150; *Surya Kumar v Trilochan Nath,* (1955) 59 Cal WN 526 : AIR 1955 Cal 495; *Durgesh Nandi Devi v Aolad Shaikh,* (1955) 95 Cal LJ 230 : AIR 1955 Cal 502; *Jagannath Upadhyay v Amarendra Nath,* (1956) 61 Cal WN 841 : AIR 1957 Cal 479.
838. *Zahoor Ahmad v State of Uttar Pradesh,* (1963) All LJ 275 : AIR 1965 All 326.
839. *Razia Begum v Shaikh Muhammad,* (1927) ILR 6 Pat 94 : 96 IC 558 : AIR 1926 Pat 508.

The delivery of possession need not be physical. Constructive delivery is sufficient.[840] Thus, where a person is already in occupation as a licensee, and subsequently, he enters into a contract of tenancy with the owner, delivery will be deemed to have taken place, even though there is no actual delivery at the time of the contract of tenancy.[841] When an oral lease accompanied by the delivery of possession is established, a rent deed can be used to support the terms of the lease.[842]

Where a registered deed is not required by law and the rent note is admissible in evidence, the admission made therein by the tenant that he is in occupation of the premises, is good evidence.[843] A rent deed executed by the lessee alone, and not registered, is not admissible to prove the creation of the lease by the instrument, but is admissible to prove the lease by oral agreement, accompanied by delivery of possession. It can be relied on to establish the jural relationship of the parties, and to prove an admission and acknowledgement by the lessee that he is a lessee, and this is the best evidence that one can possibly have as to the oral agreement of a lease. It is well known that documents relating to sale, lease, and mortgages come into existence only after an agreement is arrived at between the parties to that transaction. The terms are generally agreed upon by the lessor and the lessee beforehand, and are then reduced into writing. In such cases, according to the Kerala High Court,[844] an oral agreement can be supported by the rent deed of the lessee, and there can be no bar for the court looking into such a document.

(6) Consequences of Non-registration

In the case of *Anthony v KC Ittoop and Sons*,[845] a three-Judge bench of the Supreme Court relying on its earlier decisions[846] has held that an unregistered instrument required to be compulsorily registered by virtue of section 107, read with sections 17(1)(d) and 49 of the Indian Registration Act, 1908, cannot create a lease. The court is disabled from using the instrument as evidence. However, the court can still determine whether there was in fact a lease otherwise than through an unregistered instrument. In this case, it was found as of fact that the defendant was inducted into possession of the building by the owner, and he was paying monthly rent in respect thereof. As such it was held that the jural relationship between the parties was that of lessor and lessee falling within the purview of the second paragraph of section 107. The lacuna of registration had affected the validity of the document, but what had happened between the parties in respect of the property became a reality. The court has further held that such a case cannot be that of a licence or permissive possession.

A lease is void if unregistered in cases where registration is compulsory under this section. In *Ariff v Jadunath*,[847] the Privy Council held that if registration of a lease is compulsory under section 107, the lease can only be made by a registered instrument, and if not so made,

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840. *Mohan Lal v Genda Singh*, (1943) ILR Lah 695 : 45 Punj LR 274 : 208 IC 22 : AIR 1943 Lah 127; *Parameswarlal v Dalu Ram*, AIR 1957 Assam 188.
841. *Uda Ram v Tej Karan*, AIR 1975 Raj 147 : 1975 WLN 141.
842. *Taj Din v Abdul Rahim*, AIR 1939 Lah 423 : 41 Punj LR 498.
843. *Uda Ram v Tej Karan*, AIR 1975 Raj 147.
844. *Neelakantan Sridharan v Subba Bhaktan Narayana Bhaktan*, (1975) KLT 128.
845. *Anthony v K C Ittoop and Sons*, (2000) 6 SCC 394 : AIR 2000 SC 3523; *A Sulaikha Beevi v K C Mathew*, AIR 2001 Ker 177, pp 181,182 : (2001) 1 Ker LJ 221; *R Sreekanth v Divisional Commissioner, Bangalore*, AIR 2002 Kant 26, p 28.
846. *Shantibai v State of Bombay*, AIR 1958 SC 532 : [1959] SCR 265; *Satish Chand Makan v Govardhan Das Byas*, (1984) 1 SCC 369 : AIR 1984 SC 143; *Bajaj Auto Limited v Behari Lal Kohli*, (1989) 4 SCC 39 : AIR 1989 SC 1806.
847. *Ariff v Jadunath*, 58 IA 91 : 131 IC 762 : AIR 1931 PC 79; See also *Usha Ranjan Ray Burman v Sova Das*, AIR 1990 Cal 1, p 3; See also *S K Gupta v RC Jain*, AIR 1984 Del 187, p 197.

is void altogether. To the same effect are the undernoted cases.[848] But if the tenant is in possession under an unregistered lease and the landlord recognises his right by acceptance of rent, there is a presumption of a lease under section 106, and a notice to quit before eviction is necessary. Although the unregistered lease is void as a lease, the person in possession under such a document may put it in evidence to protect his possession under section 53A.[849] This situation, however, has changed after the amending Act of 2001 by which the words "the contract, though required to be registered, has not been registered, or," as appearing in para 4 of section 53A has been omitted. Simultaneously, sections 17 and 49 of the Registration Act, 1908 have been amended making it clear that unless the documents containing contract to transfer for consideration any immovable property for the purpose of section 53A are registered, they shall not have effect for the purposes of section 53A.[850]

In the undernoted case, it was held that though an unregistered lease is void as a permanent lease, it can be deemed to be a monthly lease terminable by 15 days' notice;[851] but in another case, it was regarded as a license.[852] If the lease is void for want of registration, neither party to the indenture can take advantage of any of the terms of the lease. Thus, the plaintiff cannot seek ejectment of the defendant solely on the basis of the duration clause in the unregistered deed.[853] A lease from year to year requires registration, and in absence of registration, the document cannot be used as a piece of evidence in proof of the terms of the lease.[854] However, an unregistered agreement of lease can be used as evidence for the breach of agreement in a suit for damages.[855] A lease for a term exceeding one year, if not effected by a registered instrument, is void even though it be by a consent decree. But if, after delivery of possession, the rent is paid and accepted, it takes effect as a lease from month to month.[856] Where an agreement does not alter the terms of a lease, but merely resolves a dispute, it does not require registration.[857] In *Technicians Studio (P) Ltd v Lila Ghosh*,[858] a two-Judge Bench of the Supreme Court considered the effect of a compromise decree, which mentioned that the defendant would become a direct tenant on a monthly rent of ₹ 1000 and the lease would be for a period of sixteen years. But compromise decree was not registered, nor did the parties execute a lease deed pursuant thereto. The contention in that case was two-fold. First was that by payment and acceptance of rent during the period of sixteen years, the monthly tenancy had been created, and second, that the compromise decree can be treated as

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848. *Badal Chandra Sadu Khan v Debendra Nath Dey*, (1933) 37 Cal WN 473 : 58 Cal LJ 325 : 145 IC 892 : AIR 1933 Cal 612; *Mopurappa v Ramaswami Gramani*, (1934) ILR 57 Mad 760 : 67 Mad LJ 54 : 152 IC 538 : AIR 1934 Mad 418; *Ram Ranbijaya v Ramjiwan Ram*, 200 IC 769 : AIR 1942 Pat 397; *Ramjiwan v Maharani*, AIR 1936 Nag 295; *Darbari Lal v Ranee Gunj Coal Association*, (1943) ILR 22 Pat 554 : AIR 1944 Pat 3; *Ambika Devi v Sachita Nandan*, AIR 1960 Pat 289; *Ramayan Saran v Patna Improvement Trust*, AIR 1972 Pat 7.
849. *Chandulal v Keshavlal*, AIR 1936 Bom 246 : 38 Bom LR 486 : 163 IC 579.
850. See Appendix V.
851. See *Darbari Lal v Ranee Ganj Coal Association*, AIR 1944 Pat 30; *Azizul Haque v Debendra Kumar*, (1957) ILR 9 Assam 16 : AIR 1959 Assam 57; *Ramdhari v Jagendra Kumar*, AIR 1959 Assam 174; *Chandra Nath v Chulai Pasha*, AIR 1960 Cal 40; *Chimanlal v Sumersinghji*, (1960) ILR 10 Raj 938 : AIR 1961 Raj 17; *Deenar Builders Pvt Ltd v Khoday Distillers Ltd*, AIR 2000 Del 147, p 150; *Uptron Powertronics Ltd v GL Rawal*, AIR 1999 Del 377, para 26.
852. *Anand Sarup v Panjab Hasan*, AIR 1943 All 279 : 208 IC 422.
853. *Pieco Electronics & Electricals Ltd v Tribeni Devi*, AIR 1990 Cal 135, p 141; See *Satishchand Makhan v Govardhan DAS Vyas*, AIR 1984 SC 143.
854. *Sajid Mia Majmudar v Abdul Sattar Gani*, AIR 1954 Assam 102; *Chitrilapalli Mathai v Chittilapalli Kochuseph*, (1956) 2 Mad LJ 75; *Budh Ram v Ralla Ram*, AIR 1987 SC 2078 : (1987) 4 SCC 75.
855. *Muruga Mudaliar v Subba Reddiar*, AIR 1951 Mad 12 : (1950) 2 Mad LJ 818.
856. *Biswabani Pvt Ltd v Santosh Kumar*, AIR 1980 SC 226 : (1980) 1 SCC 185; *Budh Ram v Ralla Ram*, AIR 1987 SC 2078, p 2079 : (1987) 4 SCC 75.
857. *Jagdish Chandra v Muhammad Bukhtiyar Shah*, AIR 1952 Pat 409.
858. *Technicians Studio (P) Ltd v Lila Ghosh*, (1997) 4 SCC 324; also see *Anthony v KC Ittoop and Sons*, (2000) 6 SCC 394 : AIR 2000 SC 3523.

evidence of part payment under section 53A. The Supreme Court accepted the findings of the lower courts that payment of rent, and acceptance of the same did not create any tenancy but observed therein that:[859]

> Whether the relationship of landlord and tenant exists between the parties depends on whether the parties intended to create a tenancy, and the intention has to be gathered from the facts and circumstances of the case. It is possible to find on the facts of a given case that payments made by a transferee in possession were really not in terms of the contract but independent of it, and this might justify an inference of tenancy in his favour. The question is ultimately one of fact.

If a lease deed is inadmissible in evidence for non-registration, all its terms are inadmissible including the one dealing with the landlord's permission to his tenant to sublet, and the party cannot be allowed to rely upon that clause in the unregistered lease deed on the ground that consent of the landlord to sub-letting does not require registration.[860] However, an unregistered lease deed would be admissible in evidence to protect possession of party as proof of part performance of contract.[861]

Where the lease is required to be registered but is not, in a suit for specific performance, an unregistered and an unstamped lease deed would not be admissible in evidence but can be admitted as evidence for a collateral purpose. It can be looked into as evidence only for proving nature and character of possession of parties, ie, can be relied upon to establish jural relations between parties, to prove admission of defendant, in which capacity he is occupying tenanted premises, and the nature of such possession.[862] Further, in absence of any written lease, a question of relief against forfeiture does not arise.[863] An agreement for construction of a commercial complex entered into between the corporation and developers on piece of land owned by the Corporation and where the terms and conditions of alleged instruments stated that the right to allot shops/offices is transferred to developer, the document is a lease and would require registration.[864] Unless there is a registered document, a lease of duration of more than one year cannot be claimed by the parties, as in the absence of registered document the lease has to be construed as only a month-to-month lease beginning on the first day of the month and ending on the last day of the month. The said monthly lease, undoubtedly, can be terminated by a 15 days notice as provided under section 106 of the Act. Where shops were allotted on lease in an open public auction on payment of premium for period of three years and further subject to payment of monthly rent, such deed requires payment of stamp duty.[865] A tripartite deed of land-cum-superstructure by way of sublease is chargeable with duty and registrable.[866] A rent note on the basis of which a tenancy was created for month to month does not require registration and would be admissible in evidence.[867] In a eviction suit, an unregistered rent deed cannot be accepted as

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859. *Technicians Studio (P) Ltd v Lila Ghosh,* (1997) 4 SCC 324, p 328, para 5.
860. *Bajaj Auto Ltd v Behari Lal Kohli,* (1989) 4 SSC 39, p 43.
861. *Mary's Education Society v Qutubuddin Ahmed,* AIR 2003 AP 41 (NOC) : 2002 AIC 2966.
862. *Om Prakash Thakur v Niranjanlal,* AIR 2012 MP 112 : LNIND 2012 MP 22 : 2012 (113) All Ind Cas 661 : 2012 (3) MP LJ 244. See also *Ahmedsaheb v Sayed Ismail,* (2012) 8 SCC 516 : LNIND 2012 SC 432 : AIR 2012 SC 3320 : 2012 (6) SCALE 505; *Satwant Kaur v Narinder Singh,* (2010) 2 RCR (Rent) 651 : (2011) 1 RCR (Civil) 214; *Moumita Poddar v Indian Oil Corporation,* (2010) 9 SCC 291 : LNIND 2010 SC 686 : AIR 2011 SC 424 : 2010 (7) SCALE 677; *Minati Rani Shill v Rabindra Kumar Bhattacharjee,* (2010) 4 Gau LR 16 : (2010) 90 AIC (Sum 6) 3; *Bolin Chandra Deuri v Union Bank of India,* (2011) 97 AIC 879 : AIR 2011 Gau 24 : (2011) 1 Gau LR 645; *Champakalata Mohanty v Atmaranjan Mohapatra,* AIR 2011 Ori 136 : LNIND 2011 ORI 66 : AIR 2011 Orissa 136.
863. *Phool Badan Verma v Ram Badhaee,* AIR 2010 (NOC) 741 (All); 2010 (2) ALJ 551.
864. *Bilaspur Infrastructures Pvt Ltd v State of Chhattisgarh,* AIR 2010 Chh 19.
865. *Rajesh Vaishnav v State of Chhatisgarh,* AIR 2011 Chh 51; *Ram Bhul v Ram Chand,* (2011) 97 AIC 747 : 2011 AIR CC 2299.
866. *NOIDA v Army Welfare Housing Organization,* (2010) 9 SCC 354 : LNIND 2010 SC 863 : JT 2010 (10) SC 303, 2010 (9) SCALE 425.
867. *Sweta Kumari v Shivshankar R Poswal,* AIR 2012 MP 155 : 2012 (3) MPHT 318.

evidence but a claim arising therefrom can be granted on the basis of other uncontroverted evidence available on record supporting the claim.[868] In case of an unregistered lease deed, the attestation by notary public leads to genuineness of the document. A duly notarized document cannot be said to be fake document in absence of any other material.[869] Where the lease though was for a period of 8 years but was not registered, the terms of this lease would not be enforceable in a court of law and the tenancy would be on month to month basis, and as there was no evidence on record that the lessee had paid rent rents regularly as and when the same had fallen due, termination of tenancy for breach of terms of lease in payment of monthly rents would be valid and proper in law.[870] The requirement of registered instrument to create a valid lease though necessary under section 107 is not necessary under the Tamil Nadu Buildings (Lease and Rent Control) Act (Act 18 of 1960 and a lease deed can be a basis to establish general relationship between the owner and tenant under the Tamil Nadu Buildings (Lease and Rent Control) Act (Act 18 of 1960). Where a tenant in occupation had paid rent directly to Bank which were so accepted by the Bank, the tenant can claim that he was a bonafide tenant in occupation irrespective of the fact the lease is not registered under the Transfer of Property Act, 1882.[871] In the case of agricultural leases, the oral settlement of agricultural land requires the vesting of title through the declaration based on unregistered hukumnamas.[872]

In *Park Street Properties (Pvt) Ltd v Dipak Kumar Singh*,[873] *T* was let out the suit premises with a right to sublet the same. He entered into an unregistered agreement with *B* subletting the suit premises. As per the terms of the agreement, in case of breach of the agreement for three consecutive months, *T* could terminate the tenancy after serving a notice of thirty days' period. He issued a notice under section 106 of the TP Act terminating the monthly tenancy of *B* upon expiry of 15 days from serving the notice. *B* did not vacate the premises and *T* filed a suit for recovery of possession. Holding in favour of *T*, the High Court said, that in the absence of registration of a document, what is deemed to be created is a month to month tenancy, the termination of which is governed by section 106 of the TP Act. Further, the phrase "contract to the contrary" in section 106 of the Act cannot be read to mean that the parties are free to contract out of the express provisions of the law, thereby defeating its very intent. The contract between the parties must be a valid contract to render the statutory right under section 106 (of a lessor to terminate the tenancy at a notice of 15 days) to not be applicable.

In Vishal N Kalsaria v Bank of India,[874] The debtor-landlords secured a loan from the bank against equitable mortgage of several properties belonging to them including the one in which the appellant was a tenant. They failed to pay the dues within the stipulated time. The question before the Court was: how can the right of a "protected tenant" be preserved where the debtor-landlord secures a loan by offering the very same property as a security interest to a bank? The Court observed that section 106 of the TP Act was silent on the position of law in cases where the agreement of tenancy is not reduced into writing and held that if the two parties are executing their rights and liabilities in the nature of a landlord-tenant relationship and if regular rent is being paid and accepted, then the mere factum of non-registration of deed will not make the lease itself

868. *Ahmedsaheb v Sayed Ismail*, (2012) 8 SCC 516 : LNIND 2012 SC 432 : AIR 2012 SC 3320 : 2012 (6) SCALE 505.
869. *Moumita Poddar v Indian Oil Corporation*, (2010) 9 SCC 291 : LNIND 2010 SC 686 : AIR 2011 SC 424 : JT 2010 (8) SC 173.
870. *Kempahanumiah v Allied Motors Service Station*, AIR 2012 Kant 100 : ILR 2012 Kant 2388.
871. *Indian Bank v Nippon Enterprises South, Chennai*, AIR 2011 Mad 238 : LNIND 2011 MAD 1180 : AIR 2011 Madras 238 : 2011 2 CTC 474.
872. *Nazir Ali Mian v Dokal Mian*, (2010) 7 SCC 384 : LNIND 2010 SC 558 : 2010 (6) SCALE 340.
873. *Park Street Properties (Pvt) Ltd v Dipak Kumar Singh*, AIR 2016 SC 4038 : 2016 (8) SCALE 327 : 2016 (8) SCJ 305.
874. *Vishal N Kalsaria v Bank of India*, (2016) 3 SCC 762 : LNIND 2016 SC 31 : AIR 2016 SC 530 : 2016 (1) SCALE 472.

nugatory. In light of the same, neither the landlord nor the banks can be permitted to exploit the fact of non registration of the tenancy deed against the tenant.

(7) Possession Under a Valid Agreement of Lease

If the lessor seeks to evict the lessee, the latter may apply for a stay of the suit and himself sue for specific performance of the agreement to lease. If the suit for specific performance is time barred, the court cannot enforce the agreement. However, if the agreement is in writing, the lessee may defend his possession under section 53A.[875] However, after the amending Act of 2001,[876] the registration is a must for seeking protection under section 53A. Where a person is already in possession as a tenant at the commencement of a lease which is void by reason of non-registration, he would continue to be a tenant from month to month, and section 53A of the TP Act would not be attracted in regard to the unregistered lease.[877] In the absence of any writing, signed by the landlord or on their behalf, section 53 A of the TP Act cannot be pressed into service. Where the letter relied upon by the tenant is written by the tenant himself and it is addressed to one of the landlords, section 53 A is not attracted.[878]

(8) By Both the Lessor and the Lessee

The third paragraph of the section was inserted by the amending Act of 1929.

The effect of this amendment is to settle a conflict of decisions as to whether a rent note signed by the lessee alone was a lease. These cases are cited in the note under section 105 under the heading "Rent notes." A close reading of the third paragraph indicates that there is no stipulation that the instrument must be signed by both the parties. The requirement is that when the lease is made by the registered instrument "such instrument shall be executed by both the lessor and lessee". The underlying purpose is that the creation of a lease is not a unilateral exercise of one of the parties, but a bilateral endeavour of both the lessor and the lessee. An instrument is usually executed through multifarious steps of different sequences. Whether both the parties have executed the instruments will be a question of fact to be determined on evidence. Merely because the documents show only the signature of one of the parties, it is not that the non-signing party has not joined in the execution of the instrument.[879]

In *Asa Ram v Ram Kali*,[880] a *kabuliat* was executed by the lessee in favour of their lessors, but the latter did not execute any instrument in favour of the lessees. It was contended that the lessees could not claim the status of tenants solely on the strength of the *kabuliat*, which was only a unilateral undertaking. But the evidence showed that the lessors had accepted the *kabuliat* and received rent as prescribed therein. On the aforesaid facts, Supreme Court overruled the contention that the lessees could not claim the status of the tenant. The Allahabad High Court which adopted the contrary view prior to the introduction of the amendment in 1929, to section 107 of the TP Act, had occasion to consider a similar contention regarding one *kabuliat* executed after such amendment. In *Gaon Sabha v Jagannath Singh*,[881] the High Court, following the ratio of *Asa Ram v Ram Kali*, has held that there was no violation of section 107 of the TP Act. A letter addressed by the lessor to the lessee confirming that he had given to the lessee his land on a 10 year lease on the annual rent specified therein, was held not to be a lease deed in itself, and,

875. *Hadu Maharana v Ramdulal Ghosh*, (1944) ILR AP 35; *Braithwaite & Co Ltd v R P Agarwalla & Bros*, AIR 1984 Cal 317 (NOC).
876. See Appendix V.
877. *Biswabani Pvt Ltd v Santosh Kumar*, AIR 1980 SC 226 : (1980) 1 SCC 185.
878. *Goodyear India Ltd v BB Jain*, (1998) 75 DLT 620.
879. *Rajendra Pratap Singh v Rameshwar Prasad*, (1998) 7 SCC 602, paras 9-11 : AIR 1999 SC 37.
880. *Asa Ram v Ram Kali*, AIR 1958 SC 183.
881. *Gaon Sabha v Jagannath Singh*, 1984 All LJ 518.

therefore, there was no question of applying the provisions of section 107 of the TP Act with regard to such a document.[882] Where an option to renew the lease is exercised by the lessor or the lessee, a valid lease does not automatically come into existence unless a registered renewed deed is executed, and the renewed deed satisfies the requirements of section 107. The option conferred is merely in the nature of pre-emption, and its exercise does not bring into existence a new lease, irrespective of other statutory provisions, such as the form, procedure, and modalities by which alone the lease can be brought into existence.[883]

(9) Decree or Order

The relationship of landlord and tenant may be created by a decree or order of a court. A decree operating to create a lease is not exempt from registration.[884]

A lease in violation of a scheme framed by the court may raise questions of validity.[885]

(10) Government Grants

Section 2 of the Government Grants Act, 1895 excludes government grants from the operation of the TP Act. This section, therefore, does not apply to a lease of government lands granted by the secretary of state, and the question of registration of such a lease is governed by section 90 of the Registration Act.[886] Section 107 does not apply to leases granted by the government.[887] Thus, the provisions of Government Grants Act and the TP Act do not apply to any transfer of land by or on behalf of the government. The lease in such a case has to be construed as a tenancy at will, and the demand for possession by the landlord was sufficient.[888] A lease of government distillery can be affected by inviting tenders.[889] Where the original lease is registered, variation in the terms of a lease can be made only by another registered instrument. Any other communication purporting to introduce a variation in the lease is excluded by section 92 of the Indian Evidence Act, 1872.[890]

An unregistered deed of lease in favour of the government of five years does not bring into existence the relationship of lessor and lessee, if possession has been delivered. In the case of a lease in favour of a party, delivery of possession under such a lease is sometimes regarded as a lease from month to month, rather than a licence simpliciter. However, where the purported lessee is the government, in view of Article 299 of the Constitution, the lease can be made only by a registered instrument. Hence, the government becomes only a licensee.[891] However, according to the Bombay High Court, a contract by the government, creating a monthly lease, must be in writing and must comply with Article 299 of the Constitution. The Constitution stands superimposed upon the general law. Even if section 107 permits an oral lease for creating monthly tenancy, the Constitution prohibits it.[892]

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882. *Weney D'Souza v G A Conceicao,* (1991) 3 SCC 14, p 16.
883. *Rasiklal M Mehta v Hindustan Photo Films Manufacturing Co Ltd,* AIR 1976 Mad 194 : (1976) 1 Mad LJ 115.
884. *Sumatibai Vaman v Anant Balkrishna,* (1949) ILR Bom 465.
885. *Jogendra Nath v Official Receiver,* AIR 1975 Cal 389. See note "Decree operating to create a lease" in *Mulla's Registration Act.*
886. *Secretary of State v Nistarini Annie Miner,* (1927) ILR 6 Pat 446 : 104 IC 209 : AIR 1927 Pat 319; *Kallingal v Secretary of State,* (1920) ILR 43 Mad 65 : 53 IC 345; dissenting from *Munshi Lal v The Notified Area Committee of Barant,* (1914) ILR 36 All 176 : 22 IC 933.
887. *State of Madhya Pradesh v Jankar Singh,* AIR 1973 MP 274.
888. *GM Southern Railway v Chintadripet Boys HS School,* AIR 1998 Mad 180.
889. *Purxotama Ramanatha Quemm v Makan Katyan Tandel,* AIR 1974 SC 657 : [1974] 3 SCR 64.
890. *Rawal & Co v K G Ramachandran,* AIR 1974 SC 818 : (1974) 1 SCC 424.
891. *State v Phool Ghana,* AIR 1982 All 260, pp 263 to 265, paras 12, 13.
892. *M Mohammad v UOI,* AIR 1982 Bom 443.

The transaction of lease is subject to levy of stamp duty under the Indian Stamp Act, 1899 and is governed by Transfer of Property Act, 1882. The subject matter of property and leasing are covered by field assigned to State legislature and thus, outside the purview of the General Legislature.[893] A notice demanding transfer fee is valid if there is public interest involved for which consent of lessor was necessary.[894]

(11) Agricultural Leases

The provisions of this section have no application to a lease where the lease is for agricultural purposes, unless there is a notification to that effect in the state concerned under section 117,[895] and any variation in rent does not make it registrable under the section.[896] But the principle of the section can apply to such leases.[897] It has, however, been held by Patna High Court,[898] that though such a lease need not be in writing, if it is reduced to writing, it must be registered within section 17(l)(d) of the Registration Act.[899] Payment and acceptance of rent would be sufficient to create a lease of agricultural land.[900] A perpetual lease is required to be registered under the Act and where it is created, it amounts to transfer of ownership and necessary documents of the transfer of the property are to be executed.[901]

(12) Punjab

Leases in Punjab where the TP Act is not in force may be made by oral agreement, and the execution of a deed in writing is not necessary.[902] But this would no longer be so after the application of the TP Act.[903] The Punjab and Haryana High Court has held that the provisions of section 107 of the TP Act are not applicable to leases of agricultural land. Consequently, a lease deed even though unregistered would still be admissible in evidence.[904]

(13) Proviso

Under the power conferred by the proviso, some local governments have issued notifications enabling lease other than leases from year to year, or for a term exceeding one year, or reserving a yearly rent, to be made (as in the old Bombay state or Madhya Bharat)[905] by an unregistered instrument, or (as in Sind) orally. For notifications by the state governments, different local rules and orders may be referred. The TP Act is a central enactment which is traceable to entry 6 of List III, seventh schedule, of the Constitution of India. The Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, came into force and received the assent of the President in 1960, and therefore in the event if there is any inconsistency between the provisions of the Tamil Nadu Act and the provisions of the TP Act, to the extent of inconsistency, the Tamil Nadu Buildings (Lease

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893. *Shubh Timb Steels Ltd v UOI,* ILR (2011) 1 P&H 1008.
894. *UP State Industrial Development Corporation Ltd v Mosanto Manufactures Pvt Ltd,* 2015 SCC OnLine SC 79.
895. See notes under section 117 below.
896. *Benoy Krishna v Biseswar Sanyal,* (1948) ILR 1 Cal 520; *Katai Mia v Sukhamayee,* (1957) ILR 9 Ass 50 : AIR 1959 Assam 60; *Raj Kishore Prasad v Subak Narain,* (1958) ILR 37 Pat 1027 : AIR 1959 Pat 89.
897. *Bramhayya v Patappa,* AIR 1948 Mad 27; But see *Radhabai v Nayadu,* (1950) ILR Nag 799 : AIR 1951 Nag 285.
898. *Ram Nath v Jojan Mandal,* AIR 1964 Pat 1; *CS Chandrasekharan Nair v K George,* AIR 1985 Ker 131, p 134.
899. See *Mulla's Registration Act,* 7th Edn, p 67.
900. *Fakir Senapati v Tehsildar,* AIR 1978 Ori 123.
901. *Khaja Abdul Qadeer v Mohammed Allauddin,* (2010) 3 UP LJ 172 : (2011) 1 ALD 224.
902. *Sunder Singh v Ram Saran Das,* (1932) ILR 14 Lah 137 : 142 IC 754 : AIR 1933 Lah 61.
903. *Vinod Sagar v Vishnubhai,* AIR 1947 Lah 388.
904. *Shyam Lal v Deepa Das Chela Garib Das,* AIR 2011 (NOC) 187 (P&H).
905. Notificaiton no 434 A, Govt Gaz 1910, Pt 1, p 59; Noti No 231 (v) L/511-53 MB Gaz 1954 : Pt I-B, p 615.

and Rent Control) Act, 1960, shall prevail over the central Act and shall have overriding effect. Thus, the requirement of a registered instrument to create a valid lease though necessary under section 107 of the TP Act, is not necessary under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, and a lease deed can be a basis to establish a general relationship between the owner and the tenant under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 irrespective of the fact that lease is not registered under it.[906]

The special benefit to which a tenant is entitled under section 106 of the Kerala Land Reform Act, 1964 can be claimed, notwithstanding anything to the contrary contained in any law. Therefore, the inhibition contained in section 107 of the TP Act (regarding a document of lease reduced to writing which is compulsorily registrable but not registered) cannot govern a case under the Kerala Land Reform Act. The rigour of section 107 cannot be applied to defeat the benefit conferred on the tenant. Courts have necessarily to act in furtherance of the object of the legislation enacted to ameliorate the weaker sections, and not to stifle the object of such legislation. The Kerala Land Reforms Act overrides section 107 of the TP Act. One is meant to safeguard the interests of the tenants, while the other is meant to deny the protection. When there is a conflict between the two, the tenant's interest should prevail.[907]

(14) Extent

This section does not apply to territories excluded from the operation of the Registration Act (section 1). The section has been extended to cantonments by section 287 of the Cantonments Act, 1924.

108. Rights and liabilities of lessor and lessee.—In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

(A) Rights and Liabilities of the Lessor

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover;

(b) the lessor is bound on the lessee's request to put him in possession of the property;

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

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906. *Indian Bank v Nippon Enterprises, South, Chennai,* AIR 2011 Mad 238 : (2012) I BC 370 : (2011) 2 CTC 474.

907. *Vaidyanathan Nadar Anantha Nadar v Kochuraman Lakshmanan,* AIR 1980 Ker 297.

(B) Rights and Liabilities of the Lessee

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease;

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;

(f) If the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor;

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor;

(h) the lessee may [908][even after the determination of the lease] remove, at any time [909][whilst he is in possession of the property leased but not afterwards] all things which he has attached to the earth; provided he leaves the property in the state in which he received it;

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them;

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease;

Nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect

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908. Ins. by Act 20 of 1929, sec. 56.
909. Subs. by Act 20 of 1929, sec. 56, for "during the continuance of the lease".

of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee;

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest;

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf;

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left;

(n) if the lessee becomes aware of any proceedings to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor;

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell [910][or sell] timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto;

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes;

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

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910. Ins. by Act 20 of 1929, sec. 56.

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(1) Amendment

In clause (h), the words "even after the determination of the lease" were inserted by the amending Act 20 of 1929. The words "whilst he is in possession of the property leased but not afterwards" were substituted by the same Act for the words "during the continuance of the lease." In clause (o), the words "or sell" and the words "belonging to the lessor" were inserted by the same Act.

(2) Rights and Liabilities

The rights and liabilities of the lessor and lessee are determined—

(1) by contract;

(2) by local usage; and

(3) by this section.

Contract

These are the covenants expressed in the lease. An express covenant always overrides an implied covenant, ie, the covenants implied by this section.[911] Thus, the covenant for quiet enjoyment under clause (c) may be excluded by a contract to the contrary. In a Calcutta case,[912] there was an express covenant not to claim compensation for dispossession of any kind. This was valid, but did not relieve the lessor of his duty under clause (b) to put the lessee in possession.

In construing a lease deed the court must look at the words used in the contract, unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it.[913] Where under the express terms of the lease deed excavation of the demised premises was prohibited, it was held that digging of bore would amount to excavation.[914]

Local usage

A usage may still be in the course of growth and it may require evidence for its support in each case, but in the result it is enough if it appears to be so well known and acquiesced in that it may reasonably be presumed to have been an ingredient imported by the parties into their contract.[915] It need not be immemorial or universal if it is prevalent usage in the neighbourhood where the land lies.[916] When a usage is proved, it overrides the covenants implied by this section, and even express contracts are construed as subject to it.

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911. *Line v Stephenson,* (1838) 5 Bing (NC) 183; *Clayton v Leech,* (1889) 41 Ch D 103, p 107 (CA); *Millers Emcee Products, Ltd,* (1956) Ch 304 : [1956] 1 All ER 237.
912. *Ahamadar Rahaman v Jaminiranjan,* (1930) ILR 57 Cal 114 : 125 IC 607 : AIR 1930 Cal 385.
913. *Provesh Chandra Dalui v Biswanath Banerjee,* AIR 1989 SC 1834, p 1838.
914. *Kwality Pulp & Paper Mills, Valsad v The Gujarat Industrial Development Corporation,* AIR 1988 Guj 104, p 105.
915. *Juggomohun v Manickchund,* (1859) 7 MIA 263, p 282.
916. *Legh v Hewitt,* (1803) 4 East 154.

Section 108

This section, as said by J Coutts Trotter sets out in a convenient form the implied covenants usually subsisting in a lease.[917] Nearly all the clauses were said by CJ Rankin to be expressions of well settled principles, familiar to the law of England.[918] The section has no application to a tenancy at will, for a tenancy at will is not a lease as defined in the Act.[919]

(3) Clause (a)—Lessor's Duty of Disclosure

This clause adopts the principle applied in the case of bailments by section 150 of the Indian Contract Act. The lessor is bound to disclose material defects with reference to the intended use of the property, but is not responsible for a defect of which he is himself unaware, or which the lessee is aware or could with ordinary care discover. The duty of disclosure is, therefore, limited to latent defects of which the lessor is aware. If the defect is patent, there is no duty and no occasion for disclosure. Therefore, there is no law against the letting of a tumble down house though this was doubted by J Kemp in a Bombay case.[920]

(4) Clause (b)—Duty to Give Possession

The lessor's implied covenant for title imports a duty to give possession. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor.[921] After possession is given, it is protected by the covenant for quiet enjoyment in clause (c). The lessee therefore has a statutory right to compel the lessor to put him in possession of the leased property,[922] as by granting a lease, the lessor undertakes to put the lessee into possession, and it does not matter that the lessor has not got possession himself. He, who lets, agrees to give possession, and not merely to give the chance of a law suit.[923] An express covenant excluding the implied covenant for quiet enjoyment will not relieve the lessor of his duty to give possession.[924] The lessor is not liable unless the lessee makes a request,[925] and the lessor is not obliged to put an unwilling and recalcitrant lessee into possession.[926] If the land is in the possession of a third person, possession is given by his attorning to the lessee.[927] If the tenant hands over the possession to the lessor under an order of the Rent Controller for demolition, renovation and reconstruction, the tenant has an implied covenant for peaceful possession and enjoyment of the property.[928]

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917. *Secretary of State v Venkayya,* (1917) ILR 40 Mad 910, p 913 : 35 IC 254.
918. *Indu Bhusan v Chowdhury Moazam Ali,* (1929) 33 Cal WN 106, p 110 : 117 IC 838 : AIR 1979 Cal 272.
919. *Ram Kishun v Bibi Sohila,* 145 IC 567 : AIR 1933 Pat 561.
920. *Lakhmichand v Ratanbai,* (1927) ILR 51 Bom 274, p 299 : 101 IC 210 : AIR 1927 Bom 115.
921. *Shakuntla Devi v Sumitra,* 2010 SCC OnLine HP 93.
922. *KC Rout v The State of Orissa,* AIR 1979 Ori 120 : (1979) 47 CLT 407.
923. *Coe v Clay,* (1829) 5 Bing 440; *Wallis v Hands,* (1893) 2 Ch 75; *Smart v Jones,* (1864) 15 CB (NS) 717; *Zamindar of Vizianagram v Behara Suryanarayana,* (1902) ILR 25 Mad 587, p 596; *Secretary of State v Venkayya,* (1917) ILR 40 Mad 910, p 914 : 35 IC 254; *Kandasami v Ramasami,* (1919) ILR 42 Mad 203, p 216 : 51 IC 507; *Abdul Karim v Upper India Bank,* (1918) PR 19 : 40 IC 684.
924. *Ahamadar Rahaman v Jaminiranjan,* (1930) ILR 57 Cal 114 : 125 IC 607 : AIR 1930 Cal 385.
925. *Narayanaswami v Yerramilli,* (1910) ILR 33 Mad 499 : 5 IC 318; *Prabhy Narain v Kamla Prasad,* AIR 1964 Pat 59.
926. *Gopal Chandra v Chowdhury Krishna,* (1910) 9 Cal LJ 595 : 4 IC 63.
927. *Zamindar of Vizianayam v Behara Suryanarayana,* (1902) ILR 25 Mad 587; *Natesa Chetti v Vengu Nachiar,* (1910) ILR 33 Mad 102 : 3 IC 701.
928. *Raichurmatham Prabhakar v Rawatmal Dugar,* (2004) 4 SCC 766 : AIR 2004 SC 3625.

If the lessor fails to give possession, the lessee can maintain a suit on his lease for possession against the lessor and against any third person, who may be in possession.[929] The lessee may also sue the lessor for damages.[930] Under the Limitation Act, 1963, the period will be three years, whether the lease is registered or not, the special period for the breach of a registered contract having been deleted. The onus is on the lessor to prove that he has discharged his obligation to put the lessee into possession.[931] But if the lessee has already paid rent under the lease, the onus of proving that he has not got possession is on him.[932] In the absence of any express provision granting over the terrace, the tenant/lessee cannot claim any right on the terrace above the portion of the property leased out to him by deeming fiction.[933]

So long as lease of immovable property does not get determined, lessee has a right to enjoy the property and this right is a right to property and cannot be taken away without the authority of law as provided in Article 300A of the Constitution. Further, without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all courts and tribunals.[934] Where the petitioner got an allotment of the land through fraud when the government decided to regularise land under the possession of the sevayats of lord lingraj by executing lease and sevayats were called to identify the land under their possession, he would not be entitled to get the delivery of possession of the property of land as per the lease deed.[935]

The lessor is not entitled to rent, unless and until he has fulfilled his obligation to put the lessee in possession of the land leased out to him.[936] As regards the lessor's right to rent, as to when he did not put the lessee in possession of the whole of the leased land, the decisions were not uniform. In some cases, it had been held that if the lessor put the lessee in possession of only a portion of the property leased, the lessee would be entitled to a suspension of the whole rent, and in other cases to a reduction or abatement of rent. If the rent was an entire rent, ie, a lump sum rent for the whole land treated as an indivisible subject, the whole rent would be suspended until the lessee was put into possession of the whole.[937] But if the land was let at a separate rent, ie, at so much per acre or per *bhiga*, the lessor was held entitled to an apportionment, and the lessee must pay a reduced or abated rent for the portion of which he has possession.[938] Again, even if the rent was an entire rent, the lessee was only entitled to an abatement of rent if he knew at the beginning of the tenancy that part of the land was in the possession of another, and that the lessor would not

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929. *Achayya v Hanumantrayudu,* (1891) ILR 14 Mad 269; *Bhutia Dhondu v Ambo,* (1889) ILR 13 Bom 294; *Ahmadar Rahaman v Jaminiranjan,* AIR 1930 Cal 385; *Bishen Sarup v Abdul Samad,* (1931) 29 All LJ 666 : 136 IC 273 : AIR 1931 All 649; *Hakim Mohmd Fazihzaman v Anwar Hussain,* (1932) All LJ 126 : 139 IC 823 : AIR 1932 All 314; *Ireland v Bircham* (1836) 2 Bing (NC) 90.
930. *Razia Begum v Shaikh Muhammad, (*1927) ILR 6 Pat 94 : 96 IC 558 : AIR 1926 Pat 508; *Purna Nand v Kamala,* AIR 1965 Pat 39.
931. *Jogesh Chandra v Emdad Meah,* 59 IA 29 : 34 Bom LR 481 : 36 Cal WN 221 : 55 Cal LJ 72 : 62 Mad LJ 336 : 136 IC 398 : AIR 1932 PC 28.
932. *Durga Prasad Singh v Rajendra Narayan Singh,* (1913) ILR 41 Cal 493 : 40 IA 223 : 21 IC 750; *Arunachandra v Shamsul Huq,* (1931) ILR 59 Cal 155 : 133 IC 577 : AIR 1931 Cal 537.
933. *Peter George v Janak J Gandhi,* (1996) 36 DRJ 248.
934. *Harshad Govardhan Sondagar v International Assets Reconstruction Company limited,* (2014) 6 SCC 1.
935. *Brundaban Mahapatra v Director of Estates and Ex-officio Deputy Secretary to Government,* AIR 2014 (NOC)123 (Ori).
936. *Shama Prosad v Taki Mullik,* (1900) 5 Cal WN 816; *Udhab Chandra v Narain,* 58 IC 186 : AIR 1920 Pat 611; *Ganda Singh v Secretary of State,* 152 IC 231 : AIR 1934 Pesh 101; *Manohar Lal v Bengal Potteries,* AIR 1958 Pat 457.
937. *Katyayani Debi v Udoy Kumar Das,* (1925) ILR 52 Cal 417 : 52 IA 160 : 88 IC 110 : AIR 1925 PC 97; *Holgate v Kay,* (1844) 1 Car & Kir 341.
938. *Katyayani Debi v Udoy Kumar,* AIR 1925 PC 97.

be able to give him possession of it.[939] This divergence of judicial opinion in India was set at rest in a case from Bengal in which the Judicial Committee held that in the case of a lease for a lump sum rent, the English Common Law rule of the suspension of entire rent should not be applied, where the lessor has failed to give possession of only a part of the premises leased.[940] This decision clearly establishes that where the lessor fails to put the lessee in possession of the whole of the demised premises then, whether the premises were leased at a lump sum rent or at a rent at so much per acre or per *bigha*, there will not be a suspension of the entire rent, but that the lessee will be entitled to a proportionate reduction, or abatement of the rent.

This decision has been duly approved and followed by the Supreme Court in *Bibra, S K v Stephen Court*[941] in the case of the tenancy of a dwelling house; J Sikri (as he then was), observed:

> On one hand it does not seem equitable that when a tenant enjoys a substantial portion of the property of the landlord, leased to him, without much inconvenience, he should not pay any compensation for the use of the property; in other words, to borrow the language of Sir George Rankin, that he should enjoy a windfall. On the other hand, it is unfair that if a tenant is not given possession of a substantial portion of the property, he should be asked to pay any compensation for the use of the property while he is taking appropriate measures for the specific performance of the contract. It seems to us that it will depend on the circumstances of each case whether a tenant would be entitled to suspend the payment of rent or whether he should be held liable to pay a proportionate part of the rent.

The note "Suspension of Rent", under clause (e) may be referred.

(5) Clause (c)—Covenant for Quiet Enjoyment

The covenant implied by this section is the absolute covenant expressed in an English lease. The express covenant of an English lease is either

(1) absolute or unqualified; or

(2) restricted or qualified.

This is explained in the following passage from the judgment of J Mookerjee in a Calcutta case:[942]

> This provision (clause (c) of section 108) secures for the lessee, the benefit of an unqualified covenant for quiet enjoyment. A qualified covenant for quiet enjoyment protects the lessee against interruption by the lessor, his heir and assigns, or any other person claiming by or under him, them, or any of them, whereas an unqualified covenant protects the lessee against interruption by the lessor, his heirs and assigns, or by any other person or persons whomsoever. The covenant, in the unqualified form covers the case of interruption by the superior landlord or other person claiming by title paramount, exercising a power of re-entry, or otherwise, dispossessing the lessee. The chief distinction is that the restricted covenant does not cover eviction by title paramount, while the absolute covenant does protect the lessee even from title paramount.

In cases decided under the TP Act the implied covenant under this sub-section has been held to be an unqualified covenant protecting the lessee from the title paramount.[943]

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939. *Narendra Chandra v Manindra Chandra,* (1922) ILR 49 Cal 1019 : 67 IC 800 : AIR 1922 Cal 153; *Joyram Chandra v Bisnu Charan,* 85 IC 781.

940. *Ram Lal v Dhirendra Nath,* 70 IA 18 : (1943) ILR 1 Cal 372 : 46 Bom LR 192 : 47 Cal WN 489 : (1943) 1 Mad LJ 514 : 206 IC 266 : AIR 1943 PC 24; and see *Surendra Nath v Stephen Court Ltd,* (1959) 63 Cal WN 922 : AIR 1960 Cal 346.

941. *Bibra, S K v Stephen Court,* [1966] 3 SCR 458, p 460 : AIR 1966 SC 1361 : [1967] 1 SCJ 12 : [1966] 2 SCA 257.

942. *Naorang Singh v Meik,* (1923) ILR 50 Cal 68, p 72 : 70 IC 161 : AIR 1923 Cal 41.

ILLUSTRATION

A leased some lands to *B*, who took possession under the lease. Subsequently, the government settled the lands with *C* and granted *C* a lease. *B* sued *C* for possession but failed, the decree providing that he should pay rent to *C*. *B* sued *A* for damages for breach of the covenant for quiet enjoyment by reason of the constructive eviction. If *B* had proved that *C*, the government lessee had a better title than *A*, it would have been a case of eviction by title paramount and *B* would have been entitled to damages. But as *B* failed to prove a defect in *A*'s title, it was a tortious eviction and *B* had no cause of action against *A*.[944]

Even before the TP Act, the covenant was implied in cases where the lessee was prevented from collecting rents, whether the interference was by the lessor himself,[945] or other lessees of the lessor,[946] or by title paramount,[947] but not of course where the interference is by a stranger.[948]

The covenant does not extend to tortious acts.

Therefore, in absence of a forfeiture clause in the lease agreement, as regards non payment of rent, lessor cannot have a right to re-enter the premises but would be entitled to recovery of rent and its arrears with costs and interest. The departure from the restoration of possession to lessee when wrongfully dispossessed during subsistence of lease is warranted on grounds of equity, but the Power of attorney holder of the tenant does not have any locus standi to file appeal after termination of tenancy and such a claim is not maintainable.[949] The applicability of writ jurisdiction to civil and private disputes of landlord-tenant relationship is limited to quashing the plaint or suit proceedings or to interfere with the injunction order passed by the trial court. The tenancy claims with allegations of harassment are not entertainable under Articles 226 and 227.[950]

An act done under compulsion of a statute is not within the covenant, for the covenant cannot be construed to be an agreement to do an illegal act.[951] So a lessee who was evicted under the Epidemic Diseases Act,[952] or under the Land Acquisition Act,[953] had no cause of action against the lessor.

Whether the covenant implied by section 108(c) applies to tortious acts

The covenant implied by section 108(c) protects against lawful, and not tortious interruptions; and this is so both in English as well as in Indian law. This is explained in the following classic passage in the judgment of CJ Vaughan in *Hayes v Bickerstaff*:[954]

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943. *Tayawa v Gurshidappa*, (1901) ILR 25 Bom 269; *Syed Mukhtar Ahmad v Rani Sunder Koer*, (1913) 17 Cal WN 960 : 19 IC 815; *Ram v Pramatha*, (1922) 35 Cal LJ 146 : 63 IC 754 : AIR 1922 Cal 237; *Dharm Narain v Labh Singh*, 60 IC 477; *Moti Lal v Yar Muhammad*, (1925) ILR 47 All 63 : 85 IC 756 : AIR 1925 All 275. See also *Indu Bhusan v C Moazam Ali*, (1929) 33 Cal WN 106 : 117 IC 838 : AIR 1929 Cal 272.
944. *Banka Behari Chose v Madan Mohan Roy*, (1921) 26 Cal WN 143 : 68 IC 477 : AIR 1921 Cal 532.
945. *Kristo Soondur v Koomar Chunder*, (1871) 15 WR 230.
946. *Kadumbinee v Kasheenath*, (1870) 13 WR 338.
947. *Gopanund Jha v Lalla Gobind*, (1869) 12 WR 109.
948. *Prabhu Narain v Kamla Prasad*, AIR 1964 Pat 59.
949. *Shaha Ratansi Khimji & Sons v Kumbhar Sons Hotel Pvt Ltd*, (2014) 14 SCC 1.
950. *Jacky v Tiny*, (2014) 6 SCC 508 : LNIND 2014 SC 491 : AIR 2014 SC 1615 : 2014 (4) SCALE 597; *Board of trustees of the Port of Kolkata v Kalipada Bhakat*, (2014) 10 SCC 573 : LNIND 2014 SC 874 : 2014 (9) SCJ 235 : 2014 (11) SCALE 647.
951. *Newby v Sharpe*, (1878) 8 Ch D 39.
952. *Merwanji v Syed Sardar Ali*, (1899) ILR 23 Bom 510; *Mahomedally v Campbell*, (1899) 1 Bom LR 739.
953. *Minto v Kalee Charn*, (1867) 8 WR 527.
954. *Hayes v Bickerstaff*, (1669) Vugh 118, pp 119, 123; *Wallis v Hands*, (1893) 2 Ch 75, p 83; *Dudley v Folliott*, (1790) 3 Term Rep 584; *British India Corporation v Secretary of State*, AIR 1945 All 425.

> By covenant in law, the lessee is to enjoy his lease against the lawful entry, eviction, or interruption of any man, but not against tortious entries, evictions or interruptions, and the reason of law is solid and clear, because against tortious acts, the lessee hath proper remedy against the wrongdoers.

In a further passage, the arguments against so extended a construction, were summarized as follows:

> Inconveniences if the law should be otherwise—
>
> (1) A man's covenant without necessary words to make it such, is strained, unreasonable, and therefore, improbable to be so intended; for, it is unreasonable that a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing.
>
> (2) The covenantor, who is innocent, shall be charged, when the lessee hath his natural remedy against the wrongdoer; and the covenantor is made to defend a man from that which the law defends every man, that is, from wrong.
>
> (3) A man shall have double remedy for the same injury against the covenantor, and also against the wrongdoer.
>
> (4) A way is opened to damage a third person (that is the covenantor) by undiscoverable practice between the lessee and a stranger, for there is no difficulty for the lessee to secretly procure a stranger to make a tortious entry, that he may therefore charge the covenantor with an action.

However, when the act is that of the lessor himself, the lessee may sue on the covenant whether the act is wrongful or not.[955]

In *Katyayani Debi v Udoy Kumar Das,*[956] the Privy Council observed that it was the duty of a tenant under a perpetual tenure to protect himself against illegal encroachments by others. This remark applies, however, to all leasehold estates; and Indian cases both before and after the TP Act do not extend the covenant for quiet enjoyment to wrongful acts.[957]

ILLUSTRATION

> *A* leases a mine to *B* on 22 April 1897, and later on 28 September 1901. *A* leases another adjoining mine to *C*. *B* removes certain pillars in his mine which cause a subsidence and *C*'s mine is flooded. *A* is not liable to *C*, for *B*'s act was a tort. Again *B*, through a lessee of *A*, was not a person claiming under *A*, for the act was not one authorised by *A*.[958]

But, where the lessor interfered with the lessee collecting rents from the sublessee and was himself the wrongdoer, this was said to be a breach of the covenant which justified a suspension of rent.[959] So also, when the lessor's minor son challenged the lease.[960] Indeed, in an old Calcutta case,[961] the lessor was held to be disentitled to rent because he had omitted to prevent his assignees from wrongfully evicting the lessee in *butwara* proceedings. The case is a strong one, but the decisions may be justified on the ground that the omission of the lessor

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955. *Andrews v Paradise,* (1724) 8 Mod Rep 318.
956. *Katyayani Debi v Udoy Kumar Das,* (1925) ILR 52 Cal 417 : 52 IA 160 : 88 IC 110 : AIR 1925 PC 97.
957. *Runglall Singh v Lalla Roodur Pershad,* (1872) 17 WR 386; *Douzelle v Girdharee,* (1874) 23 WR 121; *Tayawa v Gurshidappa,* (1901) ILR 25 Bom 269; *Kali Prasmma v Mathura Nath Sen,* (1907) ILR 34 Cal 191; *Noorang Singh v Meik,* (1923) ILR 53 Cal 68 : 70 IC 161 : AIR 1923 Cal 41; *Indu Bhusan v Chowdhury Moazam Ali,* AIR 1929 Cal 272; *Ahmed Maracair v Muthuvaliappa,* AIR 1961 Mad 28. See also *Ayyana v Gangayya,* 144 IC 16 : AIR 1933 Mad 465.
958. *Noorang Singh v Meik,* (1923) ILR 50 Cal 68 : 70 IC 161 : AIR 1923 Cal 41.
959. See note "Suspension of rent" under section 108 (l).
960. *Jabbar Singh v V R Renu,* (1964) 2 Mad LJ 142 : AIR 1964 Mad 514.
961. *Wajed Ali v Chundrabutty,* (1873) 22 WR 542.

amounted to active participation in the wrongful eviction.[962] On the other hand, the exception which allows the lessee to sue on the covenant in the case of a wrongful act by the lessor was overlooked in a Madras case,[963] where it was said that no question of the covenant arose if the lessor instigated his former tenant to set up an unfounded claim, and thereby evict the lessee.

Lessor may not derogate from his grant

There is a class of cases which are not covered by the covenant, but in which the lessor is liable on the ground that he must not derogate from his grant. The leading case is *Alidin v Latimer, Clark, Muirhead Co,*[964] where the lessor demised land for a timber merchant's business and the lessee covenanted to carry on such business, and it was held that assigns of the lessor were not entitled to erect on adjoining property acquired from the lessor, buildings which interfered with the passage of air to the drying of sheds of the lessee. Another case on the same point is *Jones v Consolidated Anthracite Collieries Ltd.*[965] The lessor had granted a mining lease, and then a building lease with reservation of the mines. Such a lease, implies the grant of a right of support from the mines. So when the buildings subsided, the lessor was held liable not on the covenant, but because he had derogated from his grant. The principle will not apply unless the disturbance is substantial, eg interference with privacy by the lessor constructing an external staircase on his adjoining building is not actionable.[966]

Breach of covenant

A breach of covenant occurs when there is a substantial interference with enjoyment, even if it does not amount to dispossession. For instance, in *Sanderson v Berwick-on-Tweed Corporation,*[967] there was a breach when the lessee's field was flooded by overflow from a drain badly constructed by the lessor. Also in *Shaw v Stenton*[968] where the lessor by excavating ironstone caused his lessee's coal mine to be flooded. In *Manchester Sheffield & Lincolnshire Rly Co v Anderson,*[969] a railway company bought the reversion of a lease and started works which caused structural damage to the lessee's house and temporarily blocked the road giving access to it. The court held that the damage to the house was a breach, but that the temporary inconvenience caused by the blocking of the road was not a breach.

Interference with the lessee's use of the premises for the particular purpose for which they were taken is a breach. So, in a case already referred to,[970] when premises were let for drying timber, the lessor could not use the adjoining land so as to block the access of air. But, interference which do not make the premises less useful generally, but only less useful for some purpose, unknown to the lessor at the time of the letting, is not a breach of the covenant. In *Robinson v Kilvert,*[971] the lessor let the upper part of a building for a paper warehouse, and then installed a heating apparatus in a cellar. This did not interfere with the lessee's comfort or make the house unfit for storing paper generally, but it did affect a particular class of delicate paper that lessee stored. This was not a breach of the covenant, for the lawful enjoyment of the house as a paper warehouse was not inferred with, and if the

962. *Cf Malzy v Eichholz,* (1916) 2 KB 308; *Phelps v City of London Corporation,* (1916) 2 Ch 255.
963. *Vithilinga Padayachi v Vithilinga Mudali,* (1892) ILR 15 Mad 111, p 121.
964. *Alidin v Latimer, Clark, Muirhead Co,* (1894) 2 Ch 437.
965. *Jones v Consolidated Anthracite Collieries Ltd,* (1916) 1 KB 123.
966. *Browne v Flower,* (1911) 1 Ch 219 : [1908-10] All ER Rep 545.
967. *Sanderson v Berwick-on-Tweed Corporation,* (1884) 13 QBD 547.
968. *Shaw v Stenton,* (1858) 2 H & N 858.
969. *Manchester Sheffield & Lincolnshire Rly Co v Anderson,* (1898) 2 Ch 394.
970. *Aldin v Latimer Clark, Muirhead & Co,* (1894) 2 Ch 437.
971. *Robinson v Kilvert,* (1889) 41 Ch D88; *Hanner v Jumbil (Nigeria) Tin Areas Ltd,* (1921) 1 Ch 200 : [1920] All ER Rep 113.

lessee required special protection he should have bargained for it. The disturbance must be the natural consequence of the act done. In *Harrison, Ainslie & Co v Muncaster,*[972] the lessee's mine was flooded by water from a mine of another lessee from the same lessor, who, while properly working his mine, tapped what is called a feeder, the effect of which was to release a large quantity of underground water. The lessor was not liable, for this was an extraordinary and accidental consequence of a lawful act. This case must be distinguished from *Shaw v Stenton,*[973] where the collapse of the upper stratum of ironstone was a consequence which could have been foreseen. The disturbance must be physical interference; and it has no reference to noise.[974] But persistent knocking on the door of the lessee and threatening to evict her and throw out her belongings, amounts to a breach of this implied covenant even though an assertion, however emphatic or rude, that the tenancy had determined, would not.[975] The mere likelihood of interference is not enough; so, a decree which is not acted upon and, therefore, does not lead to actual entry and disturbance is not a breach.[976]

Interference with the lessee collecting rents from his sub-lessee is a breach.[977] A sub-lessor is entitled to recover damages from the lessee, if the head lessor puts an end to the lease during the term of the sub-lease.[978]

Damages

Damages for the breach of the covenant for quiet enjoyment are not limited by the rule in *Bain v Fothergill,*[979] that a purchaser of real estate cannot recover damages for loss of his bargain, but only his deposit and expenses; nor is the measure of damages the amount or a proportion of the rent, for the two matters are not directly connected.[980] The lessee in a case of eviction is entitled to recover the value of the term.[981] He is also entitled to recover the cost of any structure he may have erected,[982] and the costs of defending the action for eviction.[983]

Payment of rent

The payment of rent and the performance by the lessee of the contracts binding on him are not conditions precedent to the covenant for quiet enjoyment. This has been held in English cases[984] where the covenant usually contains a clause in terms similar to clause (c). These cases have been followed in a Madras decision[985] where it is explained that the effect of a different construction would be to give the lessor a right of re-entry in the case of every breach by the lessee.

A similar clause in a different context may or may not operate as a condition precedent. Thus, when the right to a lease for a further term was dependent on the lessee paying rent

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972. *Harrison, Ainslie & Co v Muncaster,* (1891) 2 QB 680.
973. *Shaw v Stenton,* (1858) 2 H & N 858.
974. *Jenkins v Jackson,* (1883) 40 Ch D 71; *Owen v Gadd,* (1956) 2 QB 99 : [1956] 2 All ER 28.
975. *Kenny v Preen,* (1963) 1 QB 499 : [1962] 3 All ER 814.
976. *Howard v Maittland,* (1883) 11 QBD 695.
977. *Munee Dutt Singh v William Campbell,* (1869) 11 WR 278; *Gopanand Jha v Lalla Gobind,* (1869) 12 WR 109; *Kadumbinee v Kasheenath,* (1870) 13 WR 338; *Kristo Soondur v Koomar Chunder Roy,* (1871) 15 WR 230; *Douzelle v Girdharee Sing,* (1874) 23 WR 127; *Dhunpat Singh v Mahomed Kazim,* (1891) ILR 24 Cal 296.
978. *Gujadhar v Rambhau,* AIR 1938 Nag 439.
979. *Bain v Fothergill,* (1874) LR 7 HL 158.
980. *Indu Bhusan v Chowdhury Moazam Ali,* (1929) 33 Cal WN 106 : 117 IC 838 : AIR 1929 Cal 272.
981. *Rolph v Crouch,* (1867) LR 3 Exch 44; *Nagardas v Ahmed Khan,* (1897) ILR 21 Bom 175, p 182; *Tayawa v Gurshidappa,* (1901) ILR 25 Bom 269, p 275.
982. *Rolph v Crouch,* (1867) LR 3 Exch 44.
983. *Williams v Burrell,* (1845) 1 CB 402; *Rolph v Crouch,* (1867) LR 3 Exch 44.
984. *Edge v Boileau,* (1885) 16 QBD 117; *Dawson v Dyer,* (1833) 5 B Ad 584.
985. *Meenakshi v Chidambaram,* (1912) 23 Mad LJ 119 : 15 IC 711.

and performing the covenants of the lease, this was construed as a condition precedent.[986] In another case,[987] a lessor who had previously purchased the premises from the lessee agreed to recover them at a certain date, and the agreement contained the following words: "You are further required to act rightly and in conformity with the deed of rent granted by you on this date, and in the event of your failing so to do, this agreement shall be null and void." This clause was not construed as a condition precedent as there was no natural connection between the lease and the right of repurchase, which was not forfeited when the rent fell into arrears. "The benefit of such contract shall be annexed to, and go with the lessee's interest".

The second para of clause (c) enacts that the covenant for quiet enjoyment runs with the land. It can, therefore, be enforced by the assignee of the lessee not only against the lessor, but also against the assignee of the lessor whose liability is also referred to in section 109.

Leases have always been an exception to the rule that all contracts are personal. The common law of England allowed the assignee of the lessee to enforce the covenant for quiet enjoyment against the lessor; and the Statute 32, Hen 8 c 34 extended the liability under the covenant to the assignee of the lessor. The law as to the liability on covenants in leases was settled in 1583 by *Spencer's* case,[988] where it was held that the burden of a covenant runs with the land—

(1) if it directly concerns the land and relates to a thing *in esse* irrespective of whether assigns are named; and

(2) if it directly concerns the land demised and relates to a thing in future, and the assigns are named.

The notes "Leases," "Covenants annexed to the land" and "Covenants" running with land" under section 40 may be referred.

The law as to covenants annexed to the land is also discussed under section 40. The liability under the lessee's covenants is explained under section 108. The liability under lessor's covenants is the subject of section 109.

It is not open to a licensee of the lessee, during the subsistence of the licence or in the suit for recovery of possession of the property instituted after the revocation of the licence, to set up title to the property on the ground that he had purchased the property from the owner and so, refuse to deliver possession.[989]

Any part thereof

These words refer to the case where the lessee has assigned his interest in a part of the premises leased. They indicate that the covenant for quiet enjoyment can be apportioned under section 37. The duty of the lessor to perform the covenant is severed, and must be performed for the benefit of each sharer in the lessee's interest.

(6) Clause (d)—Accretions

The rule of English law is that land which imperceptibly accretes has the legal characteristics of the land on which it is formed.[990]

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986. *Bastin v Bidwell,* (1881) Ch D 238; *Simons v Associated Furnishers Ltd,* (1931) 1 Ch 379 : [1930] All ER Rep 427.
987. *Chidambara v Manikka,* (1864) 1 MHC 63, p 64.
988. *Spencer's* case (1583) 5 Co Rep 16.
989. *Sant Lal Jain v Avtar Singh,* AIR 1985 SC 857, p 860.
990. *P v Yarborough (Lord),* (1824) 3 B & C 91 affirmed sub nom; *Gifford v Yarborough (Lord),* (1828) 5 Bing 163.

The doctrine of accretion is capable of applying to a land situated over the shores of an inland lake, whether the accretion be caused by wind or water, and irrespective of whether the land to which accretion is claimed is crown land. Of course, the accretion must be gradual and imperceptible, according to the English law. The doctrine will apply, unless expressly excluded in the conveyance.[991]

The Privy Council decision in *Secretary of State for India v Raja of Vizianagram,*[992] should be related to the facts of that case.

Lord Wilberforce observed as under:

> This is a doctrine which gives recognition to the fact that where land is bounded by water the forces of nature are likely to cause changes in the boundary between the land and water. Where these changes are gradual and imperceptible (a phrase considered further below), the law considers the title to the land as applicable to the land as it may be so changed from time to time. This may be said to be based on grounds of convenience and fairness. Except in cases where a substantial and recognisable damage in boundary has suddenly taken place (to which the doctrine of accretion does not apply), it is manifestly convenient to continue to regard the boundary between land and water as being where it is from day to day or year to year. To do so is also fair. If part of an owner's land is taken from him by erosion, or diluvion (ie advance of the water), it would be most inconvenient to regard the boundary as extending into the water. The landowner is treated as losing a portion of his land. So, if an addition is made to the land from what was previously Water, it is only fair that that landowner's title should extend to it. The doctrine of accretion in other words, is one which arises from the nature of land ownership, from in fact, the long-term ownership of property inherently subject to gradual processes of change. When land is conveyed, it is conveyed subject to and with the benefit of such subtractions and additions (within the limits of doctrine) as may be taking place over the years. It may of course be excluded in any particular case, if such is the intention of the parties. But if a rule so firmly founded in justice and convenience is to be excluded, it is to be expected that the intention to do so should be plainly shown.

The language of the English law was adopted by the Privy Council in *Lopez v Muddun Mohun Thakoor,*[993] which was, however, a case of diluviated land reforming *in situ.* Again, in *Secretary of State v Kadirikutti,*[994] the Madras High Court held that the English rule applied unless excluded by enactment or local usage. But the Bengal Alluvion and Diluvion Regulation 11 of 1825, spoke of "gradual" (and not "imperceptible") accession. The earlier Indian cases[995] use the same phrase, and it is now settled that in India it is not necessary for the accretion to be imperceptible, and that it is sufficient that it is gradual.[996] If the accretion is not imperceptible or gradual, no change occurs in the ownership of the land.[997]

Lessee's right to accretions

Land gradually or imperceptible accreted forms part of the demise. The lessee holds it during his term, paying a proportionate increment of rent, and must surrender it to the

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991. *Southern Cam of Theosophy Inc v State of South Australia,* [1982] 1 All ER 283, pp 286, 288, 289 (PC).
992. *Secretary of State for India v Raja of Vizianagram,* 40 IC 896 : (1917) ILR 40 Mad 1083.
993. *Lopez v Muddun Mohun Thakoor,* (1870) 13 MIA 467.
994. *Secretary of State v Kadirikutti,* (1890) ILR 13 Mad 369.
995. *Deo dem Seebkristo v The East India Co,* (1856) 6 MIA 267; *Nasarvanji v Nasarvanji,* (1864) 2 Bom HC 345 (ACJ).
996. *Srinath Roy v Dinabandhu Sen,* (1915) ILR 42 Cal 489 : 41 IA 221 : 25 IC 467; *Secretary of State v Rajah of Vizianagram,* (1917) ILR 40 Mad 1083 : 40 IC 896; *Lala Lachmi Narayan v Maharaja Kesho Prasad,* (1920) 5 Pat LJ 1 : 52 IC 147.
997. *Carlisle Corpn v Graham,* (1869) 4 LR Ex 361; *Attorney-General of Southern Nigeria v Holt & Co,* (1915) AC 599 : [1914-15] All ER 444; *Thakurain Ritraj Koer v Sarfaraz Koer,* (1905) ILR 27 All 655 : 32 IA 165; *Narendra v Acchaibar,* (1906) ILR 28 All 647.

lessor at the end of the term. This law has been declared in various local Acts,[998] and in cases decided both before and after TP Act,[999] but a mere licensee who has no property in the land would acquire no right by an accretion.[1000]

Encroachments

The English rule as to accretions applies whether the accretion is caused by natural or artificial means, provided the means are lawful and the accretion is gradual.[1001] The dictum of Lord Chelmsford in *A G v Chambers,*[1002] and followed in *Secretary of State v Kadirikuiti,*[1003] that if the acts causing artificial accretion were done with that intention, the rule did not apply, seems to have been overruled by *Bradford Corporation v Pickles.*[1004] Therefore, although the clause does not in terms apply to encroachments made by the lessee, the law as to encroachments is the same. If the lessee encroaches upon adjoining land and acquires title thereto by prescription, he must surrender the land, to the lessor at the expiry of the term whether the land be waste land or land of a stranger.[1005] The true presumption is that the land so encroached upon is added to the tenure and forms part thereof, for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of the landlord.[1006] If the land of the lessor is encroached upon, the lessor may of course, eject the lessee before he has acquired a prescriptive title,[1007] but not in the interval after the acquisition of that title, and before the end of the term.[1008] Nor can the lessor eject the lessee before the expiry of the term, if he has recognised him as lessee of the land encroached upon.[1009] It has, however, been held that if a lessee encroaches, the property encroached upon must be treated as part of the demised premises, and the lessee must repair it under the covenant to repair.[1010]

(7) Clause (e)—Destruction

The generally accepted rule that is also endorsed by the Supreme Court in *T Lakshmipathi v P Nithyananda Reddy,*[1011] is that a lease of a house or of a shop is a lease not only of the superstructure, but also of its site. It would be different if not only the site, but also the land

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998. Beng Reg 11 of 1825.
999. *Govind Monee v Dino Bundhoo,* (1871) 15 WR 87; *Attimoolah v Shaikh Saheoolah,* (1871) 15 WR 149; *Bhuggobut Singh v Doorg Bijoy Singh,* (1871) 16 WR 95; *Ramnidhee Munjee v Parbutty,* (1880) ILR 5 Cal 823; *Golam Ali v Kali Krishna,* (1881) ILR 7 Cal 479; *Brojendra Coomar v Woopendra Narain,* (1882) ILR 8 Cal 706; *Gourhari Kaiburto v Bhola Kaiburto,* (1894) ILR 21 Cal 233; *Assanullah v Mohini Mohan Das,* (1899) ILR 26 Cal 739; *Mutura Kanto v Meanjan Mundul,* (1879) 5 Cal LR 192; *Amjad Ali v Kaderjan,* (1902) 13 Cal WN 269 : 4 IC 518; *Ahmud Bepari v Tohi Mahomed,* (1909) 13 Cal WN 267 : 4 IC 511; *Madhu v Sabar Ali,* (1910) 14 Cal WN 681 : 6 IC 177; *Manjaya v Tammaya,* (1924) 26 Bom LR 520 : 80 IC 427 : AIR 1924 Bom 449.
1000. *Beni Pershad v Chaturi Tewary,* (1906) ILR 33 Cal 444, p 450.
1001. *AG v Chambers, AG v Rees,* (1859) 4 De G & J 55.
1002. *AG v Chambers,* (1859) 4 DeG & J 55.
1003. *Secretary of State v Kadirikuiti,* (1890) ILR 13 Mad 369.
1004. *Bradford Corporation v Pickles,* (1895) AC 587 : [1895-99] All ER Rep 984.
1005. *Gooroo Dass Roy v Issur Chunder Bose,* (1874) 22 WR 246; *Nuddyarchand Shaha v Meajan,* (1884) ILR 10 Cal 820; *Indu v Atul,* (1925) 42 Cal LJ 276 : 87 IC 630 : AIR 1925 Cal 1114; *Andrews v Hailes,* (1853) 2 E & B 349; *Kingsmill v Millard,* (1855) 11 Exch 313; *Nesbit v Maplethorpe Urban Council,* (1918) 2 KB 1.
1006. *Muthurakoo v Orr,* (1911) 21 Mad LJ 615 : 10 IC 575.
1007. *Prohlad Teor v Kedar Nath Bose,* (1898) ILR 25 Cal 302; *Nuddyarchand Shaha v Meanjan,* (1884) ILR 10 Cal 820.
1008. *Tabor v Godfrey,* (1895) 64 LJ (QB) 245.
1009. *Prohlad Teor v Kedar Nath Boss,* (1898) ILR 25 Cal 302; *Khondakar Abdul v Mohini Kant,* (1899) 4 Cal WN 508.
1010. *JF Perrott & Co Ltd v Cohen,* (1951) 1 KB 705 : [1950] 2 All ER 939.
1011. *T Lakshmipathi v P Nithyananda Reddy,* (2003) 5 SCC 150 : AIR 2003 SC 2427.

beneath, ceases to exist by an act of nature. In the event having been created in respect of a building standing on the land, it is the building and the land which are both components of subject matter of demise, and the destruction of the building alone does not determine the tenancy when the land which was site of the building continues to exist, more so when the building has been destroyed or demolised neither by the landlord, nor by an act of nature, but solely by the act of the tenant or the person claiming under him.

This clause overrides clause (m), and there is no duty to repair or restore, if the property leased is destroyed by fire not caused by the negligence of the lessee.[1012] If after the destruction of the premises leased, being a thatched shed, the lessee builds a new premises on the land despite the protest of the lessor, he cannot claim tenancy in respect of those premises, if the lease was for premises only, and not for land.[1013] The site of a building on which it stands would be an integral or component part of the building. Thus, when a lease of a residential or commercial building is granted, it would normally take in the site, unless it is either expressly or impliedly excluded from the lease. Even complete destruction of a house does not by itself determine the tenancy of the land on which it stood. The right of a lessee in the lease property subsists even if the leased property has been destroyed by fire, tempest, or flood, or violence of an army or of a mob or other irresistible forces, unless the lessee exercises his option that on happening of such events the lease has been rendered void. By necessary corollary, therefore, if the leased property is destroyed wholly by fire, the lease cannot be said to be extinguished, nor can it be said that lessee's right in the leased property has come to an end, unless the lessee exercises such option. It means that destruction of the tenanted structure does not extinguish the tenancy automatically, and the right of occupation of the tenant under the contract of tenancy continues to exist between the parties.[1014] Without the site, the superstructure of the building on the land cannot normally exist. There cannot be a building without a site and once a structure is put up on the land, the site becomes a part of the building. Section 108 (e) of the TP Act may not be helpful in deciding the relationship between the parties when one is to consider the question on the basis of the definition under the rent control Act. Moreover, when there is no complete destruction of the building, only then the principle of section 56 of the Indian Contract Act, 1872, read with section 108 (e) of the TP Act can be applied. The relationship will continue till the tenant is evicted,[1015] but if by some convulsion of nature the very site ceases to exist, by being swallowed up altogether, or buried in the depths of the sea, it seems clear that any lease of the property must come to an end.[1016] Thus, where the shop room used as a godown by the tenant was pulled down by the municipal authorities, it was held that even after the destruction of the superstructure of the shop room, the tenant was entitled to continue in possession of the land on which the shoproom stood before its destruction as part of the demised property, subject to all the rights and liabilities as a tenant, since the landlord tenant relationship continued to exist.[1017] The complete destruction of the subject of the lease ie, the building/superstructure and the destruction of the underlying land in a lease deed will affect leasehold rights but where a godown that was given on lease was destroyed by fire but the lessee did not opt for declaration of the lease deed as void, he would not be deemed to have

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1012. *East Indian Distilleries & Factories v Mathias,* (1928) ILR 51 Mad 994 : 114 IC 234 : AIR 1928 Mad 1140; *Deputy Lal v Reoli Prasad,* AIR 1941 All 327.
1013. *Kshitish Chandra v Shiba Rani,* AIR 1950 Cal 441.
1014. *Hind Rubber Industries Pvt Ltd v T M Bagasarwalla,* AIR 1996 Bom 389 : (1996) 4 Bom CR 414.
1015. *V Kalpakam Amma v Muthurama Iyer Muthukrisha Iyer,* AIR 1995 Ker 99 : (1994) 2 KLJ 554.
1016. *Woodfall's Laws of Landlord and Tenant,* 28th edn, vol I, para 2056.
1017. *George J Ovungal v Peter,* AIR 1991 Ker 55, p 64; *Dhruv Dev v Harmohinder Singh,* AIR 1968 SC 1024 : (1968) 3 SCR 339 : (1968) 70 PLR 1126. See also *Jiwanlal & Co v Manot & Co,* 64 Cal WN 932; *Rahim Bux v Muhammad Shafi,* AIR 1971 All 16; *Shyam Kumari v Ezaz Ahmed,* AIR 1977 All 376.

exercised his rights under section 108 (e) as even as the godown was destroyed, the land on which it stood was still in possession of the lease.[1018]

However, the Supreme Court's[1019] decision stands in sharp contrast to the abovementioned rulings. The apex court held that where the tenancy is exclusively for premises and not for land, on the destruction of the subject matter, the tenancy stands extinguished. A perusal of section 108(B)(e) shows that where a premises has fallen down under the circumstances mentioned therein, the destruction of the shop itself does not amount to determination of tenancy under section 111. In other words, there is no automatic determination of tenancy, and it continues to exist. If the tenancy continues, the tenant can only squat on the vacant land, but cannot use the shop for carrying on the business as it is destroyed, and further he cannot resconstruct any shop on the vacant land. Under such circumstances, it is tenant who is to suffer as he is unable to enjoy the fruits of the tenancy, but he is saddled with the liability to pay monthly rent to the landlord. It is for such a situation that the tenant has been given an option under section 108(B)(e) to render the lease of the premises void and avoid the liability to pay monthly rent to the landlord. Section 108(B)(e) cannot be interpreted to mean that the tenant is entitled to squat on the open land in hope that in future if any shop is constructed on the site where the old shop existed, he would have right to occupy the newly constructed premises on the strength of original contract of tenancy. The lease of a shop, is transfer of the property for its enjoyment. On destruction of the shop the tenancy cannot be said to be continuing since the tenancy of a shop presupposes a property in existence, and there cannot be subsisting tenancy where the property is not in existence. Thus, when the tenanted shop has been completely destroyed, the tenancy right stands extinguished as the demise must have a subject matter, and if the same is no longer in existence, there is an end of the tenancy and, therefore, section 108(B)(e) has no application in case of premises governed by the state rent Act when it is completely destroyed by natural calamities.

Destruction by landlord

Destruction of the premises by the landlord is not an act of God, and section 108(e) does not apply. The tenant is protected by section 108(e). Suit by the tenant for directing the landlord to restore possession in the original condition is maintainable.[1020]

Clause (e) and the doctrine of frustration

In India, the provisions of sections 32 and 56 of the Indian Contract Act, 1872 codify the law on the subject of contingent contracts and discharge due to impossibility. This was stressed by the Supreme Court in *Ganga Saran v Ram Charan Ram Gopal,*[1021] and has been reaffirmed in *Satyabrata Ghose v Miigneeram Bangur & Co.*[1022] It is not, therefore, possible to invoke the English doctrine of frustration as such in India. In the latter case, the Supreme Court observed that the doctrine (section 56) could apply to contracts for the sale of lands, as such contracts do not in Indian law create an interest in land. Presumably, therefore, it

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1018. *Renikuntla Rajamma v K Sarwanamma,* (2014) 9 SCC 445 : AIR 2014 SC 2906 : JT 2014 (8) SC 283; *Shankar Prasad v State of MP,* AIR 2013 (NOC)172 (MP).
1019. *Vannattankandy Ibrayi v Kunhabdulla Hajee,* (2001) 1 SCC 564 : AIR 2003 SC 4453; overruling *Hind Rubber Industries Pvt Ltd v Tayebhai Mohammedbhai Bagasarwalla,* AIR 1996 Bom 389 (1996) 4 Bom CR 414 and *V Kalapakam Amma v Muthurama Iyer Muthrkrishna Iyer,* AIR 1995 Ker 99 : (1994) 2 KLJ 554; followed by *Puthukkattil Parangodan v Puthukkattil Parameswaran,* AIR 2002 Ker 221 : ILR 2002 (2) Karala 280.
1020. *Mushe Ali Khan v Mohammed Siddiq,* AIR 1981 All 307.
1021. *Ganga Saran v Ram Charan Ram Gopal,* [1952] SCR 36 : [1952] SCJ 799 : AIR 1952 SC 9.
1022. *Satyabrata Ghose v Miigneeram Bangur & Co,* [1954] SCR 310 : [1954] SCJ 1 : [1954] SCA 187 : AIR 1954 SC 44.

would apply to an agreement to grant a lease. As far as a lease is concerned, there is no scope for the doctrine as such, for, the mutual rights and obligations of parties in such cases are settled, subject to a contract to the contrary, by clause (e), and this has been so held.[1023] Where the property leased is not destroyed or substantially and permanently unfit, the lessee cannot avoid the lease, because he does not, or is unable to use the land for purposes for which it is let to him. The doctrine of frustration of contracts as embodied in section 56 of the Indian Contract Act, 1872 has no application to leases which invoke a transfer of property, and the principle of frustration to the extent embodied in section 108(e) of the TP Act alone, applies to leases governed by the TP Act.[1024]

Clause (e) clearly indicates that where a material part of the property has been destroyed, it is the lessee's option to treat the lease as void. This clause is obviously based on the assumption that there is no frustration in the sense of the lease automatically coming to an end,[1025] for it is left to the volition of the lessee only, and not to that of the lessor, to put an end to it, provided that he is not in default. In this sense, therefore, clause (e) only partially accepts the doctrine of frustration in its application to a lease.

Cases have arisen in India in which demised premises have been requisitioned by the government for long periods of time. Thus, it has been held that where part[1026] or even the whole[1027] of the demised premises have been requisitioned, there is no frustration of the lease. No reference was made in these cases to clause (e). If reference was made to it, vital interesting questions would have arisen. First of all, it would have had to be considered whether the governmental action of requisitioning amounted to "other irresistible force", or whether these words had to be read *ejusdem generis* so as to mean some physical force. A single judge of the Allahabad High Court has, however, held that clause (e) can have no application where premises are demolished under the orders of a municipal authority.[1028] The next question would have been whether the property had been "rendered substantially and permanently unfit for the purpose for which it was let". In *Purshonam v Batala Municipality,*[1029] *A* obtained a lease of *tonga* stands from the municipality for ₹ 5,000, but during the whole period of the year the *tongawallas* refused to use the stands for no fault of *A*. It was held that the contract was frustrated. No question was raised as to whether a lease could be frustrated at all. Where except a small portion of the wall of the structure which was leased alongwith the site all the remaining portions fell down, and the structure did not remain levitate, even then there would be no frustration of lease, and the landlord tenant relationship would not come to an end. However, in such a case, the tenant was not entitled to put a superstructure on the site without the permission of the landlord, and the landlord would be entitled to get decree of mandatory injunction to demolish the structure put up by the tenant.[1030]

Other illustrative decisions—Clause (e)—Applies

This clause gives the lessee the option of avoiding the lease by notice, if the premises are rendered substantially and permanently unfit for the purposes for which they were let by any

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1023. *Mahadeo Prosad v Calcutta Dyeing & Cleaning Co,* AIR 1961 Cal 70; *Court of Wards v Raja Dharan Dev,* (1960) ILR 1 Punj 384 : AIR 1961 Punj 143; And see *Valiapally v C Thomman,* AIR 1956 Tr & Coch 59.
1024. *George J Orungal v Peter,* AIR 1991 Ker 55, p 61; *Dhruv Dev v Harmohinder Singh,* AIR 1968 SC 1024.
1025. *Munnuswamy v Muniramiah,* AIR 1965 AP 167.
1026. *Abdul Hashem v Balahari,* AIR 1952 Cal 330.
1027. *Tarabai Jivanlal v Padamchand,* (1949) 51 Bom LR 797 : AIR 1950 Bom 89.
1028. *Rahim Bux v Mohammed Sharif,* AIR 1970 Lah 199 : AIR 1971 All 16.
1029. *Purshonam v Batala Municipality,* AIR 1949 EP 301.
1030. *V Kalpakam Amma v Muthurama Iyer Muthukrishna Iyer,* AIR 1995 Ker 99.

of the events described. The clause was applied and the lessee was allowed to avoid the lease when coffee plants,[1031] and godowns[1032] were destroyed by fire during the term of the lease. The Madras High Court doubted whether the clause applied when the property leased was flooded with sea water.[1033]

Clause (e)—Does not apply

The clause was held not to apply when a house was damaged by earthquake so as to need repair, but which was not in danger of collapsing,[1034] or when a godown was destroyed by fire caused by the negligence of the lessee's watchman.[1035] Nor will the clause assist a lessee of salt pans who is prevented from manufacturing salt by labour trouble,[1036] or where there is temporary damage due to a cyclone,[1037] or where crops are damaged by heavy rains,[1038] or where the parties have specifically provided for the payment of rent in the contingency contemplated by this clause.[1039]

The clause confers an option, and the lease subsists if the lessee does not exercise it.[1040]

Under section 108(e), where the property is destroyed, the lessee has the option to treat the lease as void. But where the destruction of the premises is on account of the wrongful act of the lessee, he cannot treat the lease as continuing and can neither construct a building in place of the destroyed building, nor require the lessor to reconstruct the destroyed building.[1041] In such cases, the lease comes to an end and no question of notice to quit under section 105 arises.[1042]

Rent

The notice avoiding the lease takes effect immediately on service, and section 106 has no application.[1043] Rent is apportioned and the lessee is liable for rent up to the date of his notice. But if the lessee does not give vacant possession, he will be liable for rent on an implied tenancy by holding over.[1044]

This clause was referred to in a Lahore case,[1045] where a cantonment market was blown down after the cantonment Authority had granted license for the sale of vegetables for three years. The TP Act applies in cantonments, and the court in one passage of the judgment treated the license as a lease which the lessee had omitted to avoid under section 108(e). Another part of the judgment treated the license as an agreement, and suggested that the abandonment of the premises amount to rescission. The court omitted to notice that if the document was a lease, registration was necessary, and the terms of the lease could not be

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1031. *Kunhayen Haji v Mayan,* (1894) ILR 17 Mad 98.
1032. *Dhuramsey v Ahmedbhai,* (1899) ILR 23 Bom 15; *Sidick Haji v Breul & Co,* (1910) 12 Bom LR 1055 : 8 IC 1049.
1033. *Subramania Pattar v Kattamballi,* (1920) ILR 43 Mad 132 : 53 IC 397.
1034. *Donaghey v Weatherdon,* 7 IC 201.
1035. *Girdaridoss v Ponna Pillai,* (1920) 39 Mad LR 233 : 59 IC 252.
1036. *Hari Laxman v Secretary of State,* (1928) ILR 52 Bom 142 : 108 IC 19 : AIR 1928 Bom 61.
1037. *Ramanada v TSA Hamid,* AIR 1963 Mad 94.
1038. *Suramma v Sataramaswamy,* AIR 1957 AP 71.
1039. *Surpat Singh v Sheo Prasad,* (1945) ILR 24 Pat 197 : AIR 1945 Pat 300; *Velur Devasthanam v Sundaram Naina,r* (1959) 1 Mad LJ 244.
1040. *Kundan Lal v Shamshad Ahmad,* (1964) All LJ 1120 : AIR 1966 All 225.
1041. *Thomas v Moram Mar Baselious Ougen I Catholics Metropolitan Malankara,* AIR 1979 Ker 156 : (1979) KLT 596.
1042. *V Sidharthan v Pattiori Ramadasan,* AIR 1984 Ker 181 : 1984 KLJ 263.
1043. *Simper v Combs,* [1948] 1 All ER 306.
1044. *Damodar Coal Co v Harmook Marwari,* (1915) 19 Cal WN 1019 : 31 IC 677.
1045. *Sidick Haji v Breul & Co,* (1910) 12 Bom LR 1055 : 8 IC 1049.

proved. The case seems to have been one of a license revoked by the destruction of the premises and thereafter, renewed by permission to set in other premises.[1046]

(8) Clause (f)—Lessor not Liable to Repair

The lessor is under no liability to repair in the absence of an express contract making him liable.[1047] Indeed, section 108(m) implies that the liability is that of the lessee.[1048]

Lessor's covenant to repair

The words in the section "any repairs which he is bound to make to the property" refer to an express covenant to repair. The onus of proving such express covenant is on the lessee. If the lessor commits a breach of his express covenant, the lessee is not entitled to terminate the tenancy; for the section gives him the right after notice to the lessor, to do the repairs himself and deduct the amount from the rent.[1049] The lessor's covenant to repair, and the lessee's covenant to pay the rent are independent covenants.

A lessor's covenant to repair is construed on the same principles as the lessee's covenant to repair,[1050] and does not extend to giving the lessee a different thing from that which he took at the beginning of the tenancy.[1051] A covenant to repair external parts of a house has been construed to apply to a wall left without proper support by reason of the demolition of an adjoining house under a local statute.[1052] Where the lessor of shop premises, forming part of the lessor's building which contained a theatre and a rehearsal room, covenanted to keep the exterior of the demised premises in good and tenantable repair and condition, and owing to a severe frost and not to any default of the lessor, certain sprinklers for discharging water in case of fire fitted in the rehearsal room and extending to the demised shop, burst and damaged the lessee's goods, it was held that there had been no breach of the covenant.[1053] Where an under-lease contained a covenant by the sub-lessor to "keep the outside walls and roofs in good and tenantable repair as and so far only as is required to be done by them under the head lease" and by the head lease the lessee (the predecessor in title to the sub-lessor) covenanted to keep the premises "in good and tenantable repair (destruction or damage by fire and fair wear and tear excepted)", it was held that the exception includes damage to the outside walls and roofs caused by natural agencies such as rain, wind and decay and also consequential damages to the interior of the house.[1054] A covenant by a lessor to repair is construed in English law as covenant to repair upon notice,[1055] even with reference to defects in existence at the time of demise,[1056] and this, is also the effect of the section in

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1046. *Banarsi Das v Cantonment Authority,* 153 IC 241 : AIR 1933 Lah 517.
1047. *Charles Stuart v Patrick Playfair,* (1897) 2 Cal WN 34; *Bolton v Donald,* (1906) 3 All LJ 134; *Bijay Chandra v Howrah Amta Rly,* (1923) 38 Cal LJ 177 : 72 IC 98 : AIR 1923 Cal 524; *Lakhmichand v Ratanbai,* (1927) ILR 51 Bom 274 : 101 IC 210 : AIR 1927 Bom 115; *Narayan Rajaram v Shankar Diwakar,* (1956) ILR Nag 977 : AIR 1955 Nag 202; *Steuart & Co Ltd v Mackertich,* AIR 1963 Cal 198; *Slaefer v Lambeth Borough Council,* (1960) 1 QB 43 : [1959] 3 All ER 378; *Doraipandi Konar v Sundara Pathar,* (1970) 1 Mad LJ 62 : AIR 1970 Mad 291.
1048. *Bijay Chandra v Howrah Amta Rly,* AIR 1923 Cal 524; *Lakhmichand Khetsey v Ratanbai,* AIR 1927 Bom 115.
1049. *Bijay v Hawrah Amta Light Rly,* (1923) 38 Cal LJ 177 : 72 IC 98 : AIR 1923 Cal 524; *Granada Theatres Ltd v Freehold Investment (Leytlonslone) Ltd,* (1959) Ch 592 : [1959] 2 All ER 176.
1050. See note under section 108(m) below.
1051. *Torrens v Walker,*(1906) 2 Ch 166 : [1904-7] All ER Rep 800.
1052. *Green v Eales,* (1841) 2 QB 225.
1053. *Peters v Prince of Wales Theatre (Birmingham) Ltd,* (1943) 1 KB 73 : [1942] 2 All ER 533.
1054. *Taylor v Webb,* (1937) 2 KB 283 : [1937] 1 All ER 590. But see *Regis Property Co Ltd v Dudley,* (1959) AC 370, p 393 : [1958] 3 All ER 491. And see cases under clause (m) below.
1055. *Makin v Watkinson* (1870) LR 6 Exch 25; *Manchester Bonded Warehouse Co v Carr,* (1880) 5 CPD 507, p 511.
1056. *Uniproducts, Ltd v Rose Ltd,* [1956] 1 All ER 146 : (1956) 1 WLR 45.

TP Act. The law in England, and also this section requires the tenant to give notice to the landlord of latent as well as patent defects irrespective of whether the landlord has means of access, otherwise no responsibility attaches to the landlord in respect of the covenant to repair.[1057]

The lessor's covenant to repair overrides the covenant for quiet enjoyment, and gives the lessor a right of entry for a reasonable time to perform his covenant.[1058] The cleaning of a flue comes within the expression "executing repairs" and entitles the lessor to enter upon the demised premises under covenant of the lessee to permit the lessor to enter upon the demised premises for "executing repairs".[1059]

The rule of tort that, on the lessee entering into possession, the lessor would not be liable even for existing defects, has certain exceptions — as when, under the contract, the lessor was bound to maintain the demised premises in sound condition. Therefore, where wiring and its maintenance were the responsibility of the lessor, and a visitor dies of severe electrical shock owing of defective wiring in the premises, the lessor was alone liable for the loss caused. The lessor would not be liable where he was under no obligation to attend to the upkeep.[1060]

Breach of express covenant

The lessor is liable for injury caused to the lessee by breach of an express covenant to repair, but not for injuries caused to the lessee's wife.[1061]

The occupier and not the owner is prima facie liable for damages for nuisance on the demised premises, or for injury of third persons, or to adjoining property due to the house being in a dilapidated condition.[1062] But the lessor may be liable if the house was in a defective condition when it was let, or if he has committed a breach of his covenant to repair, and thereby injury is caused to a neighbouring owner;[1063] or to a passer-by;[1064] for according to the maxim *sic mere tuo ul alienum non laedas,* the owner owes a duty to his neighbour whether the neighbour's title is of property or of passage.[1065]

ILLUSTRATION

A's assignor leased a Port Trust godown to *B* for a term of five years, beginning on 1 May 1911. On 15 April 1912, the assignor assigned the reversion of the lease to *A*. At the time of the assignment the godown was inspected by the Port Trust officials, and found to be in good order. On 19 February 1915, a wall of the godown collapsed and damaged the wall of the adjoining godown of *C*. *C* sued *A* and *B* for damage. Held, that *A* was not liable as the godown was in a good condition when let, but that the tenant *B* was liable.[1066]

Remedies of the lessee

The lessee has the right by this section to do the repairs himself, in case of the lessor's default after reasonable notice; but he is not entitled to terminate the tenancy by reason of

1057. *Morgan v Liverpool Corporation,* (1927) 2 KB 131 : [1926] All ER Rep 25 (CA).
1058. *Saner v Bilton,* (1878) 7 Ch D 815.
1059. *Greg v Planque,* (1936) 1 KB 669 : [1935] All ER Rep 237.
1060. *Villabai Ammal v S Radhakrishnan,* AIR 1986 Mad 173.
1061. *Cavalier v Pope,* (1906) AC 428; *Malone v Lasky,* (1907) 2 KB 141 : [1904-7] All ER Rep 304; *Cameron v Young,* (1908) AC 176, p 180.
1062. *Russell v Shenton,* (1842) 3 QB 449; *Bai Monghibai v Doongersey,* (1917) 19 Bom LR 887 : 43 IC 273.
1063. *Todd v Flight,* (1860) 9 CB (NS) 377; *Neison v Liverpool Brewery Co,* (1877) 2 CPD 311.
1064. *Gandy v Jubber,* (1864) 5 B & S 78; *Bowen v Anderson,* (1894) 1 QB 164; *Mills v Temple-West,* (1885) 1 TLR 503; *Wilchick v Marks and Silverstone,* (1934) 2 KB 56 : [1934] All ER Rep 79.
1065. *Cameron v Young,* (1908) AC 176, p 180.
1066. *Bai Monghibai v Dongersey,* (1917) 19 Bom LR 887 : 43 IC 273.

the lessor's default and to quit,[1067] unless the performance of the covenant has been made a condition of the continuance of the lease.[1068] The lessee may deduct the cost of repairs with interest from the rent. A covenant by the tenant to pay the rent without deduction does not exclude the tenant's right to make this deduction.[1069] But when a tenant is not deprived of the premises destroyed, he cannot ask for the abatement of the rent.[1070]

(9) Clause (g)—Payments Made on Behalf of Lessor

If the lessee makes a payment which the lessor is bound to make, and which if not made is recoverable from the lessor or from the land, the lessee is a person interested in the payment and is, therefore, entitled to be reimbursed. This is enacted in section 69 of the Indian Contract Act, 1872, and the illustration to that section is that of a payment made by a tenant of land revenue payable by the *zamindar* in order to prevent the sale of his holding. So a *patnidar* is entitled to recover land revenue due by his superior landlord, and paid by him to avoid the risk to his holding.[1071] If the lessor's mortgagee obtains a decree for the sale of the property leased, and the lessee pays the decretal amount and stops the sale, the lessee is entitled to recover the amount so paid under this section.[1072] But a payment which the lessor is not bound by law to make is not within the section.[1073]

Payments under this section may be government assessment or ground rent or rates and taxes payable by the landlord.[1074] The lessee reimbursed himself either by deducting the amount paid with interest from the rent or *aliunde,* eg by counterclaim to the lessor's suit for rent. The operation of this clause may, however, be excluded by special stipulation in that behalf. By an express condition in the contract, a lessee may undertake to pay all taxes due, such as the urban immovable property tax or riot tax in Bombay.[1075]

In section 108(g), the term "neglect", in regard to taxation, should mean the non-payment of the tax at the time when it is payable and, in the absence of anything exceptional, the non-payment would be deemed to be "neglect", after the expiry of a reasonable time for the payment of the tax.[1076]

(10) Clause (h)—Fixtures

This clause refers to the lessee's right to remove fixtures.

Amendment

This sub-section has been amended by the insertion of the words "even after the determination of the lease" to settle a conflict of decisions referred to in *Angammal v Aslami Sahib,*[1077] as to whether a lessee is entitled to an allowance of a reasonable time after the

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1067. *Bijay Chandra v Howrah Amta Rly,* (1923) 38 Cal LJ 177 : 721 IC 98 : AIR 1923 Cal 524; *Govindasamy v Palaniappa,* (1925) 48 Mad LJ 397 : 87 IC 10 : AIR 1925 Mad 833.
1068. *Surplice v Fransworth,* (1844) 7 Man & G 576.
1069. *Katie Graham v Colonial Government of British Guiana,* (1910) 12 Cal LJ 351 : 6 IC 131.
1070. *Bansi Shah v Krishna Chandra,* AIR 1951 Pat 508.
1071. *Smith v Dinonath,* (1885) ILR 12 Cal 213; *Bama Sundari Dasi v Adhar Chunder,* (1894) ILR 22 Cal 28; *Faiyazunnissa v Bajranj,* 104 IC 358 : AIR 1927 Oudh 609.
1072. *Iswara v Ramappa,* 152 IC 201 : AIR 1934 Mad 658.
1073. *Bepin Behari v Kalidas,* (1901) 6 Cal WN 336.
1074. *Basant Lal v Boora Ram,* AIR 1963 All 568.
1075. *Mancherji v Dinbai,* AIR 1941 Bom 260.
1076. *Azharudin v Syed Zahid Hussain,* AIR 1979 All 435.
1077. *Angammal v Aslami Sahib,* (1915) ILR 38 Mad 710 : 21 IC 583; *Thavasi Ammal v Salai Ammal,* (1918) 35 Mad LJ 281 : 43 IC 643; *Raja Avergal v Noor Mahomed,* 66 IC 48 : AIR 1922 Mad 349; *India Electric Works v B S Mantosh,* AIR 1956 Cal 148. And see *Municipal Board v Bir Singh,* (1965) ILR All 435 : (1965) All LJ 432 : AIR 1965 All 527.

determination of the lease for the removal of his fixtures. A further amendment by the words "whilst he is in possession of the property leased and not afterwards" fixes definitely the time during which the right may be exercised. The amendment introduces no new principle, but limits and defines the tenant's right to remove as one to be exercised during the term, and negatives any right to remove when the tenant is not in possession.[1078] If he once quits possession, he may not return and the fixtures become the property of the lessor.

Subject to a contract to the contrary

Section 108 opens with a non obstante clause which reveals that where there is a contrary to the contrary the provisions of section 108(h) would not apply.[1079] Clause (h) of section 108 confers a right on the lessee to remove either during or even after the determination of the lease, at any time whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth which will include any building raised by him on the leased land. However, such right is subject to a contract or local usage to the contrary.[1080] In *Dhairyawan v J R Thakur*[1081] the Supreme Court held that although under section 108, the lessee has the right to remove the building but by the contract, in the facts of the case, the lessee had agreed to hand over the same to the lessors without the right to receive compensation at the end of the lease. The matter would be governed by the contract between the parties. Such a contract did not transfer the ownership in the building to the lessors only while the lease subsisted. Obviously at the end of the lease, the things attached to earth by the tenants pass over to lessor-owners of land in accordance with the contract. On determination of lease, as entered into between the parties the consequences which follow are: (i) the lease of land comes to an end; (ii) the ownership of building raised by principal tenants stand vested in the lessor-owners of land, the building goes with the land, (iii) the principal tenants have to physically vacate the property, and (iv) the lessor-owners stand subrogated in place of principal tenants.

The section is subject to a contract to the contrary, and has no application if there is special stipulation in the lease as to the lessee's right of removal and of compensation.[1082] If, on a true construction of such a lease, the buildings to be erected thereon are deemed to be the property of the lessor, and are leased back to the lessee, they are part of the demised premises, and the lessee is entitled to the benefit of the rent Acts;[1083] where, however, the building remains the property of the lessees during the pendency of the lease, on its expiry the lessee is not entitled to claim the protection of such acts *qua* the building.[1084]

All things which he has attached to the earth

The phrase "attached to the earth" has been explained in a note under section 3, and includes trees, shrubs, buildings and machinery. The lessee's right does not depend upon the maxim of English law *quicquid plantatur solo, solo cedit,* but on the common law of India as

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1078. *Govind Prasad Shaha v Charusheela Dasee,* (1932) ILR 60 Cal 1042 : 37 Cal WN 791 : 58 Cal LJ 161 : 147 IC 1238 : AIR 1933 Cal 875; Cf *Penton v Robart,* (1801) 2 East 88; *Khimji v Pioneer Fibre Co,* AIR 1941 Bom 337; *Murti Shri Radha Krishnaparnami Mandir v Des Raj,* AIR 1990 P&H 169 (NOC).
1079. *Basant Lal v State of Uttar Pradesh,* AIR 1981 SC 170.
1080. *Ratan Lal Jain v Uma Shankar Vyas,* (2002) 2 SCC 656, para 6.
1081. *Dhairyawan v J R Thakur,* AIR 1958 SC 789 : [1959] 1 SCR 799 : 1958 SCJ 1060.
1082. *Cook & Co v C L Phillips,* (1931) 34 Cal WN 785 : 130 IC 222 : AIR 1931 Cal 133.
1083. *Bhatia Co-operative Housing Society Ltd v DC Patel,* [1953] SCR 185 : [1952] SCJ 642 : AIR 1953 SC 16.
1084. AIR 1958 SC 789, [1959] 1 SCR 799.

stated in *Poramanick's* case[1085] which this section follows. In that case, a Full Bench of the Calcutta High Court said:

> We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building, or allowing the removal of the material, remaining with the owner of the land, in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.

The lessee is the owner of the building put up by him on the land leased.[1086] It is by now well settled that the maxim, what is annexed with the soil goes with the soil, has not been accepted as absolute rule of law of this country. A person who bona fide puts up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land.[1087]

The English law allows a tenant to remove fixtures such as can be removed without causing serious damage to the structure, but under this section the lessee may remove anything he has attached, provided he leaves the property in the state in which he received it.

The right to remove the buildings negatives the rights to compensation.[1088] The option is with the lessor either to take the building on payment of compensation, or if he is unwilling to pay compensation, to allow the lessee to remove the building.[1089] If there is nothing to remove, as when the tenants have sunk a well in the property, there is no right to compensation.[1090] But if the land and building are acquired under the Land Acquisition Act during the term, the lessee will be entitled to compensation for the buildings he has erected.[1091] Where the leased land was acquired by the government for the lessee-company, while the lessee company was still in possession, and continued to be in possession by virtue of the land having been acquired, the Supreme Court held that the real effect of clause (h) of section 108 was that the lessor could not claim any title to the construction or the materials.[1092]

The principle of the section was applied when a lease proved to be invalid, and the tenant was allowed to remove a building he had erected.[1093] But in such a case, a tenant has no higher right on equitable grounds or otherwise, and cannot claim compensation; he is only entitled to remove the structures.[1094] A lessor is entitled to require the lessee to remove a

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1085. *Poramanick's* case (1866) 6 WR 228, p 229; *Russickloll v Lokenath,* (1880) ILR 5 Cal 668; *Dunia Lal Seal v Gopi Nath,* (1895) ILR 22 Cal 820; *Ismail Kani Rowthan v Nazarali Sahib,* (1904) ILR 27 Mad 211; *Kanai Lal v Rasik Lal,* (1915) 19 Cal WN 361 : 23 IC 762.

1086. *Lakshmipat v Larsen & Toubro,* AIR 1951 Bom 205 : 52 Bom LR 688.

1087. *Bishan Das v State of Punjab,* AIR 1961 SC 1570, p 1574; *Atmakur Venkatasubbiah Chetty v Thirupurasundari Ammal,* AIR 1965 Mad 185, p 186; *Mohammed Abdul Kadar v The District Collector of Kanyakumari,* AIR 1972 Mad 56, p 59; *Park View Enterprises v State of Tamil Nadu,* AIR 1990 Mad 251, pp 281, 283, 284.

1088. *Shaikh Hussain v Gowardhandas,* (1896) ILR 20 Bom 1, p 6; *Ismail Khan Mahomed v Jaigun Bibi,* (1900) ILR 27 Cal 570, p 586; *Usain Rowthen v Nizurali,* (1909) 19 Mad LJ 208 : 4 IC 1129; *Sundareswarar Devastanam v Marimuthu,* AIR 1963 Mad 369.

1089. *Ismail Kani Rowthan v Nazarali Sahib,* (1904) ILR 27 Mad 211, p 216.

1090. *Venkatavaragappa v Thirumalai,* (1887) ILR 10 Mad 112.

1091. *Dunia Lal Seal v Gopi Nath,* (1895) ILR 22 Cal 820; *Narayan Das Khettry v Jatindra Nath,* (1927) ILR 54 Cal 669 : 54 IA 218 : 102 IC 198 : AIR 1927 PC 135.

1092. *Basant Lal v State of Uttar Pradesh,* (1980) 4 SCC 430, p 434.

1093. *Govindasami v Ethirajammal,* (1916) Mad WN 180, 34 IC 1.

1094. *Bastacolla Colliery Co Ltd v Bandhu Beldar,* (1960) ILR 39 Pat 140 : AIR 1960 Pat 344, affirming *Darbari Lal v Raneeganj Coal Association,* (1943) ILR 22 Pat 554 : AIR 1944 Pat 30, and *Hiralal Rewani v Bastacolla Colliery Co Ltd,* AIR 1957 Pat 331. And see *Mana Devi v Malki Ram,* AIR 1961 All 84.

permanent structure on the land leased, which the latter has erected in breach of the conditions of the lease and against the will of the lessor.[1095] Section 13 of Tamil Nadu City Tenants Protection Act, repeals or modifies the provisions of the TP Act to the extent necessary to give effect to the provisions of that Act. Thus section 108(h) of the TP Act will not in a case where that Act applies, govern the question as to payment of compensation for superstructure.[1096]

Trees

Trees are part of the land, and the right of the tenant to cut them down depends upon custom and the terms of the lease.[1097] In the absence of a contract to the contrary, trees planted by a tenant pass to the landlord on the expiry of the lease.[1098] The question generally arises in agricultural tenancies which are outside the scope of TP Act. The tenants' rights vary in different provinces according to local usages and local Acts. In Bengal, the tenant's right has varied at different times. Before the Bengal Tenancy Act, 1885, the tenant had the right to enjoy the benefit of trees on his holding, but not to cut them down, unless they had been planted by himself.[1099] After the Bengal Tenancy Act his right was enlarged, and he had the right to fell trees which were on the land when it was leased to him, unless the landlord could prove a custom prohibiting him from doing so;[1100] but the trees when felled were the property of the landlord,[1101] unless they had been planted by the tenant himself or his predecessor.[1102] The Allahabad High Court has held that a tenant at fixed rates has rights of ownership, and that the trees belong to him,[1103] yet an occupancy tenant has only the right to enjoy the trees so long as his tenure lasts,[1104] and is not entitled even to trees which he has planted himself.[1105] The Bombay and Madras High Courts recognize the right of a permanent tenant to trees planted by himself.[1106] So also, the Calcutta High Court when the tenancy has come into existence after the TP Act.[1107] With regard to the trees that were on the land when the lease was granted, the tenants are not entitled to fell or sell timber trees. They may enjoy the usufruct thereof. In regard to the trees which have been planted after the commencement of the tenancy, the tenant is entitled to fell timber trees, but not non-timber trees.[1108] However, this does not apply to *babul* trees which have spontaneously grown, and the lessee cannot remove them.[1109] The lessor cannot cut down trees that belong to him during the continuance of the term, unless he has reserved a right of re-entry for that purpose,[1110] for his entry would be a trespass.[1111] But if the trees are expressly exempted from

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1095. *Chhedi Manjihi v Mahipal,* AIR 1951 Pat 600.
1096. *N A Munavar Hussain v E R Narayanan,* AIR 1984 Mad 47, p 59.
1097. *Ruttonji Edulji Shet v Collector of Tanna,* (1867)11 MIA 295.
1098. *Jugrajsa v Umrao Singh,* AIR 1950 MB 39.
1099. *Abdool Ruhoman v Dataram,* (1865) WR 367; *Goluck v Nubo,* (1874) 21 WR 344; *Radhika Nath v Samir Wakir,* (1917) 21 Cal WN 636 : 38 IC 49; *Hemangini Dassi v Ashutosh Das,* 113 IC 568 : AIR 1929 Cal 330.
1100. *Nafar Chandra v Ram Lal Pal,* (1895) ILR 22 Cal 742.
1101. Ibid; *Kedar Nath v Govinda,* (1928) 32 Cal WN 366 : 108 IC 242; *Prodyot Kumar v Gopichandra,* (1910) ILR 37 Cal 322 : 5 IC 243.
1102. *Mofiz Sheikh v Rasik Lal,* (1910) ILR 37 Cal 815 : 6 IC 796.
1103. *Harbans Lal v Maharaja of Benares,* (1910) ILR 23 All 126.
1104. *Deoki Nandan v Dhian Singh,* (1886) ILR 8 All 467; *Janki v Sheoadahar,* (1901) ILR 22 All 211.
1105. *Imdad Khatun v Bhagirath,* (1888) ILR 10 All 159.
1106. *Sitabai v Sambhu,* (1914) ILR 38 Bom 716 : 28 IC 140; *Vasudevan v Valia,* (1901) ILR 24 Mad 47.
1107. *Kedar Nath v Govinda,* (1928) 32 Cal WN 366 : 108 IC 242.
1108. *Ganesh Subrayya v Hanmam Vithoba,* AIR 1950 Bom 100.
1109. *Rangraju v Sitaramayya,* (1954) 2 Mad LJ 217 : AIR 1955 AP 62.
1110. *Kamalkrishna Sanyal v Madhusudan Chaudhuri,* (1930) ILR 57 Cal 344 : 123 IC 316 : AIR 1930 Cal 240; *Ganga Dei v Badam,* (1908) ILR 30 All 134; *Pokardas v Amir,* (1917) PR (Rev) 5 : 41 IC 907.
1111. See *Barker v Barker,* (1829) 3 C & P 557; *Neale v Wyllie,* (1824) 3 B & C 533.

the demise, such exemption would probably carry with it the incidental right of re-entry for removal.[1112] In the absence of special custom to the contrary, the principle underlying section 108 can be invoked in the case of agricultural leases. Such a lessee is not entitled to claim the timber of trees which have spontaneously grown on the land.[1113]

(11) Clause (i)—Crops

Where the lease is of uncertain duration and the lessee's interest is determined otherwise than by his fault, the lessee is entitled to the benefit of all crops growing on the land, and planted or sown by him. As ancillary to the right to remove growing crops, the lessee has the right of free ingress to and egress from the property in order to carry them away, for "when the law doth give anything to one, it giveth impliedly whatsoever is necessary for the taking and enjoying of the same".[1114] The right under this section is similar to that given by section 51 to a bona fide transferee who has sown crops, and is evicted by a person having a better title. A similar right is reserved by the common law of England in regard to emblements grown by a tenant from year to year whose tenancy is determined by no fault of his. This section has, therefore, been described as representing the common law of India.[1115] The section does not apply directly to agricultural tenancies, but the principle would no doubt be applied. Various local Acts safeguard the evicted tenant's right to their crops.

(12) Clause (j)—Assignment

Property rights are ordinarily heritable in nature.[1116]

In English law a tenant can, as an ordinary incident of the estate granted to him, both assign his term, and create sub-tenancies. Except as to some non-transferable agricultural tenancies, this has been the law in India both before and after the TP Act.[1117]

The rule of the lessee assigning the interest under a lease can in India be taken away by a contract to the contrary.[1118] Where there is a permanent lease, and there is no covenant restricting the right of the lessee to assign his interest, the lessee's rights are heritable and transferable.[1119]

The clause does not apply to tenancies of homestead land in Bengal created before the passing of the TP Act, and these are not transferable except by custom or by a condition in the contract.[1120] The clause refers to assignments that are absolute and to assignments by way of mortgage and sublease. It has, however, been held that a lessee cannot by his unilateral act of assigning his interest in the leasehold premises, put an end to the obligations which he has

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1112. *Kamalkrishna Sanyal v Madhusudan Chaudhuri,* AIR 1930 Cal 240; *Ganga Dei v Badam,* (1908) ILR 30 All 134; *Ruttonji Edulji v Collector of Tanna,* (1867) 11 MIA 295.
1113. *Gur Prasad v Mehdi Husain,* 201 IC 728 : AIR 1942 Oudh 460.
1114. Co Litt, 55b.
1115. *Narayanan v Krishna Patter,* (1914) 26 Mad LJ 348 : 22 IC 515.
1116. *Gaiv Dinshaw Irani v Tehmtan Irani,* (2014) 8 SCC 294 : LNIND 2014 SC 199 : AIR 2014 SC 2326 : 2014 (6) SCALE 99.
1117. *Venkatasamy Naick v Kulandapuri,* (1871) 5 Mad HC p 227, 247; *Doorga Pershad v Brindabun,* (1871) 15 WR 274; *Bance Madhub Banerjee v Joy Krishna Mookerjee,* (1871) 12 WR 495; *Kishori Lal v Krishna Kamini,* (1910) ILR 37 Cal 377, p 383 : 5 IC 500; *Jyoti Prasad v Har Prasad,* (1932) All LJ 567 : 139 IC 346 : AIR 1932 All 473.
1118. *Mahendra Saree Emporium v G V Srinivas Murthy,* (2005) 1 SCC 481; *Aroti Das v UOI,* AIR 2008 (NOC) 304 (Del).
1119. *Pattabhirama Rao v Sri Ramanuja G & R Factory,* AIR 1984 AP 176, p 182.
1120. *Hari Nath v Raj Chandra,* (1897) 2 Cal WN 122; *Hanuman Prasad v Deo Charan,* (1908) 7 Cal LJ 309; *Madhu Sudan v Kamini,* (1905) ILR 32 Cal 1023; *Umakanta v Kashiram,* 23 IC 246; *Mohendra v Krishna Kumar,* 46 IC 656; *Ananda Mohan v Gobinda Chandra,* (1916) 20 Cal WN 322 : 33 IC 565; *Safar Ali v Abdul Rasid,* (1924) 30 Cal LJ 585 : 84 IC 28 : AIR 1924 Cal 1012; *Sarada Kama v Nabin Chandra,* (1927) ILR 54 Cal 333 : 97 IC 817 : AIR 1927 Cal 39.

undertaken either by contract of lease, or under this section. As far as privity of contract is concerned, the only person liable is the lessee himself. The obligation to hand over possession of the property on the determination of the tenancy is not upon the assignee, but upon the lessee. The lessee is, therefore, the proper person to whom notice to vacate should be given.[1121] In a case where the lease-deed itself stipulated that the buildings put up by the tenant shall not be sold or let out to others, it was held that the doctrine of dual ownership could be of no avail to the tenant.[1122] A relinquishment is different from an assignment of tenancy.[1123] In the case of the latter, the assignor remains liable to the landlord for the fulfillment of his obligations as a tenant, while the assignee becomes liable by the privity of the estate. In the absence of a contract, no consent of the landlord is necessary for the assignment. The relinquishment of possession must be to the lessee, or to one who holds his interest. The surrender or extinguishment extinguishes the lease.[1124]

Absolute assignments

Absolute assignments are assignments of the whole interest of the lessee. Such an assignment creates privity of estate between the lessor and the assignee, and the assignee becomes liable to the lessor on covenants running with the land, including the covenant to pay rent.[1125] Equally, the assignee is entitled to the benefit of all the covenants, including an option given to purchase the reversion. However, this liability does not extend to pay interest on arrears of rent.[1126]

In English law; a sublease for the whole residue of the lessee's term operates as an absolute assignment of the lease. So does a sublease for a term exceeding that of the head lease. The Privy Council has pointed out that this is not the law in India, and that a sublease for the whole of the expired term does not operate otherwise than by a sublease.[1127]

Assignment by way of mortgage

An Indian mortgage is not as a rule an absolute assignment, and does not create privity of estate between the lessor and the mortgagee;[1128] though, of course, the mortgagee of the term when he forecloses stands in the shoes of the lessee.[1129] It has been held that a privity of estate is created where the usufructuary mortgagee pays rent to the lessor who accepts it,[1130] but this does not seem to be consistent with the decision of the Privy Council in *Ram Kinkar's* case.[1131] As

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1121. *Treasurer of Charitable Endowments v Tyabji*, (1949) ILR Bom 79 : 50 Bom LR 240 : AIR 1949 Bom 349.
1122. *West's Palm Press Co Ltd v Govindnaik Gurunathunaik Kalghatgi*, AIR 1984 Kant 274 (NOC) : see AIR 1957 Bom 94.
1123. *W H King v Republic of India*, [1952] SCR 418 : AIR 1952 SC 156 : [1952] SCJ 133 : [1952] SCA 306; *Pandit Kishen Lal v Ganpat Ram Khosla*, [1962] 2 SCR 17 : AIR 1961 SC 1554.
1124. *Haripada Singha v Sailesh Chandra*, AIR 1952 Cal 141.
1125. *Walker v Reeves*, (1781) 2 Doug 461; *Williams v Bosanquet*, (1819) 1 Brod and Bing 238; *Monica v Subraya Hebbara*, (1907) ILR 30 Mad 410; *Kamala Nayak v Ranga*, (1861) 1 Mad HC 24; *Ram Kinkar v Satya Charan*, AIR 1939 PC 14.
1126. *Virabhadraya v Hasangowda*, (1940) ILR Bom 328 : 42 Bom LR 279 : 187 IC 680 : AIR 1940 Bom 154.
1127. *Hunsraj v Bejoy Lal Seal*, (1930) ILR 57 Cal 1176 : 57 IA 110 : 122 IC 20 : AIR 1930 PC 59; *Ram Kinkar v Satya Charon*, AIR 1939 PC 14; *Nanjappa v Ranga Swami*, (1940) 1 Mad LJ 200 : 51 Mad LW 258 : (1940) Mad WN 266 : AIR 1940 Mad 410.
1128. *Thethalan v Eralpad Rajah*, (1917) ILR 40 Mad 1111 : 40 IC 841; followed in *Keshavlal v Manganlal*, (1934) ILR 58 Bom 327 : 36 Bom LR 197 : 148 IC 993 : AIR 1934 Bom 134 (but doubting the application of the doctrine of privity of estate in India).
1129. *Macnaghten v Bhikaree*, (1878) 2 Cal LR 323.
1130. *Girendra Narayan v Ganga Narayan*, (1938) ILR All 288 : (1938) All LJ 66 : 174 IC 245 : AIR 1938 All 167.
1131. *Ram Kinkar's* case, (1939) ILR 1 Cal 283 : 66 IA 50 : 41 Bom LR 672 : 43 Cal WN 281 : (1939) 1 Mad LJ 544 : 179 IC 328 : AIR 1939 PC 14.

pointed out by the Privy Council in a later case,[1132] even after a mortgage the lessor retains certain interest. The mortgagee cannot be liable to the lessor for the whole of the rents and covenants, and cannot be liable for any part of it without apportionment even if he takes possession. In such circumstances, if the mortgagee in possession pays the whole rent to the lessor, he may be regarded as doing so on behalf of the lessor, and such payment will not by itself create a privity of estate between the lessor and the mortgagee. Nor will taking of possession by the mortgagee create such privity. An English mortgage is in the form an absolute assignment, and when a mortgage in India took this form, it was thought that it made the mortgagee of the term liable by privity of estate to the lessor. This rule was laid down by CJ Wallis in *Thethalan v The Eralpad Rajah.*[1133] The same view was adopted by CJ Rankin in *Bengal National Bank v Janakinath Roy.*[1134] This was, however, doubted by J Mukerji in the undernoted case.[1135] There was thus a conflict of decisions as to whether an English mortgage by a lessee of his leasehold interest operated as an absolute assignment so as to create a privity of estate with the lessor. This conflict has now been set at rest by the decision of the Judicial Committee in *Ram Kinkar v Satya Charan,*[1136] in which it has been held that a mortgagor in India, when he assigns his interest under a lease to a mortgagee, does not under any of the forms of mortgage specified in section 58 transfer an absolute interest and consequently, the mortgagee is not liable by privity of estate for the burdens of the lease.

Assignment by way sublease

A subletting is permissible under a contract between the landlord and the tenant.[1137] The term "sub-let" is not defined under the TP Act. However, the definition of "lease" can be adopted mutatis mutandis for defining "sub-lease". What is "lease" between the owner of the property and his tenant, becomes a sub-lease when entered into between the tenant and tenant of the tenant, the latter being sub-tenant qua the owner-landlord. A lease of immovable property as defined in section 105 is a transfer of a right to enjoy such property made for a certain time for a consideration of a price paid or promised. A transfer of a right to enjoy such property to the exclusion of all others during the term of the lease is *sine qua non* of a lease. A sub-lease would imply and stands discharged by adducing prima facie proof of the fact that the alleged sub-tenant was in exclusive possession of the premises or, to borrow the language of section 105, was holding right to enjoy such property. A presumption of sub-letting may then be raised, and would amount to proof unless rebutted.[1138]

A sublease is an assignment of a lesser term and accordingly, there is no privity of estate between the lessor and the sublessee,[1139] and this is so in Indian law, although the sublease is for the whole residue of the term.[1140] A sublease which specifies no term is construed as one for the

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1132. *Jagadamba Loan Co v Raja Shiba Prosad,* 68 IA 67 : 43 Bom LR 789 : 45 Cal WN 644 : (1941) 2 Mad LJ 53 : AIR 1941 PC 36.
1133. *Thethalan v The Eralpad Rajah,* (1917) ILR 40 Mad 1111 : 40 IC 841; discussing *Kunhanujan v Anjelu,* (1894) ILR 17 Mad 296; and *Kannye Loll v Nistoriny,* (1884) ILR 10 Cal 443.
1134. *Bengal National Bank v Janakinath Roy,* (1927) ILR 54 Cal 813 : 104 IC 484 : AIR 1927 Cal 725.
1135. *Fala Krishna Pal v Jagannath,* (1932) ILR 59 Cal 1354 : 56 Cal LJ 187 : 36 Cal WN 709 : 140 IC 788 : AIR 1932 Cal 775.
1136. *Ram Kinkar v Satya Charan,* AIR 1939 PC 14.
1137. *Ashok Kumar Krishnalal Patel v Continental Textile Mills Ltd,* AIR 2013 Del 166 : LNIND 2013 DEL 954 : 199 (2013) DLT 733 : 2013 (1) ADR 572.
1138. *Mahendra Saree Emporium v GC Srinisava Murthy,* (2005) 1 SCC 481 : AIR 2004 SC 4289; see also Transfer of Property Act, 1882, section 105.
1139. *Akhoy Kumar Chatterjee v Akman Molla,* (1915) 19 Cal WN 1197 : 27 IC 397; *Timmappa v Rama Ventanna,* (1897) ILR 21 Bom 311, p 313 (but in the report privity of contract is a mistake for privity of estate).
1140. *Hunsraj v Bejoy Lal Seal,* (1930) ILR 57 Cal 1176 : 57 IA 110 : 122 IC 20 : AIR 1930 PC 59.

whole residue of the term.[1141] Sub-letting postulates two distinct persons—the head tenant and sub-tenant.[1142] A mere arrangement for management of the business of the tenant on fixed monthly payments, is not an agreement of sub-tenancy.[1143] Where the landlord enters into an agreement of lease directly with the sub-lessee, the relationship of sub-tenancy between the lessor and sub-lessee may come to an end. From the date of attornment, the status of sub-tenant comes to an end, and the sub-lessee becomes a lessee. It was held that in the circumstances of the case, it was open to the landlord to enter into a direct lease with the sub-lessee.[1144] Where the lessee of business premises enters into an agreement of partnership respecting the business, such a deed would amount to an assignment only if the premises are an asset of the partnership.[1145]

In the case of sub-letting, the onus lying on the landlord would stand discharged by adducing *prima facie* proof of the fact that the alleged sub-tenant was in exclusive possession of the premises or, to borrow the language of section 105 of the Transfer of Property Act, was holding right to enjoy such property. A presumption of sub-letting may then be raised and would amount to proof unless rebutted.[1146] Where the property had been sub-let without the permission of the landlord, it violates section 108 of the TP Act if there is an express stipulation in the lease deed barring such sub-letting.[1147] If the premises remain the possession of the tenant or sub-tenant after the termination of the tenancy, then there is an obligation to pay mesne profits.[1148] The burden of proof in an eviction suit lies on the landlord to prove illegal subletting, even if the tenant has parted with the legal possession of the premises in favour of another person without the landlord's consent. Subletting can be proved on the basis of legitimate inferences.[1149] Where an advertisement for sale was given by LIC but instead a sub lease was pressed upon with a restraint clause that the sub-lessee will not be entitled to further transfer, mortgage, sublet, sub- lease or otherwise part with the possession of the property without prior consent of the Cuttack Development Authority in writing...and the allottees cannot mortgage the house with any nationalized bank for any purpose other than construction without due permission or cannot create a permanent right of tenancy over the said land, but that there shall not be any restriction to let out the building in question on rent for the purpose for which it is constructed, the writ petition challenging such restraint was allowed.[1150]

A decree passed against the original lessee is binding upon the sub-tenant and non-joinder of such sub-tenant in the eviction suit filed by head lessor against its lessee will not make the eviction decree inexecutable qua sub-tenant. The sub-lessee does not acquire any independent right in respect of the suit premises.[1151]

1141. *Harish Chunder Roy v Sree Kalee,* (1874) 22 WR 274; *Devassy Thommen v Subramonia Iyer,* AIR 1955 Tr & Coch 223.
1142. *Jakisandas v Abdul Rahman,* AIR 1975 Guj 205.
1143. *Md Salim v Md Ali,* AIR 1987 SC 2173, p 2174 : (1987) 4 SCC 270.
1144. *Kewal Ram v Mangu Mal,* AIR 1974 Raj 201 : (1974) 7 WLN 241.
1145. *Ginn Singh & Co v Nahar,* (1965) 1 WLR 412 : [1965] 1 All ER 768 (PC).
1146. *Celina Coelho Pereira v Ulhas Mahabaleshwar Kholkar,* 2010 (1) SCC 217 : LNIND 2009 SC 1938 : AIR 2010 SC 603 : JT 2009 (13) SC 602.
1147. *Elias Meyer Free School & Talmud Torah v The Official Trustee of West Bengal,* (2010) 4 Cal LT 604 : (2011) 1 Cal LJ 324 : (2011) 102 AIC 387.
1148. *Kersi Commissariat v Maharashtra Deptt,* (2012) 5 SCC 187 : LNIND 2012 SC 219 : AIR 2012 SC 1271 : 2012 (4) SCALE 124.
1149. *S F Engineer v Metal Box India Ltd,* (2014) 6 SCC 780 : LNIND 2014 SC 293 : AIR SC (Civ) 2014 SC 1240 : JT 2014 (4) SC 284.
1150. *Bimavihar Duplex House Owners' v Unknown,* 2012 (1) ILR(Cut) 274.
1151. *Cooke and Kelvey Properties Pvt Ltd v Expo International,* (FMA 968 and 969 of 2010) decided on 23 December 2016. (*Calcutta High Court*); See also *Balavant N Viswamitra v Yadav Sadashiv,* AIR 2004 SC 4377 : LNIND 2004 SC 797 : 2004 (6) SCALE 636; *Rupchand Gupta v Raghubanshi (Pvt) Ltd,* AIR 1964 SC 1889 : LNIND 1964 SC 139 : 1964 AIR SC 0 1889.

The right of lessee springs only from letter of allotment and lease agreement and he is obliged to comply with and adhere to conditions of letter of allottment and lease agreement, he cannot compel the lessor to allow it to use the land for some other purpose than specified in such letter of allotment and lease agreement.[1152] In an agreement entered into between the lessee and sub-lessee for management, maintenance of tenancy held by the tenant, no deed of lease was executed between them and so a mere agreement of maintenance does not confer any right upon sub-lessee to prefer appeal as a co-lessee, being not a co-lessee he was neither necessary nor proper party and would not be entitled to challenge the decree of eviction suffered by the lessee.[1153] In the renewal of a lease, there exists an inefficacy of renewal of sub-lease during subsistence of renewal of head lease.[1154]

Liability of the lessee after the transfer

The section expressly enacts that the lessee by transferring the whole of his interest does not absolve himself from his contractual liabilities to the lessor.[1155] Notice to the lessor of the transfer does not affect the liability.[1156] The original lessee is liable on his covenant, ie, by privity of contract and the assignee is liable by privity of estate. There is no inconsistency between the liabilities of the two.[1157] The word "only" shows that mere transfer does not absolve the lessee, and that the transfer coupled with other circumstances may do so. Thus, the liability of the lessee ceases when the lessor releases the lessee. The release may be express or implied. The facts that the lessor served a notice on the assignee determining the lease, that the lessor filed a suit against the assignee describing the latter as lessee in the plaint and recovered judgment which, however, remained unsatisfied, have been held, in the last mentioned Bombay case, not to be enough to justify an inference that the lessor had released the lessee.

Privity of estate

In early times, the action of debt for rent in England was proprietary. The idea of a personal obligation played a very small part in the relation of landlord and tenant; and the landlord who demanded a rent in arrear was not seeking to enforce a contract, but was seeking to recover a thing. The result was that under the old system of pleading, the lessor in the absence of an express covenant, could not maintain an action for debt against the lessee for rent accruing due after an assignment of the term. Subsequently, when the personal and contractual nature of the action for debt was recognized, it became necessary to explain how a person who was not party or privy to the contract could be made liable. This difficulty was got over by applying the principle that the assignee who takes the whole interest of the lessee in the land takes it subject to the burdens. As between himself and the lessor, the assignee stands in the place of the lessee, acquiring his rights and being subject to his liabilities, and in fact becomes a tenant. In the case of a sublease, the sublessee becomes a tenant of the lessee, and does not stand in the lessee's place. Therefore, there is neither privity of estate, nor

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1152. *Shakti Commercial Premises Society Ltd v State of Maharashtra,* AIR 2012 (NOC) 379 (Bom).
1153. *Urban Amenities Pvt Ltd v Mrityunjoy Seal,* AIR 2011 Cal 123.
1154. *Saroj Screens P Ltd v Ghanshyam,* (2012) 11 SCC 434 : LNIND 2012 SC 205 : 2012 (4) SCALE 25.
1155. *Bholanath v Raja Durga,* (1907) 12 Cal WN 724; *Ardeshar v K D & Bros,* (1925) 27 Bom LR 553 : 88 IC 79 : AIR 1925 Bom 330; *Akrumani v Madhab Chandra,* 47 IC 800; *Manmatha Nath v Nalinksha,* 79 IC 557 : AIR 1925 Cal 423; *Chimanlal v Sumersinghji,* (1960) ILR 10 Raj 938 : AIR 1961 Raj 17.
1156. *Sasi Bhushun v Tara Lal,* (1895) ILR 22 Cal 494; *Manmatha Nath v Bataichandra,* 70 IC 111 : AIR 1924 Cal 359; *Satya Niranjan v Sarajubala Debi,* (1930) 33 Cal WN 865 : 127 IC 749 : AIR 1930 PC 13; *Devidas Bhatta v Ratnakana Rao,* AIR 1966 Mys 147.
1157. *Bombay Municipal Corpn v Vasantlal,* (1938) ILR Bom 471 : 177 IC 479 : AIR 1938 Bom 360; *Saradindu v Kunja Kamini Ray,* (1942) 46 Cal WN 798 : 202 IC 663 : AIR 1942 Cal 514.

privity of contract between the head lessor and the sublessee, and the sublessee is not liable for rent nor on the covenants in the head lease to the head lessor.

The doctrine of privity of estate has been applied in India in cases referred to in the next paragraph. But in *Keshavalal v Maganlal,*[1158] CJ Beaumont doubted whether the doctrine could be applied in India because the lessee in India has no estate, and because there is no reversion in the case of a perpetual lease. The word "estate" originally referred to the feudal tenure under which all real property was held for some estate under the Crown. It first meant personal status, and then status in relation to land, and now means simply the interest of a tenant in his land. In this sense it applies to the interest of a lessee in Indian law, for the lessee is recognized as having an interest in section 108(c) and section 108(j). Then, as to reversion, it is true that in English law a lease in perpetuity would operate as a grant in fee simple, and there would be no reversion. But in Indian law there is a reversion, for as Sir Lawrence Jenkins said:

> A man who being owner of land grants a lease in perpetuity, carves a subordinate interest out of his own and does not annihilate his own interest.[1159]

It seems therefore, that CJ Beaumont, referred to privity of estate in the strictest sense of English law, ie, the relationship between a legal term and a legal estate in reversion. The phrase "privity of estate" when applied in India, cannot carry precisely the same implication as in English law, since the common law of England attached very special results to the relationship between the tenant of a legal term and the owner of a legal estate in reversion, which differed in many respects from the relationship between a tenant and a landlord who had no legal reversion. But if the expression is used with reference to the relationship of landlord and tenant, there seems no reason why the principle underlying the doctrine, viz that the assignee who takes the whole interest of the lessor should take it subject to the burden, should not apply in India.

Liability of assignee to the lessor

The doctrine of privity of estate has been applied in India, and also the liability of the assignee of the term to the lessor is founded upon privity of estate. An absolute assignee is liable by privity of estate to the lessor for rent,[1160] and on all covenants running with the land. There is neither privity of estate, nor privity of contract between the head lessor and the sublessee or mortgagee and, therefore, the sublessee or mortgagee is not liable for rent, or on covenants in the head lease to the head lessor.[1161] The liability of an assignee from a lessee to pay rent to the lessor arises because of the privity of estate and, therefore, the assignee is not liable for the period prior to the date of the assignment, unless by some clear contract he becomes liable.[1162]

1158. *Keshavalal v Maganlal,* (1934) ILR 58 Bom 327 : 36 Bom LR 197 : 148 IC 493 : AIR 1934 Bom 134.
1159. *Kally Dass Ahiri v Monmohini Dassee,* (1897) ILR 24 Cal 440 approved by the Privy Council in *Abhiram v Goswami,* 36 IA 148 : 4 IC 449; *Raghunath Roy v Raja of Jheria,* 46 IA 158 : 50 IC 849.
1160. *Monica v Subraya Hebbara,* (1907) ILR 30 Mad 410; *Ardeshar v K D & Bros,* (1925) 27 Bom LR 553 : 88 IC 79 : AIR 1925 Bom 330; *Sukhdeo Pandey v Rameshwar Prasad,* 185 IC 557 : AIR 1939 Pat 522.
1161. *Thethalan v Eralpad Rajah,* (1917) ILR 40 Mad 1111 : 10 IC 841; *Timmappa v Rama Venkanna,* (1897) ILR 21 Bom 311; *Akhoy Kumar Chatterjee v Akman Molla,* (1915) 19 Cal WN 1197 : 27 IC 397; *Sitaram Maharaj v Narayan,* 56 IC 268 : AIR 1922 Nag 224; *Jethe Nand v Udho Das,* 131 IC 121 : AIR 1931 Lah 614; *Syed Nawabali v Mohammed Ramzan,* AIR 1944 Nag 141; *Ram Kinker v Satya Charan,* (1939) ILR 1 Cal 283 : 66 IA 50 : 41 Bom LR 672 : 43 Cal WN 281 : (1939) 1 Mad LJ 544 : 179 IC 328 : AIR 1939 PC 14; *Jagadamba Loan Co v Raja Shiba Prosad,* 68 IA 67 : 43 Bom LR 789 : 45 Cal WN 644 : (1941) 2 Mad LJ 53 : AIR 1941 PC 36; *Baban v Champabai* (1949) ILR Nag 632 : AIR 1949 ILR Nag 336.
1162. *Dwijendranath v Promotha Kishore,* AIR 1951 Cal 251.

The respective liabilities may be expressed in a table as follows:—

Lessor

↓

Lessee → *Absolute assignee*

Liable to lessor by privity of contract and privity of estate

Liable to lessor by privity of estate.

↓

Sublessee and Mortgagee

Not liable to lessor as there is no privity of estate or of contract.

The lessor can, therefore, enforce payment of rent from the lessee by privity of contract; and also from the assignee of the lessee by privity of estate. But he can have execution only against one.[1163]

The lessee ceases to be liable, and the privity of contract is extinguished when the lessor accepts rent from the assignee or otherwise recognizes him as his tenant[1164] in circumstances implying that the lessor has released the lessee. This would also be the case where the lease is varied by the lessor and the assignee, for this would amount to a new lease, but the lessee would continue to be liable where the assignee exercises an option for renewal contained in the original lease.[1165] Mere acceptance of rent from the assignee by itself, it is submitted, is not enough to release the lessee. But there is no such recognition when the assignee pays the rent not as assignee, but as the agent of the lessee.[1166] In *Treasurer of Charitable Endowments v Tyabji*,[1167] it has been held that on an assignment of a lease, although a property in estate comes into existence between the lessor and the assignee, the lessee continues to remain liable to the lessor in respect of all the covenants between him and the lessor. A lessee, therefore, cannot by his unilateral act of assigning his interest in the leasehold premises, put an end to his obligations which he has undertaken either under his contract to lease, or under this section.

The liability of the assignee is founded upon privity of estate, and it, therefore, continues only so long as his estate lasts and he is only liable for rent due and for breaches of covenant incurred during his time.[1168] As the liability rests upon privity of estate, it ceases when the assignee makes a reassignment.[1169]

ILLUSTRATION

A leases a house to *B* for a term of nine years commencing on 1 January 1900. *B* on 1 January 1901, assigns the lease to *C*. *C* on 1 July 1901 assigns the lease to *D*. *B* is liable by

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1163. *Kunhanujan v Anjelu*, (1894) ILR 17 Mad 296; *Manmatha Nath v Nalinaksha*, 79 IC 557 : AIR 1925 Cal 423.
1164. *Swansea Corpn v Thomas*, (1882) 10 QBD 48; *Thethalan v Eralpad Rajah*, (1917) ILR 40 Mad 1111, p 1113 : 40 IC 841; *Bombay Municipal Corpn v Vasantlal*, (1938) ILR Bom 471 : 40 Bom LR 497 : 177 IC 479 : AIR 1938 Bom 360; *Saradindu v Kunja Kamini Ray*, (1942) 46 Cal WN 798 : 202 IC 663 : AIR 1942 Cal 514; *Krishna Bhatt v Narayan Acharya*, (1949) 1 Mad LJ 191 : AIR 1949 Mad 618.
1165. *Baker v Merckel*, (1960) 1 QB 657 : [1960] 1 All ER 668.
1166. *Digbijoy Roy v Shaikh Ata Rahman*, (1912) 17 Cal WN 156 : 15 IC 156.
1167. *Treasurer of Charitable Endowments v Tyabji*, (1949) ILR Bom 79 : AIR 1949 Bom 349 : 50 Bom LR 250.
1168. *Chancellor v Pool*, (1781) 2 Doug KB 764; *Paul v Nurse*, (1928) 8 BC 486; *Mehta v Gadadhar Rai*, (1910) ILR 37 Cal 683 : 7 IC 198; *Palin Behari v Ram Ranjan*, AIR 1944 Cal 219; *Saradindu v Kunja Kamini Ray*, AIR 1942 Cal 514.
1169. *Manjappa v Venkatesh*, (1907) ILR 31 Bom 159; *Mehta v Gadadhar Rai*, 7 IC 198.

privity of contract to *A* for the rent of the years 1900 and 1901. *C* is liable to *A* by privity of estate for the rent of the first half year of 1901. *D* is liable to *A* by privity of estate for the rent of the second half year of 1901.

However, if there be a special covenant by the assignee to pay the rent, the liability of the assignee continues even after assignment by him. Further, a covenant by the assignee with the lessee to pay the rent is not a mere covenant of indemnity, but is an absolute covenant the benefit of which may be assigned by the lessee to the lessor who may sue upon it, although the assignee is no longer possessed of the rent. The liability of the assignee does not depend upon possession,[1170] for mere possession does not render a man liable for rent if there has not been a complete assignment.[1171] The contrary decision in a Bombay case[1172] is based on a misreading of the English authorities as shown in the judgment of CJ Wallis in *Thelhalan v Eralpad Rajah.*[1173] The assignee is liable for rent from the date of the assignment, and not from the date of taking possession.[1174]

Liability of assignees of part of the demised premises to the lessor

The question of apportionment of rent or other covenant in the case of the assignment of a part of the demised premises by the lessee is not free from difficulty. The Patna High Court has taken the view, with some doubt, that in such a case the lessor is entitled to sue the assignee for the whole rent, and the assignee is liable jointly and severally with the lessee for the entire rent.[1175] In a later case, the same High Court has held that if the assignee of a part is in separate possession of that part, he is liable only for proportionate part of the rent.[1176]

As between the lessee and absolute assignee

The primary liability to the lessor being that of the assignee who has the property, the liability of the lessee has been said to be that of a surety for the assignee. So if the lessee has had to pay rent accruing during the period of the assignment or damages for breach of covenant during the holding of the assignee, he can recover from the assignee. It is usual to express this liability in a covenant for indemnity, and when so expressed, it is a contractual liability which the assignee cannot get rid of by re-assignment. In the case of a sublease of the property which is subject to a maintenance charge and the sublease contains a covenant for quiet enjoyment, on the sublessor failing to pay the maintenance charge, the sublessee is entitled to pay the same in order to secure quiet enjoyment of the property, and to then recover the same from the sublessor.[1177]

Covenants running with the land

The liability of the assignee is on covenants running with the land. This expression has been explained in the note under section 40 and in the note under section 108(c). The following are instances from case law:

1170. *Walker v Reeve,* (1781) 2 Doug 461; *Williams v Bosanquet,* (1819) 1 Br & B 238; overruling on this point *Eaton v Jacques,* (1780) 2 Doug 455; *Kunhi Sou v Mulloli Chathu,* (1915) ILR 38 Mad 86 : 17 IC 833; *Thethalan v Eralpad Rajah,* (1917) ILR 40 Mad 1111 : 40 IC 841; *Srimanavedan v Anjela,* (1908) Mad LJ 292; *Monica v Subraya Hebbara,* (1907) ILR 30 Mad 410; dissenting from *Kamala Nayak v Ranga,* (1864) 1 Mad HC 24, *McNaghten v Lalla Mewa Lall,* (1879) 3 Cal LR 285.
1171. *Ananda Chandra v Abdullah Hussein,* (1914) ILR 41 Cal 148, p 155 : 20 IC 679.
1172. *Vithal Narayan v Shiram Savant,* (1905) ILR 29 Bom 391 : 7 Bom LR 313.
1173. *Thelhalan v Eralpad Rajah,* (1917) ILR 40 Mad 1111 : 40 IC 841.
1174. *Bengal National Bank v Janaki Nath Roy,* (1927) ILR 54 Cal 813 : 104 IC 484 : AIR 1927 Cal 725.
1175. *Jyoti Prasad Singh v Sedden,* (1940) ILR 19 Pat 433 : 192 IC 17 : AIR 1940 Pat 516.
1176. *Madhabilata Devi v Butto Kristo Ray,* AIR 1944 Pat 129.
1177. *Nanjappa v Ranga Swami,* (1940) 1 Mad LJ 200 : 51 Mad LW 258 : (1940) Mad WN 261 : AIR 1940 Mad 410.

(i) a covenant by the lessor to grant a perpetual lease on a part of the land demised, in case the lessee required it for an indigo factory;[1178]

(ii) a covenant for renewal;[1179]

(iii) a covenant giving the lessee an option to purchase;[1180]

(iv) a covenant in a lease of a mine to leave a barrier of coal of a certain thickness between it and the mine;[1181]

(v) a covenant by the lessor to renew, as it affects the very existence and continuance of the term.[1182]

Collateral or personal covenants

A collateral or personal covenant is a covenant which affects land other than that demised, or affects the covenantor personally. Such a covenant does not run with the land, and, except under the equity referred to in the next paragraph, cannot be enforced against assigns.[1183]

ILLUSTRATIONS

(1) *A* leases a house to *B* who covenants to build another house on other land of *A*. *B* assigns the lease to *C*. *A* cannot enforce the covenant against *C*.[1184]

(2) *A* leases a house to *B* who covenants to pay the rates and taxes of another house of *A*. *B* assigns the lease to *C*. *A* cannot enforce the covenant against *C*.[1185]

(3) *A* leases a public house to *B* and *B* covenants not to build or keep any house for the sale of liquor within half a mile of the demised premises. *B* assigns the lease to *C*. *A* cannot enforce the covenant against *C*.[1186]

Restrictive covenants

Covenants relating to land may bind an assignee in equity, if they are of restrictive nature, though they are not made by a lessee in relation to the land comprised in the lease, or are otherwise not binding on the assignee at law.[1187] This is on the principle that "a party shall not be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased".[1188] This is so whether the covenant be that of the lessor or of the lessee.

Covenant not to assign

The lessee's right to transfer or assign his interest is subject to a contract to the contrary. Section 10 shows that the right of the lessee to alienate may be restricted. If the restrictive

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1178. *Mathewson v Ram Kanai Singh*, (1909) ILR 36 Cal 675 : 1 IC 626.
1179. *MacLeod v Kissan*, (1906) ILR 30 Bom 250; reversed on another point in *Secretary of State v Volkart Bros*, (1928) ILR 51 Mad 885 : 55 IA 423 : 111 IC 404 : AIR 1928 PC 258; *Secretary of State v Forbes*, (1912) 16 Cal LJ 217 : 17 IC 180; *Naval Kishore v Madan Mohan*, 69 IC 600 : AIR 1924 Cal 346; *Onkarprasad v Badri Das*, (1927) 23 Nag LR 26 : 89 IC 273 : AIR 1925 Nag 281.
1180. *Ladhabhai v Sir Jamsetji*, (1917) ILR 42 Bom 103 : 42 IC 882.
1181. *Lodhna Colliery Co v Bepin Behari Behari*, 55 IC 113.
1182. *Secretary of State v Volkart Bros*, (1927) ILR 50 Mad 595 : 102 IC 246 : AIR 1927 Mad 513.
1183. *Jagdish Chandra v Muhammad Bhukhijashah*, AIR 1952 Pat 409.
1184. *Spencer's* case, (1583) 5 Co Rep 16.
1185. *Gower v Post-master General*, (1887) 57 LT 527.
1186. *Thomas v Hayward*, (1869) LR 4 Exch 311.
1187. *Luker v Dennis*, (1877) 7 Ch D 227; *Wilson v Hart*, (1866) 1 Ch App 463.
1188. *Wilson v Hart*, (1866) I Ch App 463.

clause gives the lessor a right to re-entry, its breach may under section 111(g) involve the forfeiture of the lease, and the consequent extinction of the right of the assignee.[1189] If there is no provision of re-entry, the breach does not give the lessor a right to determine the lease,[1190] but only a personal right to an injunction or damages.[1191] Since the amendment of section 111(g), a provision in the lease that it shall be void in case of assignment without a right of re-entry is not sufficient to determine the lease, and the undernoted cases[1192] are now obsolete.

Section 10 recognises the validity of conditions restrictive of alienation in leases where the condition is for the benefit of the lessor or those claiming under him. The construction put upon these words in some cases[1193] is that the restriction is invalid, unless accompanied by a proviso giving the lessor a right of re-entry on breach. This view was dissented from on the ground that every restriction is for the benefit of the lessor.[1194] The covenant cannot be invalid, for such a covenant by itself, will support a suit for injunction and damages.[1195] The words in section 10 seem to be words of explanation, rather than of limitation. In some cases[1196] the covenant not to assign has been described as inoperative. This can only mean inoperative as being per se, and without words giving a right or re-entry, insufficient to determine the lease. Section lll(g) has been amended to show that a mere provision that the lease shall be void on breach of condition, is not enough to determine the lease. Whether the restriction is by simple covenant or by a covenant to which a right of re-entry is annexed, an assignment in breach of the condition is valid. This is because the condition is constructed as making the lease voidable at the lessor's option; and until the lessor exercises his right of re-entry, the assignment stands. This is the law in England, and is followed in India.[1197] But it has been suggested that the lessor could treat the assignment as a nullity.[1198] This point was referred to by CJ Wallis in *Udipi Seshagiri v Seshawa,*[1199] and again by the Judicial Committee in *Hunsraj v Bejoy Lal Seal,*[1200] but in neither case was it decided.

A covenant against absolute assignment is not broken by a sub-lease for the whole residue of the term. The English law that such a sub-lease operates as an absolute assignment does not apply in India.[1201]

Where the lessor entered into an agreement of sale of the leasehold interest that belonged to the government in violation of the conditions of the lease deed, the state cannot be

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1189. *Krisio Nath v Brown*, (1887) ILR 14 Cal 176.
1190. *Narayan v Ali Saiba*, (1894) ILR 18 Bom 603; *Madan Saheb v Sannabawa*, (1897) ILR 21 Bom 195; *Netrapal Singh v Kalyan Das*, (1906) ILR 28 All 400; *Udipi Seshagiri v Seshamma, (*1920) ILR 43 Mad 503 : 61 IC 568; *Jogesh Chandra Roy v Mokbul Ali*, (1921) 25 Cal WN 857 : 60 IC 984 : AIR 1921 Cal 474; *Reajuddin v Basuda Sundari*, (1918) 28 Cal LJ 278 : 48 IC 330; *Khetra Nath v Sheikh Baharali*, (1928) 49 Cal LJ 89 : 116 IC 153 : AIR 1929 Cal 228.
1191. *Tamaya v Timapa*, (1883) ILR 7 Bom 262; *Parameshri v Vittappa*, (1903) ILR 26 Mad 157.
1192. *Vyankatraya v Shivrambhai*, (1883) ILR 7 Bom 256; *Vishveshwar v Mahableshwar*, (1919) ILR 43 Bom 28 : 47 IC 198.
1193. *Nil Madhab v Narattam*, (1890) ILR 17 Cal 826; *Udipi Seshagiri v Seshamma*, (1920) ILR 43 Mad 503 : 61 IC 658.
1194. *Parameshri v Vittappa*, (1903) ILR 26 Mad 157.
1195. *Gurushantappa v Mallaya*, (1921) ILR 45 Bom 1197 : 63 IC 240 : AIR 1921 Bom 27.
1196. *Akram Ali v Durga*, (1911) 14 Cal LJ 614 : 10 IC 489; *Mahananda Saratmani v Saratmani*, (1914) 14 Cal LJ 585 : 10 IC 374.
1197. *Basarat Ali v Manirulla*, (1909) ILR 36 Cal 745 : 20 IC 416; *Promode Runjan v Aswini*, (1914) 18 Cal WN 1138 : 26 IC 23; *Golak Nathji v Mathura Nath, (*1893) ILR 20 Cal 273; *Sital Prasad v Nawab Dildar, (*1916) 1 Pat LJ 1 : 33 IC 408.
1198. *Parameshri v Vittappa*, (1903) ILR 26 Mad 157.
1199. *Udipi Seshagiri v Seshawa*, (1920) ILR 43 Mad 503 : 61 IC 658.
1200. *Hunsraj v Bejoy Lal Seal*, (1930) ILR 57 Cal 1176 : 57 IA 110 : 122 IC 20 : AIR 1930 PC 59.
1201. See note "Absolute assignment".

directed through a suit for specific performance to execute a sale deed in favour of the vendee and pro forma defendant and as owner of the land would be entitled to re-enter the suit premises as well as prevent the use of the land for purposes other than that specified in the lease deed.[1202] Where the tenant claimed that the partnership business was run in shop with consent of the landlord, the burden of proving the consent on part of the landlord would be on the tenant and not on the landlady.[1203]

Consent of lessor

A lessee who is under a covenant not to assign may not assign without the consent of the lessor. Such consent must be a direct consent to a contemplated assignment to a particular assignee.[1204] This is frequently expressed in the covenant, and with the added term that such consent shall not be unreasonably withheld. This is construed not as a covenant by the lessor not to withhold consent unreasonably, but as a qualification of the covenant not to assign. So if consent is unreasonably refused, the lessee may assign without consent, or may obtain from the court a declaration of his right to assign.[1205] Consent is unreasonably withheld if the lessor refuses to consent because he wishes to regain possession of the premises, but not if he genuinely believes that the assignment would be detrimental to the property. A covenant in a lease not to assign the demised premises without first obtaining the lessor's consent, and that such consent is not to be unreasonably withheld is not a separate covenant which the lessee has to fulfill. It only limits or qualifies the lessee's covenant not to assign by relieving him from the burden of the covenant, if the lessor withholds his consent unreasonably.[1206] Such a covenant is construed to enable the lessor to refuse his consent only if he has bona fide objection to the proposed lessee from the point of view of his respectability or financial responsibility.[1207]

The onus of proving that the consent has been unreasonably withheld should be on the lessee. A transfer by the lessee of his right in contravention of the terms of the lease is not wholly void, but voidable at the instance of the landlord.[1208] A superstructure built on a plot taken on joint lease can be partitioned by metes and bounds according to the respective shares of the parties, while keeping the plot underneath as joint, and no permission of the lessor is needed for affecting the partition of the building by metes and bounds.[1209]

Statutory restrictions on sub-letting

There can be no assignment or transfer of government land.[1210]

In absence of any statutory bar positively prohibiting the creation of sub- tenancies, the contract of sub-tenancy is valid, and enforceable. The rent control legislations restricting such assignments and sub-letting by tenant, by providing that the sub-letting or assignment shall not be done without the previous consent in writing of the landlord, do not make the unauthorised transaction void ab initio, though it can be avoided at the instance of the

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1202. *Jayalakshmi Patra v Shyama Kanta Mohanty,* AIR 2014 Ori 162 : 2014 (2) OLR 572 : 118 (2014) CLT 942.
1203. *Hiroo Bisht v District Judge, Almora,* AIR 2011 Utr 82 : LNIND 2011 UTTAR 115 : 2011 AIR (Uchal) 82.
1204. *South Asia Industries v Sarup,* [1965] 3 SCR 829 : AIR 1966 SC 546 : [1966] 1 SCJ 186 : [1966] 1 SCA 151.
1205. *Ducasse v Cohen,* (1921) ILR 48 Cal 176 : 24 Cal WN 1007 : 60 IC 105.
1206. *Kamala Ranjan v Baijnath,* [1950] SCR 840 : AIR 1950 SC 1 : [1951] SCJ 13.
1207. See *Shankar Prasad v State of Madhya Pradesh,* AIR 1965 MP 153.
1208. *Jankibai v Keshav Majhe,* AIR 1949 Assam 61.
1209. *Inderjit Singh v Tarlochan Singh,* (1991) Rajdhani LR 239; *Chiranjilal v Bhagwan Das,* AIR 1991 Del 325, p 333.
1210. *Jayalakshmi Patra v Shyama Kanta Mohanty,* AIR 2014 Ori 162 : 2014 (2) OLR 572 : 118 (2014) CLT 942.

landlord. Until and unless it is avoided, it remains a valid transaction as between the tenant and the unauthorised sublessee.[1211]

Under West Bengal Tenancy Act, 1956, the Calcutta High Court relying upon the decision of Supreme Court in *Dhuli Chand v Janminder Dass*[1212] and *Ramsaran v Pearylal*,[1213] held that mere knowledge of the landlord about occupation of the tenanted premises by a sub-tenant and acceptance of rent for the tenanted premises tendered by the tenant in the name of the sub-tenant will not create sub tenancy, unless induction of such tenant is made with the written consent of the landlord.[1214] Where the tenant retained complete and exclusive control and possession of the premises and the other party had been specifically excluded from having any right or interest in the premises or tenancy, the mere fact that the tenant was only to sell the products of such other or was to follow marketing strategies or instructions on decoration and design of a specified agency, would not mean that the premises have been sublet.[1215]

Involuntary assignment

An involuntary assignment by the operation of law is not a breach of the covenant; for the covenant is not the same as one to do no act from which an assignment may result. Hence, it is not broken by an execution unless the proceeding is collusive.[1216] On the other hand, a covenant may be so framed as to restrain involuntary assignment.[1217]

Runs with the land

A covenant not to assign or sub-let runs with the land.[1218] But a contractual restriction on assignment does not apply to an assignment by a person upon whom the property has devolved by the operation of law, and who is under an obligation to assign, and so a trustee in bankruptcy may assign despite the covenant.[1219] A liquidator of a company in voluntary winding up is bound by the covenant,[1220] and so is the liquidator of a company in a company winding up, for he represents the company and acts on their behalf.[1221] The covenant is, extinguished on the extinction of the lease by merger.[1222]

Strictly construed

The courts do not favour restriction on alienation, and covenants not to assign are strictly construed. An assignment of a part is not a breach of a covenant against assignment of the whole.[1223] A covenant against assignment does not prevent sub-letting,[1224] and a covenant

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1211. *Banarasi Dass v Shakuntala*, AIR 1989 Del 184, p 189; See also *Udhoo Dass v Prem Bakat*, AIR 1964 All 1; *Murli Dhar v State of Uttar Pradesh*, AIR 1974 SC 1924; *Shankerlal Gupta v Jagdishwar Rao*, AIR 1980 AP 181; *Dwijendra Nath v Rabindra Nath*, AIR 1987 Cal 289.
1212. *Dhuli Chand v Janminder Dass*, (1990) 1 SCC 169.
1213. *Ramsaran v Pearylal Ramsaran v Pearylal*, AIR 1996 SC 2361 : (1996) 11 SCC 728.
1214. AIR 1997 Cal 386.
1215. *Palwell Exports Pvt Ltd v Royal Safe Co (South)*, AIR 2000 Del 249 : (2000) 84 DLT 442.
1216. *Vyankatraya v Shivrambhat*, (1883) ILR 7 Bom 256, 261; *Tamaya v Tamapa*, (1883) ILR 7 Bom 262; *Golak Nath v Mathura Nath*, (1893) ILR 20 Cal 273.
1217. *Vyankatraya v Shivrambhat*, (1883) ILR 7 Bom 256; *Dwaraka Nath Ray v Mathura Nath*, (1916) 21 Cal WN 117 : 34 IC 883.
1218. *McEacham v Cotton*, (1902) AC 104; *Williams v Earle*, (1868) LR 3 QB 739; *Goldstein v Sanders*, (1915) 1 Ch 549; Re *Stephenson & Co Poole v The Company*, (1915) 1 Ch 802 : [1914-15] All ER Rep 1107.
1219. *Deo d Goodbehere v Bewan*, supra.
1220. *Cohen v Popular Restaurants Ltd*, (1917) 1 KB 480 : [1916-17] All ER Rep.
1221. *Farrows Bank Ltd*, (1921) 2 Ch 164 : [1922] All ER Rep 679.
1222. *Golden Lion Hotel (Hunstanton) Ltd v Carter*, (1965)1 WLR 1189 : [1965] 3 All ER 506.
1223. *Church v Brown*, (1808) 15 Ves 258.
1224. *Crusoed Blancoe v Bugby*, (1770) 2 Wm B 766; *Sweet & Maxwell Ltd v Universal News Services Ltd*, (1964) 2 QB 699 : [1964] 3 All ER 30 (CA).

against sub-letting does not prevent sub-letting of a part.[1225] Nor does a mere contract to sub-let which does not create the relation of landlord and tenant between the parties amount to a breach of covenant not to sub-let.[1226]

The whole or any part

These words recognize the right of the lessee to assign or sub-lease not only the whole, but also a party of the property. An assignment of a part creates privity of estate,[1227] and the assignee is liable for a proportionate part of the rent.[1228]

The assignee of a part of the property leased is entitled to the benefit of covenants which run with the land and which can be apportioned under section 37, so far as they affect his part of the land. Such covenants may be covenant to repair, or a covenant for quiet enjoyment. In *Simpson v Clayton,*[1229] an assignee of a share of sub-lease was allowed to recover damages for breach of the lessee's covenant to obtain a fresh lease from the head lessor, without joining the owner of the other share of the sub-lease as a party. But a covenant for renewal of a lease is a covenant to renew the lease as a whole, and a lessee who has assigned his interest in a part cannot by suit for specific performance require renewal of the lease as to the part that he has not assigned.[1230]

Non-transferable tenures

These are tenures which are by custom not transferable. They are generally agricultural tenures to which this chapter does not apply. A similar exception was added to section 6 of TP Act by Act 3 of 1885. Agricultural tenancies are generally regulated by local Acts. The note under section 6(i) may be referred in this connection.

If a non-agricultural tenancy is by custom not transferable, that custom overrides the provisions of this section.[1231] The incident of non-transferability was common to tenancies of homestead lands and of agricultural lands before the passing of the TP Act in the absence of a custom to the contrary.[1232] But section 26B of the Bengal Tenancy Act as amended by Bengal Act 4 of 1928, the holding of an occupancy *raiyat* in Bengal was subject to the provisions of that Act, capable of being transferred like other immovable property.

(13) Clause (k)—Lessee's duty of disclosure

The lessor is by section 108(a), under an obligation to disclose defects of which he is aware and which affect the intended use of the property, but the duty of the lessee is more limited. He is only bound to disclose facts affecting the lessor's title which increase the value of the lease, and of which the lessor is unaware. The section is similar to section 55(5)(a)

1225. *Wilson v Rosenthal,* (1906) 22 TLR 233; *Cook v Shoesmith, (*1956) 1 KB 752 (CA); *Esdaile v Lewis,* [1956] 2 All ER 357 : (1956) 1 WLR 709 (CA); Danckwerts, J dissenting; and see (1956) 72 LQR 325.
1226. *Secretary of State v Kunchwar Lime & Stone Co Ltd,* 65 IA 45 : (1938) All LJ 72 : 40 Bom LR 292 : 42 Cal WN 593 : (1938) 1 Mad LJ 209 : 172 IC 443 : AIR 1938 Pat 20.
1227. *United Dairies v Public Trustee,* (1923) 1 KB 469 : [1922] All ER Rep 444.
1228. *Madhabilata Devi v Butto Kristo Ray,* AIR 1944 Pat 129 (assignee having exclusive and separate possession of the part assigned). (See note "Apportionment by estate" under section 37).
1229. *Simpson v Clayton,* (1838) 4 Bing (NC) 758.
1230. *Secretary of State v Volkart Bros,* (1928) ILR 51 Mad 885 : 55 IA 428 : 111 IC 404 : AIR 1928 PC 248.
1231. *Ananda Mohan v Gobinda Chandra,* (1916) 20 Cal WN 322 : 33 IC 565.
1232. *Madhab Chandra v Bejoy Chand,* (1899) 4 Cal WN 574; *Madhu Sudan v Kamini,* (1905) ILR 32 Cal 1023; *Ram Charan v Hari Charan,* (1908) 7 Cal LJ 107; *Safar Ali v Abdul Rasid,* (1924) 39 Cal LJ 585 : 84 IC 28 : AIR 1924 Cal 1012; *Sarada Kanta v Nabin Chandra,* (1927) ILR 54 Cal 333 : 97 IC 817 : AIR 1927 Cal 39; *Nabu Mondal v Cholim Mullik,* (1898) ILR 25 Cal 896; *Kamal Mayee Dasi v Nibaran Chandra Pramanik,* (1932) 36 Cal WN 149 : 138 IC 72 : AIR 1932 Cal 431.

which imposes a similar duty on the buyer and refers to the title, and not to physical advantages. A lessee like a buyer would be under no duty to disclose the existence of a coal mine of which the lessor was unaware. The note under section 55(5)(a) may be referred in this connection.

But if the lessee obtained an agreement for a renewed lease, in consideration of the surrender of the old lease, suppressing the fact that the person on whose life the old lease depended was then on his death-bed, the agreement could not be enforced.[1233]

(14) Clause (l)—Obligation to pay rent

Under this sub-section there is an implied covenant by the lessee to pay rent. But there is no charge for unpaid premium[1234] as in the case of unpaid price. Again as all leases have now to be executed by both parties, the covenant will always be expressed. The obligation to pay rent begins as soon as the lessor has fulfilled his obligation under section 108(b), and put the lessee in possession.[1235] This would be so, even if one of the joint lessees is in actual possession, and the other lessee is not obstructed by lessor in getting joint possession.[1236] Payment to one of several joint lessors is a payment to all[1237] and conversely, payment by one of several joint lessees is a payment by all.[1238] But payment to a landlord by a stranger to the tenancy of a sum equivalent to the amount of the rent owing by the tenant is not a good satisfaction of the rent, even if it be accepted by the landlord, unless it is made by the payer as agent for and on behalf of, or in the name and account of the tenant or with his authority or subsequent ratification. Thus, where the tenant being in arrears, the estate agent of the landlord paid the amounts in arrears out of his own pocket in the hope of recouping himself when the tenant would pay and, the tenant not still paying, the estate agent on behalf of the landlord put in a distraint and recovered the amount, it has been held that there had been no satisfaction of arrears of rent, and distraint was not unlawful.[1239] Joint lessors may sue together, or any one of them may sue alone for the whole rent;[1240] for a lease who are the joint tenants of a property operates as a lease by each and by all. If lessors are tenants-in-common, lessee should pay rent on joint receipt to all, or to one who is authorised by the others. Payment to one co-sharer landlord is not a discharge against all.[1241] If a lessor purchases the whole of the interest of the lessee, the whole of the lease is extinguished by merger, but there can be no merger or extinction where one of the several joint holders of the *mokarari* interest purchases a portion of the *lekhraj* interest.[1242]

Lessors who are tenants-in-common can maintain a joint action for rent or one co-sharer may sue for the whole rent if he joins the other co-tenants as parties.[1243] But one co-sharer cannot sue separately for his share of the rent, unless there is an agreement that the lessee

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1233. *Ellard v Llandaff (Lord)*, (1810) 1 Ball & B 241.
1234. *Venkatacharuyulu v Venkatasubba*, (1915) ILR 48 Mad 821 : 90 IC 725 : AIR 1926 Mad 55, not following *Kandaswami v Ramasami*, (1919) ILR 42 Mad 203 : 51 IC 507; and *Shepheard v Beetham*, (1877) 6 Ch D 597.
1235. *Shama Prosad v Taki Mullik*, (1901) 5 Cal WN 816.
1236. *Nur Mohammad v Ahmad Alikhan*, AIR 1936 Lah 815.
1237. *Oodit Narain v Hudson*, (1865) 2 WR 15; *Krishnarao v Manaji*, (1874) 11 Bom HC 106; *Sambhu v Kamalrao*, (1898) ILR 22 Bom 794; *Hiralal v Agarchand*, AIR 1957 MP 5.
1238. *Nillunber Mustophy v Doorgachum*, (1865) 2 WR 94.
1239. *Smith v Cox*, (1940) 2 KB 558 : [1940] 3 All ER 546.
1240. *Robinson v Hofmua*, (1828) 4 Bing 562, p 565.
1241. *Azim Sirdar v Ramlall*, (1898) ILR 25 Cal 324.
1242. *Badrinarain Jha v Rameshwar Dayal*, [1951] SCJ 153 : AIR 1950 SC 186.
1243. *Shashi Kumar v Seem Nath*, (1908) ILR 35 Cal 744; *Perish Lal v Akhowi*, (1892) ILR 19 Cal 735.

shall pay each his share separately.[1244] However, the mere fact that they have been recovering rent separately in the past does not prevent them from suing jointly.[1245] Where the plaintiff and defendants were joint owners of a *zamindari* and the defendants purchased the lessee's interest in certain parcels, it was held that the plaintiff could not maintain a suit for rent for those parcels, apparently because the rights of the parties could only be worked out in a partition suit.[1246] Where premises were let out to two persons who jointly and severally covenanted for the payment of rent and on the death of one the other paid the whole rent, it has been held in England that as the lease created a joint tenancy both in law and in equity and as the surviving tenant succeeded to the whole benefit of the lease, there was no reason why equity should compel the executors of the deceased tenant to contribute.[1247] In India, it is submitted, the two tenants would be regarded as co-tenants and the benefit of the lease will also devolve upon the legal representative of the deceased, and the surviving tenant will be entitled to contribution. Where there is a joint electricity meter for the tenants of the property, there being no privity of contract between the tenants *inter se*, each tenant would be liable to pay only his share of the electric bills.[1248] Where the electric charges are not fixed and can only be ascertained at the end of the month, after electricity consumed is known, while the rent is payable in advance, it is clear that the electric charges cannot be held to form part of the rent.[1249]

Where the tenant and the landlord had agreed and the same was through letters written by the tenant as well, that the tenant would pay for increase of 10% in respect of all tenancies and additional increase of 15% for the ground floor lobby, the landlord would be entitled to such agreed occupation charges month by month for use and occupation of the premises as well as the enhanced rate.[1250] In a suit or eviction, the rent note can be admissible in evidence.[1251] Where the tenant was inducted in the premise on the fixed rent but the lessor claimed increased rent on the basis of an unregistered rent note that was not signed by both the parties, his claim on the basis of such rent note would be improper.[1252] In *Surinder Singh Arora v Rajeev Dhingra*,[1253] the lease was executed for 9 years through a registered deed. It contained a clause as per which, in case of two months consecutive default the lease was liable to be terminated. The tenants did not pay the rent for a year and the lessors terminated the lease. In light of clause (f) of section 108 the court directed the lessee company to hand over vacant physical possession of the leased premises.

1244. *Pramada Nath Roy v Ramani Kama Roy*, (1907) ILR 35 Cal 331 : 35 IA 73; *Nepal Chandra Ghose v Mohendra Nath*, (1904) ILR 31 Cal 707; *Jadoo Shat v Kadumbinee Dassee*, (1881) 7 Cal 150; *Guni Mahomed v Moran*, (1879) ILR 4 Cal 96; *Baijo Kishore v Ooma Soonduree*, (1874) 23 WR 37; *Bykunt Kyburto v Shushee Mohan Pal*, (1874) 22 WR 526; *Lalun v Hemraj Singh*, (1873) 20 WR 76; *Dinobundhoo Chowdhery v Dinonath Mookerjee*, (1870) 19 WR 168: *Haradhun Gossamee v Ram Newaz*, (1872) 17 WR 414; *Sree Misser v Crowdy*, (1871) 15 WR 243; *Gunga Narain Dass v Sharoda Mohun Roy*, (1869) 12 WR 30; *Decharms v Horwood*, (1834) 10 Bing 526.

1245. *Akshoy Kumar v Gopal Kamini Debi*, (1906) ILR 33 Cal 1010; *Grish Chunder v Chhatradhar Ghose*, (1905) 6 Cal LJ 379.

1246. *Girindra Pal v Sreenath Pal*, (1905) ILR 32 Cal 567.

1247. *Cunningham Reid v Public Trustee*, (1944) 1 KB 602; [1944] 2 All ER 6.

1248. *Harish Chander v Krishan Kumar*, AIR 1985 Del 70, p 72.

1249. *Chhote Lal v Kewal Krishan Mehta*, AIR 1971 SC 987; *Harish Chander v Krishan Kumar*, AIR 1985 Del 70, p 72.

1250. *Murlimal Santram v Bata India Limited*, AIR 2013 Cal 102 : LNIND 2013 CAL 125 : AIR 2013 Calcutta 102 : 2013 (4) CHN 92.

1251. *Pardeep Bahal v Kanwaljit Kaur*, AIR 2012 (NOC) 417 (P&H).

1252. *SwetaKumari v Shivshankar R Poswal*, AIR 2012 MP 155 : 2012 (3) MPHT 318.

1253. *Surinder Singh Arora v Rajeev Dhingra*, FAO (OS) (Comm.) 13/2017, decided on 18 January 2017, High Court of Delhi, SCC Online Del 6579.

A stipulation for interest on arrears of rent is enforceable.[1254] Even if there is no such stipulation, as rent is a certain sum payable at a certain time, interest on arrears of rent are recoverable under the Interest Act if the lease is in writing, or otherwise from the date of demand in writing, giving notice that interest will be claimed. The Patna High Court has, however, held that in the absence of any term in the lease providing for the payment of interest, the claim of interest upto the date of the suit cannot be allowed.[1255] A mere omission by the lessor to charge interest is not a waiver of his right.[1256] Where in a mining lease, the lessee covenanted to pay the royalty and also to "pay and discharge all taxes, rates assessments and impositions whatsoever being in the nature of public demands which shall from time to time be charged, assessed or imposed upon the said mines", it has been held that the lessee was under this covenant liable to reimburse the lessor for the road and public works cess and the expenses of the Mines Board of Health paid by the lessor, but not for income tax paid by the lessor on the royalty.[1257]

The lease agreement provided that the lessee should pay the house tax and other taxes. But the lessor did not intimate to the lessee the actual amount of the taxes due and the lessee, therefore, could not pay it. On the lessor's refusal to receive the rent on the ground that the lease had been forfeited for non-payment of taxes, it was held that in the circumstances there was no justification for forfeiture.[1258] An increased payment is sometimes stipulated for in case of breach of covenant, eg not to carry on certain trades;[1259] to restore to its original condition land on which slag had been placed;[1260] not to sell hay off the premises.[1261] English cases turn upon the distinction between a penalty and liquidated damages. If it is a penalty, only the actual damage suffered is recoverable, but if it is a liquidated damage, the full amount is recoverable as increased rent. But in India, the distinction between a penalty and liquidated damages having been abolished, the lessor cannot recover more than reasonable compensation not exceeding the amount named. In a Madras case,[1262] increased rent in the event of a breach of any of the several stipulations was allowed as liquidated damages. No reference was made to section 74 of the Indian Contract Act, 1872, and it is submitted that the increased rent should not have been allowed except on the finding that it was reasonable compensation. In *Tejendro Narain Singh v Bakai Singh*,[1263] the lessee held fields under a *kabuliyat*, some at rents of eight, some of four, and some of two annas for seven years and by that *kabuliyat*, agreed that on the expiry of the term he would execute a fresh *kabuliyat* and then cultivate, and that if he cultivated without executing a *kabuliyat*, he would pay at the uniform rent of ₹ 4. The lessee did not execute a fresh *kabuliyat* and was charged at the rate of ₹ 4. The court held, J Rampini dissenting, that the increase was a penalty. It is submitted that J Rampini was right. The agreement to execute a fresh *kabuliyat* was not a condition of the existing tenancy. At the determination of the tenancy the agreement gave the tenant the option (1) to restore possession; or (2) to execute a *kabuliyat* for a fresh tenancy on such terms as might be agreed; or (3) to continue in possession on an oral tenancy at a rental of

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1254. *Raj Narain v Panna Chand*, (1908) ILR 30 Cal 213; *Bhyrub Chunder v Meer Ameeroodeen*, (1872) 17 WR 173.
1255. *Jwala Prasad v Harihar Prasad*, 192 IC 776 : AIR 1941 Pat 106.
1256. *Johoory Lall v Bullab Lall*, (1880) ILR 5 Cal 102; *Shyama Charan Mandal v Heras Mollah*, (1899) ILR 26 Cal 160.
1257. *Bengal Coal Co v Janardan Kishore Lal Singh Deo*, 65 IA 354 : (1938) ILR 2 Cal 624 : 176 IC 433 : AIR 1938 PC 243.
1258. *Ram Singh v Asa Ram*, AIR 1973 P & H 451.
1259. *Weston v Metropolitan Asyiam District, (Managers)*, (1882) 9 QBD 404 (CA).
1260. *Elphinstone (Lord) v Monkland Iron & Coal Co*, (1886) 11 App Cas 332.
1261. *Wilson v Low*, (1895) 1 QB 626 : [1895-99] All ER Rep 325.
1262. *Balkurayu v Sankamma*, (1899) ILR 22 Mad 453.
1263. *Tejendro Narain Singh v Bakai Singh*, (1895) 22 Cal 658.

₹ 4; and he accepted the oral tenancy. Where after a lease has been granted, another lease of the same property is granted, terms being concurrent with the existing lease, which transfers an interest in the reversion and entitles the concurrent lessee to recover the rent from the earlier lessee.[1264]

Necessity of Rent Receipt

Generally, the tenant is not expected to demand from the landlord issue of a rent receipt for the payment of the rent. After all, it is a relation of confidence between the landlord and the tenant, unless there is a special contract in that behalf.[1265]

Time of payment

The section does not specify the proper time for payment. That may be fixed by the terms of the lease or by custom, and, if not, it is at the end of the period for which the rent is reserved.[1266] It has been held that if rent is payable on a specified day, it is due then, and is in arrears on the day following.[1267] Rent may be reserved, payable in advance as forehand rent. But if rent is paid before it is due, it is treated as an advance to the landlord with an agreement that on due date, such advance will be treated as a fulfillment of the obligation to pay rent. The note "Rent paid in advance" under section 50 may be referred. The inclusion of future rents does not make the tenancy invalid.[1268]

Place of payment

The common law rule is that in the absence of an express covenant, the lessee must be ready to pay the rent on the land demised. If there is an express covenant for payment, the lessee must seek out the lessor and pay him wherever he may be.[1269] It is not necessary that the lessor should make a demand for rent.[1270] This rule has been adopted as to the implied covenant in this clause, and it has been held that if no place is specified, the lessee must seek out the landlord to make the payment.[1271] A tender at the landlord's or his agent's usual place of business is valid and sanctioned by custom.[1272]

Mode of payment

The mode of payment is the same as in the case of any other debt. Rent reserved is money payable in cash.[1273] Payment through the post is at the tenant's risk,[1274] unless the landlord has led the lessee to believe that he may resort to the post for payment.[1275] If the landlord accepts a bill of exchange or a promissory note for the rent this may, if that is the agreement, be taken as an absolute payment.[1276] But if that is not the agreement, the bill or the note, if a negotiable instrument, operates as a conditional payment, and the lessor, if he has not endorsed the instrument, may sue for the rent if the bill or note is dishonoured. If the bill or

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1264. *Paraswami v Panaswami,* AIR 1951 Mad 948.
1265. *Neki Bakhatawor v Satnarain,* AIR 1997 SC 1334.
1266. *Rangayya v Bobba Sriramulu,* (1904) ILR 27 Mad 143 : 31 IA 17, p 20; *Rama Naidu v Sri Mahant Rama,* (1900) 10 Mad LJ 26.
1267. Re *Aspinall,* (1961) Ch 526 : [1961] 2 All ER 751.
1268. *Krishnaswamy v Mohanlal,* (1949) ILR Mad 689 : AIR 1949 Mad 685.
1269. *Haldane v Johnson,* (1853) 8 Exch 689, p 695.
1270. *Nasiruddin v Umerji Adam & Co,* AIR 1941 Bom 286.
1271. *Jatadhar v Shamsul,* (1912) 16 Cal LJ 522 : 14 IC 713. Re *Maung,* 186 IC 69.
1272. *Fakir Lal Goswami v Bonnerji,* (1899) 4 Cal WN 324; *Allibhoy v Gordhandas,* (1929) 23 SLR 29 : 111 IC 530 : AIR 1929 Sau 13.
1273. *Henderson v Arthur,* (1907) 1 KB 10 (CA).
1274. *Hawkins v Rutt,* (1793) Peake 248.
1275. *Warwick v Noakes,* (1791) Peake 98; *Norman v Rickelts,* (1886) 3 TLR 182 CA; *Luttges v Sherwood,* (1895) 11 TLR 233.
1276. *Lewis v Lyster,* (1835) 2 Cr M & R 704; *Sard v Rhodes,* (1836) 1 M & W 153.

note is not a negotiable instrument, it operates only as security for the rent, and does not extinguish the debt. A party is not bound to make a useless tender of rent when he knows for certain that the tender would be refused.[1277] With reference to section 108(1) (*sic*), it has been held that where the practice of the tenant was to make payment to the previous landlord by cheque, and where, after the sale of the premises, the new landlord had not given any contrary instructions and the tenant made the payment bona fide by cheque, the new landlord cannot refuse acceptance of the cheque and file a suit for eviction on the ground that payment should have been made in cash.[1278]

Suspension of rent

If the lessee is evicted by the lessor from the whole of the property leased, the lessee is not liable for rent for the period of the eviction.[1279] Such eviction, therefore, involves suspension of rent. The word suspension implies that the liability for rent is not finally determined, but revives as soon as the lessee is restored to possession. There cannot be any abatement of rent where the lessee is deprived or ousted from the part or whole of the premises. A mere breach of a condition to repair does not give a right to abatement.[1280]

The principles governing suspension of rent are based on justice, equity and good conscience. It will depend on the facts of each case, whether a tenant is entitled to suspension of rent. Where the tenant of an industrial premise had deliberately stopped paying rent to his landlord for almost a year before the landlord had got the electricity disconnected, and the tenant took no steps for reconnection for about three years, the court rejected the plea of the tenant that it had a right to suspend the payment of rent.[1281]

Eviction

To constitute an eviction it is not necessary that the lessee should be forcibly dispossessed.[1282] In the case of *Upton v Townend,*[1283] an eviction was said to be "not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises." Substantial interference by the landlord with the tenant's enjoyment will suffice even if there is no complete dispossession.[1284] It is an eviction if the lessor induced the lessee's tenants to pay rent to him;[1285] or if he prevents the lessee from collecting rent from the sub-lessees;[1286] but not when he merely takes *kabuliyats* from the sub-lessee which do not result in any interference with the lessee.[1287] Where, however, the lessor recovered rent from a sub-lessee

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1277. *S K Shaw v Brij Raj Krishna,* AIR 1949 Pat 475.
1278. *Dharmendra Nath v Jagdish Prakash,* AIR 1976 All 107 (1977) All LJ 337.
1279. *Kadumbinee v Kasheenath,* (1870) 13 WR 338; *Dhunpal Singh v Mohamed Kazim,* (1897) ILR 24 Cal 296; *Rani Lalita Sundari v Rani Surnomoyee Dasi,* (1900) 5 Cal WN 353; *Mohamed Jeaullya Mean v Sukheannessa Bibi,* (1910) 14 Cal WN 446 : 5 IC 352; *Godai Malla v Aminuddi Howladar,* (1913) 18 Cal LJ 509 : 21 IC 957; *Chandrakant Das v Rama Nath Barman,* (1910) 11 Cal LJ 591 : 6 IC 478; *Manindra Chandra v Narendra Chandra,* (1919) ILR 46 Cal 956 : 52 IC 13.
1280. *B Shah v K Chandra,* AIR 1951 Pat 508; *Janta Pershad v Nath Tubes Pvt Ltd,* AIR 1994 Del 317.
1281. *Apparel Trends v Smt Krishna Dandona* AIR 1985 Del 106, p 111.
1282. *Noorijan Sardas v Bimola Sundari,* (1913) 18 Cal WN 552 : 18 IC 87; *Jogendra Lal v Mohesh Chandra,* (1928) ILR 55 Cal 1013 : 112 IC 172 : AIR 1929 Cal 22; *Abdul Latif v Hamed Gazi,* (1933) ILR 60 Cal 1082 : 38 Cal WN 61 : 148 IC 1177 : AIR 1933 Cal 898.
1283. *Upton v Townend,* (1885) 17 CB 30, p 64-65; *Neale v Mackenzie,* (1836) 1 M & W 747; *Dhanpat Singh v Mohamed Kazim,* (1897) ILR 24 Cal 296.
1284. *Mahomed Jeaullya Mean v Sukheannessa Bibi,* (1910) 14 Cal WN 446 : 5 IC 352.
1285. *Hoymobutty v Sreekishen,* (1871) 14 WR 58.
1286. *Kristo Soondur v Koomar Chunder,* (1871) 15 WR 230; *Raseswari v Saurendra Mohun,* (1910) 11 Cal LJ 601 : 5 IC 105; *Dhunput Singh v Mahomed Kazim,* (1897) ILR 24 Cal 296.
1287. *Aiyangar v Rangaswami,* 25 IC 812.

by mistake, it was held that such act does not amount to eviction. It must be shown that the lessor deliberately and intentionally evicted the lessee.[1288]

Effect of partial eviction by lessor

It has already been noted that if the lessee is evicted by the lessor from the whole of the property leased, the lessee is not liable for rent for the period of eviction. In this connection, see note "Suspension of Rent".

The question is what is the effect of the eviction of the lessee by the lessor from a part of the demised premises. The answer to this question appears, from the decided cases, to have been given differently on a consideration of different factors, namely:

(i) whether the lease was for a lump sum rent;

(ii) whether the lease was for separate or divisible rent, eg so much per acre or per *bigha*; and

(iii) whether the eviction was a deliberate act of the lessor.

It will be convenient to note the decisions under these different heads.

(i) *Effect of partial eviction in case of a lease at a lump sum rent*—If the premises are let for one rent, the rule of English law is that the eviction of the lessee by the lessor *from part of* the demised premises, suspends the rent for the *whole*.[1289] Judicial decisions on this point have not been uniform in India. In some cases this rule of English law has been followed and it has been held that if the rent is an entire rent for all the property leased, eviction by the lessor of the lessee from part of the property leased suspends the whole rent.[1290] In some cases[1291] decided by the Madras High Court, it was said that if the lessee is in possession of any part of the premises demised, he is estopped from pleading that he is not liable for the rent of that part. In a later Calcutta' case it was said that if the rent is an entire rent, the tenancy is indivisible, and it is not open to the landlord to assert that any portion of the rent is payable in respect of any portion of the premises demised.[1292] This view has been followed in Allahabad.[1293] In *Katyayani Debi v Udoy Kumar Das,*[1294] the Privy Council held that the doctrine had no application where the rent was per *bigha* or acre. The observations in that case that the doctrine applied where the rent was a lump sum have been explained in a later case by the Privy Council[1295] as *obiter*. This issue has been considered by the Supreme Court in *Bibra S N v Stephen Court,*[1296] a case where the lessee was not given possession of the entire

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1288. *Basantilal Marwari v Jamuna Prasad,* AIR 1941 Pat 417 : 193 IC 280; *Sukhraj Rai v Dip Narain,* 197 IC 160 : AIR 1942 Pat 266.

1289. *Upton v Townend,* (1855) 17 CB 30; *Neale v Mackenzie,* (1836) 1 M & W 747.

1290. *Rasheswari v Saurendra Mohun,* (1910) 11 Cat LJ 601 : 5 IC 105; *Purna Chandra Sarbajna v Rasik Chakrabani,* (1910) 13 Cal LJ 119 : 9 IC 568; *Sarip Jan Bibi v Aftabuddin Miah,* (1910) 13 Cal LJ 115 : 8 IC 30; *Ashutosh Dhar v Joy Lal Sardar,* (1913) 17 Cal LJ 50 : 8 IC 621; *Rajani Manna v Satish Chandra,* 48 IC 699; *Ramani Kanta v Hara Chandra,* 68 IC 495 : AIR 1923 Cal 162; *Abhayacharan v Hemchandra,* (1929) ILR 57 Cal 137 : 123 IC 653 : AIR 1929 Cal 568; *Krishna v Surendra Nath,* (1932) 36 Cal WN 72 : 137 IC 696 : AIR 1932 Cal 385; *Rai Bahadur Dalip Narayan Singh v Suraj Narayan Missir,* (1935) ILR 14 Pat 323 : 153 IC 298 : AIR 1935 Pat 38; *Nilkantha Pati v Kshitish Chandra,* (1952) ILR 1 Cal 59 : AIR 1951 Cal 338.

1291. *Meenakshi v Chidambaram,* (1912) 23 Mad LJ 119 : 15 IC 711; *Suryanarayana v Rajah of Takkiah,* 69 IC 517 : AIR 1923 Mad 459; *Hanumantha Goundan v Doraswami Pillai,* (1928) 54 Mad LJ 354 : 109 IC 465 : AIR 1928 Mad 380.

1292. *Dhirendra Nath Roy v Bhabatarini Debi,* (1929) 33 Cal WN 367 : 119 IC 297.

1293. *Gopalji Maharaj v Shiam Lal,* AIR 1952 All 125.

1294. *Katyayani Debi v Udoy Kumar Das,* (1925) ILR 52 Cal 417 : 52 IA 160 : 88 IC 110 : AIR 1925 PC 97.

1295. *Ram Lal v Dhirendra Nath,* 70 IA 18 : (1943) ILR 1 Cal 372 : 46 Bom LR 192 : 47 Cal WN 489 : (1943) 1 Mad LJ 514 : 206 IC 266 : AIR 1943 PC 24.

1296. *Bibra SN v Stephen Court,* [1966] 3 SCR 458 : AIR 1966 SC 1361.

premises demised. The court held that it would depend on the circumstances of each case whether the rent would be suspended or the tenant would be liable to pay a proportionate part. In a Calcutta case it was held that where two tenancies comprising a different plots of land in two different *rouzas* and held at different *jamas* are amalgamated so as to form one tenancy in law and the tenant is dispossessed by the landlord from a portion of one of the plots, the tenant cannot claim suspension of the whole rent, but only of the rent of the plot from the portion of which he has been dispossessed.[1297]

(ii) *Effect of partial eviction in case of a lease at separate or divisible rent*—In the case of partial eviction by the lessor the whole rent is not suspended, unless the rent is a lump sum rent for the whole land treated as an indivisible subject.[1298] In *Sajjad Ahmad v Jrailakhya Hath,*[1299] Rankin, CJ said that the doctrine of suspension of rent depends solely upon this that the rent due is an entire sum in respect of the land demised. When the land is let at a stipulated rent at so much per acre or per *bhiga*, the whole rent is not suspended and the lessor is entitled to an apportionment. In such cases there is an abatement of rent, and the lessee pays a reduced or abated rent or the portion of which he is in possession.[1300]

(iii) *Where the partial eviction was not a deliberate act of the lessor*—Again, as suspension of the whole rent is in the nature of a penalty, it is not enforced if the eviction is not the deliberate act of the landlord. When the lessor by inadvertence included a part of the lessee's lands in a rent suit filed against other tenants, and the lessee was dispossessed of that part the lessee was only entitled to an abatement of rent,[1301] although the rent was an entire rent. So also where the lessor recovered rent from a sub-lessee by mistake, it was held that such act does not amount to eviction so as to entitle the lessee to suspension of the entire rent.[1302] Nor will suspension be enforced if the lessee has consented to give up possession of part of the demised premises.[1303] This exception is similar to the equity of apportionment which the lessor has when he is unable to put the lessee in possession of part of the land leased, and the lessee knows at the beginning of the tenancy that the part is in the possession of another, and that the lessor will not be able to give him possession.[1304]

It has already been noted (note "Covenant to give possession" under clause (b) of this section) that where the lessor fails to put the lessee in possession of the whole of the demised premises, the English rule of suspension of the entire rent whether it was a lump sum rent or a separate rent, was not applicable in India. In laying this down the Privy Council in *Ram Lal v Dhirendra Nath*[1305] observed:

1297. *Bibi Samsunehar v Hari Nath,* (1942) ILR 2 Cal 406 : 76 Cal LJ 425 : 46 Cal WN 861 : 205 IC 502 : AIR 1943 Cal 91.
1298. *Deoki Koer v Sheo Prasad Singh,* AIR 1939 Pat 356 : 180 IC 98.
1299. *Sajjad Ahmad v Jrailakhya Hath,* (1928) ILR 55 Cal 464, p 472 : 116 IC 375 : AIR 1928 Cal 479.
1300. *Katyayani Debi v Udoy Kumar Das,* (1925) ILR 52 Cal 417 : 52 IA 160 : 88 IC 110 : AIR 1925 PC 97; *Bisweswar v Kali Charan,* (1926) 44 Cal LJ 27 : 94 IC 418 : AIR 1926 Cal 908; *Tarap Sheikh v Kunja Behary,* (1926) 44 Cal LJ 191 : 98 IC 215 : AIR 1926 Cal 1226; *Susil Kumar Biswas v Rajani Kanta,* (1928) ILR 55 Cal 689 : 104 IC 775 : AIR 1927 Cal 737; *Raja Keshee v Satish Chandra,* (1931) 35 Cal WN 46 : 132 IC 81 : AIR 1931 Cal 397. Contra — *Harro Kumari v Purna Chandra,* (1900) ILR 28 Cal 188.
1301. *Bisweswar Sarkar v Kali Charan,* (1926) 44 Cal LJ 27 : 94 IC 418 : AIR 1926 Cal 908.
1302. *Basantilal Marwari v Jamuna Prasad,* AIR 1941 Pat 417 : 193 IC 280; *Sukhraj Raj v Dip Narain,* 197 IC 160 : AIR 1942 Pat 266.
1303. *Rameshwar Lal v Butto Kristo Rai,* (1934) ILR 13 Pat 396 : 152 IC 992 : AIR 1934 Pat 653.
1304. *Narendra Chandra v Manindra Chandra,* (1922) ILR 49 Cal 1019 : 67 IC 800 : AIR 1922 Cal 153; *Joyram Chandra v Bisnu Charan,* 85 IC 781 : AIR 1925 Cal 805.
1305. *Ram Lal v Dhirendra Nath,* 70 IA 18 : (1943) ILR 1 Cal 372 : 46 Bom LR 192 : 47 Cal WN 489 : (1943) 1 Mad LJ 514 : 206 IC 266 : AIR 1943 PC 24.

> As the case before the Board has been held to be a case not of eviction by the lessors, but of their failure to give possession, their Lordships in this *ex parte* appeal confine themselves to the law applicable to the latter class of cases. To that class they think that the doctrine of suspension of rent should not be applied in Bengal. Whether it should be applied at all to cases of eviction of the lessee by the lessor from a part of the land, and if so, whether it is limited to rents reserved as a lump sum, and whether it is a rigid or discretionary rule — these questions will call for careful review when they are presented by the facts of a particular case. Their Lordships must guard themselves from being supposed to assume that had Srinath been ousted from any portion of the lands in 1886, it would be open to his successors to set up for the first time in 1931 that the entire rent must be suspended.

Their Lordships explained *Katayayani's* case[1306] and stated that it had been wrongly taken to lay down that if rent was a lump sum rent then in all cases of failure to give possession of any part, there must be a suspension of the entire rent.

It now seems fairly clear that there is no rigid and inflexible rule and the technical common law rule of suspension of the entire rent on partial eviction in a case where a lump sum rent is reserved by the lease ought not to be applied rigidly in India in every case. It is submitted that the courts in India should apply the principle of justice, equity and good conscience and decide each case on its own particular facts. Where, for example, the dispossession does not amount to a tortious or wrongful act deliberately done by the lessor, or where the area from which the tenant has been dispossessed is insignificant or when the claim for suspension of rent is put forward after the lapse of a long period, it would not, it is submitted, be in accordance with rules of justice, equity and good conscience to allow suspension of the entire rent even if a lump sum rent is reserved by the lease. This has been so held by the Calcutta High Court[1307] and has also been the approach adopted by the Supreme Court in *Bibra, SN v Stephen Court.*[1308]

Eviction by title paramount

Eviction by title paramount does not involve the penalty of suspension of rent, and the lessor is entitled to have the rent apportioned. Title paramount is a title superior to both that of the lessor and of the lessee, against which neither is able to make a defence.[1309] To constitute eviction by title paramount, Foa says that three conditions must be fulfilled:

> the eviction must have been from something actually forming part of the premises demised; the party evicting must have a good title; and the tenant must have quitted against his will.[1310]

Eviction by title paramount is a good defence against a covenant to pay rent. If the three conditions mentioned above are satisfied, the lessee can claim abatement of rent.[1311] The lessee is not entitled to have the whole rent suspended, but must pay rent in proportion to the part of which he has possession.[1312] The onus is on the lessor to show what is the fair rent

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1306. *Katayayani's* case, (1925) ILR 52 Cal 417 : 52 IA 160 : 88 IC 110 : AIR 1925 PC 97.
1307. *Ashutosh Roy v Indu Bhusan*, (1945) 49 Cal WN 470; and see *Surendra Nath v Stephen Court Ltd*, (1959) 63 Cal WN 922 : AIR 1960 Cal 346; *Jatindra Kumar v Raimohan Rai*, (1958) 10 Ass 121 : AIR 1961 Assam 52.
1308. *Bibra, SN v Stephen Court*, [1966] 3 SCR 458 : AIR 1966 SC 1361 : [1967] 1 SCJ 12 : [1966] 2 SCA 257.
1309. *Joyendra Lol v Mohesh Chandra*, (1928) ILR 55 Cal 1013, p 1028 : 112 IC 172 : AIR 1929 Cal 22.
1310. Foa, *Landlord and Tenant.*
1311. *Bidhu Bhushan Bhuiya v Ranajit Mondal*, AIR 1981 Cal 154.
1312. *Gopanund Jha v Lalla Gobind*, (1869) 12 WR 109; *Rani Dassi v Asutosh Roy*, (1910) 15 Cal LJ 310 : 6 IC 206; *Banka Behari v Madan Monan Roy*, (1921) 26 Cal WN 143 : 68 IC 477 : AIR 1921 Cal 532; *Imambandi Begum v Kamleswari Pershad*, (1894) 21 Cal 1005 : 21 IA 118; *Jatindra Nath v Udoy Kumar*, (1931) ILR 58 Cal 1281 : 131 IC 309 : AIR 1931 PC 104; *Jogesh Chandra v Emdad, Meah*, 59 IA 29 : 36 Cal WN 221 : 55 Cal LJ 72 : 34 Bom LR 481 : 62 Mad LJ 336 : 136 IC 398 : AIR 1932 PC 28; *Surendra Narain v Dina Nath*, (1915) ILR 43 Cal 554 : 34 IC 33.

of the land out of which the tenant was not evicted.[1313] If the lessee is evicted from the whole of the property leased by title paramount he is, of course, not liable to pay any rent at all for the period of the eviction.[1314] Even if the lessee allowed the person who evicts both the lessor and the lessee in execution of the decree obtained against the lessor, the lessor is not entitled to recover any rent from the lessee. His title is extinguished.[1315] It is tantamount to an eviction if the lessee is obliged to attorn to the person having the superior title;[1316] but not if he attorns because he has been bribed by the offer of a lower rent.[1317]

Diluvion

If part of the tenant's holding is lost by diluvion, he is, in the absence of any special stipulation in the lease, entitled to a proportionate abatement of rent.[1318] He will not be entitled to suspension of the whole rent even if the land re-forms by alluvion and the landlord settles it with a stranger.[1319] If the tenant is entitled to a proportionate abatement of rent by reason of diluvion or partial eviction by title paramount, the onus is on the tenant to prove from what portion he has been evicted and the extent to which the rent should be reduced.[1320] The fact that the tenant has proved dispossession in a previous suit is not sufficient to shift the onus.[1321]

Acquisition

When part of the land is acquired under the Land Acquisition Act, the compensation includes the value of the leasehold and of the reversion. The right to an abatement of rent will depend upon whether the whole compensation is paid to the landlord.[1322] A condition in a lease that if the tenancy is terminated by acquiring the land for a public purpose the whole amount of acquisition money shall be payable to the landlord, is valid.[1323]

1313. *Surendra Narain v Dina Nath*, 34 IC 33.
1314. *Chandrakant Das v Rama Hath Barman*, (1910) 11 Cal LJ 591 : 6 IC 478; *Noorijan Sardar v Bimola Sundari*, (1913) 18 Cal WN 552 : 18 IC 87; *Moti Lal v Yar Muhammad*, (1925) ILR 47 All 63 : 85 IC 756 : AIR 1925 All 275.
1315. *Hanumanthiya v Thavakal San*, AIR 1950 Mys 9.
1316. *Noorijan Sardar v Bimola Sundari*, 18 IC 87; *Jogendra Lal v Mohesh Chandra*, AIR 1929 Cal 22; *Amritlal v Uttamlal*, AIR 1939 Cal 216 : (1938) ILR 2 Cal 559 : 181 IC 529; *Padmakumari v Nanda Padhan*, 195 IC 203 : AIR 1941 Pat 219.
1317. *Noorijan Sardar v Bimola Sundari*, 18 IC 87.
1318. *Kali Prasanna v Dhananjai Ghose*, (1884) ILR 11 Cal 625; *Krista Das v Abdul Karim*, (1921) 25 Cal WN 328 : 62 IC 474 : AIR 1921 Cal 220. See also *Ram Ran Bijaya v Aprup Tewary*, 201 IC 504 : AIR 1942 Pat 466 a case relating to agricultural land — following *Arun Chandra v Shumsul Huq*, AIR 1931 Cal 537 : 35 Cal WN 1011 (FB) on the question of onus; *Medini Kumar v P C Mallick*, AIR 1948 Pat 322; *Vishnu Bhasmarithaya v Kunnungal Kannan*, AIR 1962 Ker 239 (siltation).
1319. *Rai Charan Shar v Administrator-General of Bengal*, (1909) ILR 36 Cal 856 : 2 IC 169.
1320. *Arunchandra Singh v Shamsul Huq*, (1932) ILR 59 Cal 155 : 133 IC 577 : AIR 1931 Cal 537, dissenting from a dictum of Sir Bames Peacock in *Gopanund Jha v Lalla Gobind*, (1869) 12 WR 109, and overruling on this point; *Krista Das v Abdul Karim*, (1921) 25 Cal WN 328 : 62 IC 474 : AIR 1921 Cal 220; *Durga Prasad Singh v Rajendra Narain Singh*, (1913) ILR 41 Cal 493 : 40 IA 223 : 21 IC 750 *Jogesh Chandra Roy v Emdad Meah*, 59 IA 29 : 36 Cal WN 221 : 55 Cal LJ 72 : 34 Bom LR 481 : 62 Mad LJ 336 : 136 IC 398 : AIR 1932 PC 28.
1321. *Satish Chandra Pal v Raja Hrisheekesh Law*, (1933) ILR 60 Cal 247 : 36 Cal WN 1134 : 57 Cal LJ 403 : 143 IC 30 : AIR 1933 Cal 290.
1322. *Uma Sunkur v Tarini Chunder*, (1882) ILR 9 Cal 571; *Watson & Co v Nistarini Gupta*, (1883) ILR 10 Cal 544; *Peari Mohan v Audhiraj Aftab Chand*, (1882) 10 Cal LR 526; *Ganu Dadu v Panditrao*, (1930) 32 Bom LR 1243 : 128 IC 899 : AIR 1930 Bom 592.
1323. *Amritlal v Mamteshwar*, AIR 1973 Del 75 : (1973) ILR 1 Del 43.

War Damage

Special provisions were made in England by statute regarding war damage and rights inter se between the landlord and tenant. There was no such legislation in India and the matter would be governed by an express covenant, if any, or by the provisions of this section.

Doctrine of Frustration

As to the doctrine of frustration, see notes under clause (e).

Apportionment of rent

Rent may be apportioned either by time, or by estate. This subject is dealt with in the notes under sections 36 and 37.

Illegal or immoral purpose

Rent is not recoverable for premises leased for an illegal or immoral purpose. Note "Immoral" under section 6(h) may be referred.

(15) Clause (m)—Repairs

This clause imposes the same obligation in the case of all leases, and section 108(o) requires the lessee to use the premises as a person of ordinary prudence would use them, as if they were his own. The lessee is liable for permissive waste,[1324] and must keep the property in as good a condition as he found it, and must yield up the property in the same condition, subject only to fair wear and tear and irresistible force.

There are thus two implied covenants:

(1) to keep in repair, on which suits may be filed from time to time during the term; and

(2) to restore in repair, ie, in as good a condition as he found the property, on which covenant a suit can only be filed at the end of the term.

Keep

The word "keep" refers to the state in which the property is to be maintained,[1325] and obliges the lessee to maintain the property in the same condition at all times during the whole term.[1326] The breach of the obligation is continuous so long as the premises are not in the requisite state of repair.[1327]

Restore

The obligation to restore the premises in good repair is not affected by the mode in which the tenancy is terminated, whether by efflux of time or by forfeiture.[1328] This obligation is subject to section 108(e), and does not apply if the property is destroyed by a fire not caused by the negligence of the lessee.[1329]

The tenant would be responsible for material damage caused to the premises by the sub-tenant with whom the landlord has no privity.[1330]

1324. *Doongersey v Keshavji Meghji*, (1917) 19 Bom LR 878, 883 : 43 IC 273; Also See the judgment of J Mookerjee in *Bijay Chandra v Howrah Amta Railway*, (1923) 38 Cal LJ 177, p 180 : 72 IC 98 : AIR 1923 Cal 524.
1325. *Lurcott v Wakely & Wheeler*, (1911) 1 KB 905, p 918 : [1911-13] All ER Rep 41.
1326. *Luxmore v Robson*, (1818) 1 B & Aid 584.
1327. *Spoor v Green*, (1874) LR 9 Ex 99, p 111; *Plumer v Johnson*, (1902) 18 TLR 316.
1328. *Sarafali v Subraya*, (1896) ILR 20 Bom 439.
1329. *East India Distilleries & Factories v Mathias*, (1928) ILR 51 Mad 994 : 114 IC 234 : AIR 1928 Mad 1140.
1330. *Laxmi Narain Gauri Shankar v Gopal Krishna Kanoria*, AIR 1987 SC 8.

Reasonable wear and tear

This exception exonerates the lessee in case of dilapidation caused by the friction of the air, by exposure and by ordinary use.[1331]

In England, covenants obliging the tenant to repair are frequent, subject to exceptions regarding "fair wear and tear" or "reasonable wear and tear". Such an exception only excuses the tenant from liability for a want of repair which is directly attributable to wear and tear, and he is obliged to prevent the consequences flowing originally from wear and tear from producing others, which wear and tear would not directly produce.[1332]

Irresistible force

The lessee is not liable to repair damage due to extraordinary causes such as storm, flood or accidental fire. Under this section, the lessee is not responsible for accidental fire, unless he has definitely taken that burden on his shoulders by covenant.[1333] The lessee is of course, liable for fire lighted intentionally or caused by negligence.[1334] The storage of cotton in an unventilated room where it is ignited by spontaneous combustion is negligence which makes the lessee liable.[1335] But the storage of spirits does not make the lessee liable on the principle of *Ryland v Fletcher*[1336] which says that a dangerous thing may be only kept at a man's own peril,[1337] for the rule in that case does not apply, unless there is a special use bringing increased danger to others and is not applicable to such matters as domestic use of gas and electricity.[1338] If the property is destroyed by accidental fire, the lessee can avoid the lease under section 108(e). In a case in which a godown was burnt down owing to the negligence of the lessee's watchman, the lessee sought to avoid the lease and escape responsibility on this ground. But the court held that the lessee was liable in damages, and that this disclaimer of liability was a waiver of notice under this section.[1339]

Section 108(e) refers to destruction which renders the house substantially unfit for inhabitation so that if the chimney of an uninhabited room were blown down the lessee could neither avoid the lease, nor call upon the lessor to restore it unless there was an express covenant for repair by the lessor. The lessee would not be liable to replace it, but if the broken chimney let in rain, he would be under an obligation to do such repairs as were necessary to prevent damage to the house by wetness. Where part of the leased building collapses due to a natural calamity, the landlords cannot put an end to the tenancy, or restrain the tenant from effecting repairs.[1340]

Right of entry and view

The lessor is given, by this section, statutory authority to enter the premises for the purposes of inspecting the state of repair. In the absence of such authority or of an express power in the lease, he would be liable on such entry to be treated as a trespasser,[1341] even though the non-repair renders the landlord liable to forfeiture under a superior lease.[1342]

1331. *Terrell v Murray*, (1901) 17 TLR 570; *Davies v Davies*, (1888) 38 Ch D 499, p 505.
1332. *Rejis Property Co Ltd v Dudley*, (1959) AC 370 : [1958] 3 All ER 491; approving *Haskell v Marlow*, (1928) 2 KB 45; and disapproving *Taylor v Webb*, (1937) 2 KB 283 : [1937] 1 All ER 509; *Brown v Davies*, (1958) 1 QB 117 : [1957] 3 All ER 401.
1333. *East Indian Distilleries & Factories v Mathias*, AIR 1928 Mad 1140.
1334. *Girdaridoss v Pound Pillui*, (1920) 39 Mad LJ 233 : 59 IC 252.
1335. *Mulchand Nemi Chand v Basdeo Ram Sarup*, (1926) ILR 48 All 404 : 94 IC 425 : AIR 1926 All 695.
1336. *Ryland v Fletcher*, (1868) LR 3 HL 330.
1337. *East India Distilleries & Factories v Mathias*, AIR 1928 Mad 1140.
1338. *Richards v Lothian*, (1913) AC 263 : [1911-13] All ER Rep 71; *Dhonal Soorma v Rangoon Indian Telegraph Association Ltd*, (1935) ILR 13 Rang 369 : AIR 1935 Rang 401.
1339. *Girdharidoss v Ponna Pillai*, (1920) 39 Mad LJ 233.
1340. *Eashwar v B Sudershan*, AIR 1984 AP 4, p 5.
1341. *Barker v Barker*, (1829) 3 C & P 557; *Neale v Wyllie*, (1824) 3 B & C 533.
1342. *Stacker v Planet Building Society*, (1879) 27 WR 877.

At all reasonable times

This condition would no doubt be satisfied by the lessor giving notice of his coming.[1343]

Express covenant to repair

An express covenant by the lessee to repair is a contract to the contrary and excludes the implied covenant.[1344] The express covenant to repair is either special or general. The special covenant is for particular decorative repairs such as papering or painting. The general covenant is for general repairs.

A general covenant to repair includes repair not only of buildings existing when the demise is made, but all those which may be erected during the term.[1345] In a Calcutta case,[1346] J Page stated the rule as follows:

> Now, the general rule of law with respect to the construction of covenants to repair is that where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to new buildings that subsequently are erected on the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to a specific property that is demised, such as "the said buildings" or "the said houses," unless the additional buildings in fact became part of the specific buildings which the tenant covenanted to repair, the covenant will not extend to such new and separate erections. Such a covenant would extend to premises not originally demised but encroached upon by the lessee.[1347]

The covenant for general repairs may be expressed in different ways such as, to keep in good repair[1348] or "in good and substantial repair"[1349] or "in good and tenantable order and repair"[1350] or "in habitable repair"[1351] or "in thorough repair and good condition".[1352] But all these forms have no technical significance, and are satisfied by substantial repairs.[1353]

The covenant for general repair is construed with reference to the condition of the building at the commencement of the lease, and if the house is an old house, the lessee is bound only to keep the house in good repair as an old house[1354] and not to give the lessor the benefit of improvements.[1355] On the other hand, repair implies renewal and replacement of parts that have decayed and when that is done the new is put in place of the old. So if the floor of a house had become rotten, the tenant must put down a new floor;[1356] or if an external wall has decayed and become dangerous, he must demolish and rebuild it.[1357] The

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1343. *Deo d Wetherall v Bird*, (1836) 6 C & P 195 (at convenient times).
1344. *Standen v Christmas*, (1847) 10 QB 135.
1345. *Ezra Meyer Aaron Cohen v Kumar Debendra*, (1928) 32 Cal WN 154 : 107 IC 86 : AIR 1928 Cal 89.
1346. *Debendra Lal v Cohen*, (1927) ILR 54 Cal 485, pp 490, 491 : 106 IC 477 : AIR 1927 Cal 908; citing *Deo d Worcester Trustees v Rowlands*, (1840) 9 C & P 734; *Smith v Mills*, (1889) 16 TLR 59.
1347. *JF Perrott & Co Ltd v Cohen*, (1951) 1 KB 705 : [1950] 2 All ER 939.
1348. *Payne v Haine*, (1847) 16 M & W 541.
1349. *Debendra Lal v Cohen*, (1927) ILR 54 Cal 485, p 486 : 106 IC 477 : AIR 1927 Cal 908.
1350. *Stanley v Towgood*, (1836) 3 Bing (NC) 4.
1351. *Belcher v M'Intosh*, (1839) 8 C & P 720.
1352. *Lurcott v Wakley & Wheeler*, (1911) 1 KB 905, p 906 : [1911-13] All ER Rep 41.
1353. *Harris v Jones*, (1932) 1 Modd & R 173; *Gutteridge v Munyard*, (1834) 7 C & P 129; *Stanley v Towgood*, (1836) 3 Bing (NC) 4; *Mantz v Goring*, (1838) 4 Bing (NC) 451; *Payne v Haine*, (1847) 16 M & W 541; *Scales v Lawrence*, (1860) 2 F & F 289 (lessor may not claim for every crack in glass or scratch in paint); *Perry v Chotzner*, (1893) 9 TLR 488 (cracks in plaster and nail holes in wall not a breach).
1354. *Payne v Haine*, (1847) 16 M & W 541; *Harris v Jones*, (1932) 1 Modd & R 173.
1355. *Gutteridge v Munyard*, (1834) 7 C & P 129; *Soward v Leggatt*, (1836) 7 C & P 613; *Scales v Lawrence*, (1860) 2 F & F 289; *Truscott v Diamond Rock Boring Co*, (1882) 20 Ch D 251.
1356. *Proudfoot v Hart*, (1890) 25 QBD 42, 53.
1357. *Lurcott v Wakely & Wheeler*, (1911) 1 KB 905.

landlord does, therefore, get the benefit of improved and renewed parts; and the dictum of Tindall, CJ in *Gutteridge v Munyard*[1358] that:

> what the natural operation of time flowing on effects, and all that the elements bring about, in diminishing the value constitute a loss which so far as it results from time falls upon the landlord,

is not correct if applied to parts. But it is correct if applied to the whole fabric, for the obligation to replace decayed parts does not extend to the recreation of the whole. Thus in *Lister v Lane & Nesham,*[1359] where a house built upon a timber platform resting on mud, decayed to such an extent that the platform could not be renewed and it was necessary to seek a new foundation on the solid gravel below the mud, this work was held not to be included in the covenant for general repairs. Lord Esher said:

> However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant.

The lessee is not bound to give the lessor a new house at the end of the term, but he is bound to make timely repairs, for, as said by Fletcher Moulton LJ in *Lurcott v Wakely and Wheeler:*[1360]

> If you properly repair as you go along the consequence will be that you will always get a house which will be in repair and usable as a house, but you will not get a house that does not suffer from age, nor a house which when old is the same as when it was new.

In *Brew Bros Ltd v Snax (Ross) Ltd,*[1361] the English Court of Appeal has observed that no definition can bring out the distinction between repairs and improvements because:

> things which are easily recognised are not always susceptible of simple definition.

In order to decide the question, one must look at the whole work required to be done, and not merely each component part separately. The covenant is also construed with reference to the class of house and the locality in which it is situated for the state of repair necessary for a house in Grosvenor Square would be totally different from the state of repair necessary for a house in Spitalfield.[1362] An express covenant may be specific and require the tenant to keep the main walls and roof in good repair. Fixed windows may be treated as a part of walls in this context,[1363] but not glass windows and wooden window frames for they do not serve the function of a wall, viz to separate the outside from the inside, but merely admit light and air.[1364] Alterations not authorised are as much a breach of the covenant as dilapidations, eg opening a door in a wall,[1365] or pulling down a wall across a courtyard,[1366] or converting the ground floor into a shop.[1367]

The express covenant is more extensive than the implied covenant, for if the premises are in a bad state of repair when let, the covenant to "put" in good repair obliges the lessee to give up the premises in a better state of repair than when he got them, and he is not justified

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1358. *Gutteridge v Munyard*, (1884) 7 C & P 129.
1359. *Lister v Lane & Nesham*, (1893) 2 QBD 212 : 216-217 CA. See also *Wright v Lawson*, (1903) 19 LTR 203; *Torrens v Walker*, (1906) 2 Ch 166 [1904-07] All ER Rep 800.
1360. *Lurcott v Wakely and Wheeler Lurcott v Wakely and Wheeler*, (1911) 1 KB 905.
1361. *Brew Bros Ltd v Snax (Ross) Ltd*, (1970) 1 QB 612, p 640 : [1970] 1 All ER 587.
1362. *Payne v Haine*, (1847) 16 M & W 541; *Haldane v Newcomb*, (1863) 9 LT 420.
1363. *Boswell v Crucible Steel Co*, (1925) 1 KB 119 : [1924] All ER Rep 298.
1364. *Holiday Fellowships Ltd v Hereford*, [1959] 1 All ER 433 : (1959) 1 WLR 211.
1365. *Deo d Vickery v Jackson*, (1817) 2 Stark 293; *Gange v Lockwood*, (1860) 2 F & F 115.
1366. *Deo d Wetherall v Bird*, (1833) 6 C & P 195.
1367. *Marsden v Edward Heyes Ltd*, (1927) 2 KB 1 : [1926] All ER Rep 329.

in keeping them in bad repair because they were in a bad state when he took them.[1368] Again, the covenant to "keep in good repair" implies that the lessee must put them in good repair, for he cannot keep them in good repair, unless he put them in good repair.[1369] Moreover, the express covenant may require the lessee to rebuild if the property is totally destroyed by fire or other inevitable accident. An Indian illustration is the case of *Hechle v Tellery.*[1370] The lessee covenanted to "keep the premises wind and water-tight and in habitable condition," and when the house was damaged by earthquake he was liable to repair it to the extent of making it wind and water-tight and habitable.

Breach of covenant

Breach of covenant to repair will not be restrained by injunction of specific performance.[1371] The remedy is damages.

If the covenant is to put in good repair, there can be only one breach for which only one suit can be maintained.[1372] If the covenant is to keep in good repair, the breach is a continuing one as long as the premises are out of repair, and suits can be maintained from time to time during the term.[1373] The damages being for injury to the reversion, the lessor is under no obligation to expend damages recovered on the repair of the premises. The measure of damages is the depreciation in the market value of the reversion.[1374] But no hard and fast rule can be laid down and all the circumstances of the case must be taken into consideration and damages assessed at such sum as represents the loss to the covenantee.

If the covenant is to leave or restore in good repair or in the same condition as when the lessee took possession, only one suit can be brought at the end of the term, and the damages will be the cost of putting the premises in the state of repair required by the covenant.[1375] Any sum recovered during the term as damages for breach of covenant to keep in repair will be taken into account.[1376]

So far as the property other than the leasehold property is concerned, clauses (m), (o) and (p) of section 108 of the Act would not be attracted in respect of such other property inasmuch as the word "property" as mentioned in clauses (m), (o) and (p) of section 108 of the Act would mean only the premises demised and not any other property or premises. This is simply because of the fact that if the tenant occupies land of property other than the lease held property, he is not to be treated as tenant in respect of such excess land or premises unless there is any such contract, and in the absence of any such contract his said occupation would be that of a trespasser and/or unauthorised occupant but clauses (m), (o) and (p) of section 108 would not be attracted in such a case.[1377]

1368. *Belcher v M'Intosh*, (1839) 8 C & P 720; *Payne v Haine*, (1847) 16 M & W 541; *Proudfoot v Hart*, (1890) 25 QBD 42.
1369. *Lurcott v Wakely & Wheeler*, (1911) 1 KB 905 : [1911-13] All ER Rep 41; *Proudfoot v Hart*, (1890) 25 QBD 42.
1370. *Hechle v Tellery*, (1899) 4 Cal WN 521.
1371. *Hill v Barclay*, (1810) 16 Ves 402 : (1811) 18 Ves 56.
1372. *Coward v Gregory*, (1866) LR 2 CP 153.
1373. *Luxmore v Robson*, (1818) 1 B & Aid 584; *Anthony v Neelakandan*, (1955) Tr & Coch 666 : AIR 1955 Tr & Coch 277.
1374. *Deo d Worcester Trustees v Rowlands*, (1841) 9 C & P 734; *Henderson v Thorn*, (1893) 2 QB 164; *Smiley v Townshend*, (1950) 2 KB 311 : [1950] 1 All ER 530; *Mahavaraya Udpa v Dasa Tantri*, AIR 1964 Mys 179.
1375. *Joyner v Weeks*, (1891) 2 QB 31, 43; *Sarafali v Subraya*, (1896) 2 Bom 439, 449.
1376. *Ebbetts v Conquest*, (1900) 82 LT 560.
1377. *Rameshwar Roy v Baidhendra Kinbas Roy*, AIR 1998 Cal 292.

Section 108(m) and Uttar Pradesh Act 13 of 1972

The provisions of Uttar Pradesh Act 13 of 1972 are not inconsistent and can co-exist with section 108(m). Under the provisions of section 108(m), it is the duty of tenant to keep the premises in as good a condition, as they were when they were let out. These provisions make it obligatory upon the landlord to keep the premises wind proof and waterproof and to effect periodical repairs and to enforce this obligation, the tenant has been given a right to apply under section 28 to the prescribed authority and to claim adjustment of the expenses against the rent in the manner and to the extent provided for under that section. These provisions do not take away the right of the tenant himself to effect the repairs if he does not want to claim adjustment of the expenses against the rent.[1378]

Notice

Clause (m) of section 108 provides that when any damage has been caused by an act or default on part of lessees or his servants or agents, he is bound to make it good within three months from the date of notice to that effect given by landlord. In case no notice being given by the lessor, lessee cannot be said to have violated clause (m).[1379]

(16) Clause (n)—Lessee's duty to the lessor

It is correlative to the covenant for quiet enjoyment, for, while the lessor secures undisturbed possession to the lessee, the lessee is under an obligation to give notice to the lessor, if his title is in jeopardy. Rankin Chief Justice explained the clause as throwing a duty on the lessee in order that the lessor may, if he chooses, protect his own interest and that the lessor may be safeguarded against the results, or a collusive eviction submitted to by the lessee.[1380]

Even before the TP Act, the Calcutta High Court said that it is incumbent on every lessee to protect his lessor's property from encroachment or unlawful eviction.[1381]

The lessor's cause of action to recover possession accrues when the tenancy is determined, and there can be no adverse possession against him till then.[1382] In *Katyayani Debi v Udoy Kumar,*[1383] the Privy Council pointed out that the lessor could not maintain an action against a trespasser at his own hand for ejectment as he might be met with the objection that the apparent trespass had been acquiesced in by the tenant. But if his title is endangered, the landlord may sue for a declaration of his rights, and for a decree giving him formal possession as against the trespasser.[1384] It is no doubt true that an owner has every right to enter upon his property and restrain the trespasser from perpetuating his illegal occupation. It is not necessary for him to take recourse to a legal proceeding in order to vindicate his rights of ownership and possession in respect of his property of which another person without having any right or title enters into possession. He can throw out a trespasser while he is in act of or

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1378. *Saroj Dwivedi v Additional District Judge/Special Judge,* AIR 2003 All 315, para 4 : (2003) 3 AWC 1910.
1379. *Menoka Rani Pal v Maya Rani Karmakar,* AIR 1999 Cal 182, para 19.
1380. *Indu Bhusan v Chowdhury Maozam Ali,* (1929) 33 Cal WN 10 : AIR 1929 Cal 272.
1381. *Prosonnomoyi v Kali Das,* (1881) 9 Cal LR 347.
1382. *Davis v Kazee Abdool,* (1868) 8 WR 55; *Womesh Chunder v Raj Narain,* (1869) 10 WR 15; *Krishna Gobind v Had Churn,* (1883) ILR 9 Cal 367; *Sharat Sundari v Bhobo Pershad,* (1886) ILR 13 Cal 101; *Vinayak Janardhan v Mainai,* (1895) ILR 19 Bom 138; *KishwarNath v Kali Sankar,* (1905) 10 Cal WN 343; *Thamman Pande v Maharaja of Vizianagram,* (1907) ILR 29 All 593.
1383. *Katyayani Debi v Udoy Kumar,* (1925) ILR 52 Cal 417 : AIR 1925 PC 97.
1384. *Raj Cumar v Ali Mia,* (1923) 37 Cal LJ 94 : 70 IC 792 : AIR 1923 Cal 192; *Damodar Prasad v Lachmi Prasad,* (1928) ILR 7 Pat 496 : 110 IC 642 : AIR 1928 AP 354; *Ghulam Husain v Muhammad Husain,* (1904) ILR 31 All 271 : 2 IC 209; *Tiruvengada v Venkatachala,* (1916) ILR 39 Mad 1042 : 32 IC 198; *Bissesuri Dabea v Baroda Kanta,* (1883) ILR 10 Cal 1076.

process of trespassing, but this right is not available to the true owner if the tresspasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances, the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law.[1385] The landlord holds possession through his tenant, and if the tenant is dispossessed, the landlord may sue for recovery of the land demised under the Specific Relief Act.[1386] The lessor may also sue for the purpose of giving possession to a person to whom he has granted a lease.[1387]

(17) Clause (o)—User

The words "use the property for the purpose other than that for which it was leased" occuring in this clause mean that the change of business would not bring about change of user as contemplated by this clause.[1388] Section 108 starts with the word "in absence of a contract or local usage to the contrary". In other words, it permits contract to the contrary mentioned under this section. If the lease deed spells out that "the tenant shall not carry out any other business than the business specified" then the parties restricts the user of the tenanted premises only for the business which is stated therein and no other.[1389] But it will be permissible only to a limited extent, that is to say, if the tenant was permitted to sell his goods and the shop was meant as an outlet for the goods manufactured by him elsewhere, he cannot start the manufacturing process in the shop itself.

This clause requires the lessee to use the land as a man of ordinary prudence would use his land, and not to use it for a purpose different to that for which it was leased. The lessee must not use or permit another to use, the property for a purpose other than that for which it was leased. In case of any violation, he is liable for eviction.[1390] He shall also ensure that the occupant banks, nursing homes, companies or persons carrying on any commercial activity in the residential sector should stop such activity and shift the same to the appropriate sectors i.e. commercial, commercial pockets in industrial/institutional area and specified pockets for commercial use within the residential sector, strictly earmarked for that activity in the development Plan, Regulations and provisions of the Delhi Rent Act, 1995.[1391]

Amendment

The words "or sell" were added by the amending Act of 1929. The words "belonging to the lessor, or" were inserted by the same amending Act.

Diversion to a different use

The lessee may not use the property for a purpose other than that for which it was leased. However, where a new business started by the tenant in the premises let out to him is an allied business or a business which was ancillary to the main business, it would not amount to change of user.[1392] In the case of *Mohanlal v Jai Bhagwan*,[1393] it was held that if the building was rented for the purpose of carrying on a business, using it for another business will not in

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1385. *Nabekishore Sahu v East India Arms Co,* AIR 1998 Ori 95.
1386. *Jagannatha Charry v Rama*, (1905) ILR 28 Mad 238; *Shyama Churn v Mahomed Ali*, (1908) 13 Cal WN 835 : 3 IC 466; *Nabin Das v Koylas Chunder*, (1911) 12 Cal LJ 483 : 7 IC 924; *Akhil Chandra Dey v Akhil Chandra*, (1911) 15 Cal WN 715 : 10 IC 455.
1387. *Mohideen Ravuthar v Jayarama Aiyar*, (1921) ILR 44 Mad 937 : 62 IC 284 : AIR 1921 Mad 42.
1388. *Jagdish Lal v Parma Nand*, (2000) 5 SCC 44, para 3 : AIR 2000 SC 1822.
1389. *M Arul Jothi v Lajja Bal*, (2000) 3 SCC 723 : AIR 2000 SC 1122.
1390. *Dinesh Jagannath Khandelwal v Kundanlal*, (2010) 1 Bom CR 728 : (2010) 7 Mah LJ 719 : (2010) 2 AIR Bom R 413.
1391. *R K Mittal v State Of UP*, AIR 2012 SC 389 : 2012 3 AWC 3109 SC : JT 2011 (14) SC 133 : 2011 (13) SCALE 369 : (2012) 2 SCC 232 : 2011 (6) UJ 4245.
1392. *Jagdish Lal v Parma Nand*, (2000) 5 SCC 44, para 18 : AIR 2000 SC 1822.
1393. *Mohanlal v Jai Bhagwan*, (1988) 2 SCC 474; Re *SG Assurance* Co AIR 1965 Cal 16.

any way impair the utility or damage the building, and this business can be conveniently carried on in the premises. Where the original letting of the shop is not for any specific purpose and the shop was used for carrying on the business of foodgrains, the mere change in the user of the shop for setting up a flour mill does not amount to user for purposes other than that for which it was leased.[1394] But premises let for residential or trade purposes cannot be used for a flour mill.[1395]

There is a change of user where:

(a) A premise was demised for running a shop and the tenant installed an "*atta chakki* and oil *kolhu*".[1396]

(b) An open piece of land was let out for carrying on the business of sugarcane-crushing and it is being used for selling cloth and readymade clothes.[1397]

(c) A lawyer's office was established in a part of the building let out solely for residence.[1398]

(d) A shop let out for carrying on business as general merchant and "*kirana*" was being used a tea-stall along with sale of cold drinks.[1399]

(e) In a shop let out for doing business in "dry fruits and soda water", the tenant set up an "oven" and prepare "*pakoras*".[1400]

(f) There was a change from the business of "general & provision store" to the business of selling "stones and marble chips".[1401]

(g) House let out for residential purpose was used as a shop.[1402]

(h) Residential premises was used as a boarding house.[1403]

(i) House let out for residential purpose was used by a dentist for carrying on his profession.[1404]

A house let for residential purposes may not be used as a shop by the exhibition of goods therein without structural alteration.[1405] In *UP Naing v Burma Oil Co*,[1406] land was leased with the right to win oil from it. The lessees sank oil wells but the well yielded not oil but gas which the lessees used for their own purposes. The Privy Council held that they were entitled to do so without doing any damage to the property leased.

The Supreme Court, while applying the principle of dominant purpose, held that running of a tailoring shop in one of the rooms is not sufficient to convert, what otherwise to all intents and purposes is a residential building, into a non-residential building.[1407]

Ordinarily, as long as the interest of the landlord is not prejudiced, a small change in the user would not be actionable. If a tenant who takes a petty premise for carrying on a small

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1394. *Ram Saroop v Janki Dass Jaikumar*, AIR 1976 Del 219 : (1976) ILR 1 Delhi 153.
1395. *Beharilal v Chandrawati*, (1966) All LJ 358 : AIR 1966 All 541.
1396. *Ram Gopal v Jai Narain*, AIR 1989 SC 1841 : (1995) 4 SCC 648 (Supp).
1397. *Dashrath Baburao Sangale v Kashimath Bhaskar Data*, (1994) 1 SCC 504 (Supp).
1398. *Bishamber Dass Kohli v Satya Bhalla*, (1993) 1 SCC 566.
1399. *Om Prakash v Parmeshri*, (1984) 1 AI RCJ 241 (P&H).
1400. *Pratap Singh v Ajmer Singh*, (1984) 1 AI RCJ 431 (P&H).
1401. *Banwari Lal v Iqbal Singh*, (1980) 2 RCR 119 (P&H).
1402. *Gurdial v Raj Kumar*, AIR 1989 SC 1841.
1403. *Tendler v Sproule*, (1947) 1 All ER 193.
1404. *Manchester Corpn v Buttle*, (1929) 2 Ch 390.
1405. *Wilkinson v Rogers*, (1864) 2 De G J & Sm 62 (CA). [In English law, the word "waste" is used instead of "different use". It has been held that if such different use is not injurious to the premises it is a technical waste and not actionable under English law.]
1406. *U P Naing v Burma Oil Co*, (1929) ILR 7 Rang 157 : 56 IA 140 : 115 IC 705 : AIR 1929 PC 108.
1407. *Prem Chand v District Judge, Dehradun*, (1977) 1 SCC 254 : AIR 1977 SC 364.

trade also stays in the rear portion, cooks and eats, he does not defeat the purpose of the lease.[1408] Where, along with a repair shop, sale of television sets was temporarily carried on, it was held that there is not change of user.[1409] It has been held that the question whether the change of user is in the substantial part of the building is not relevant.[1410]

The lessor may show that the property was being used for a different purpose and such purpose was destructive of or permanently injurious to the property.[1411] Before the landlord can rely on an act as one in contravention of section 108(o), injury must be proved, if a beam, ridden by termite, is removed and a new one is substituted in its place, it cannot be said to be an act destructive of, or injurious to, the premises.[1412] Where in an allotment of plots by auction, a person accepted the plot reserved for market, signed the lease deed, paid money and got the lease deed registered with open eyes, he had full liberty at that time to refuse to accept plot and take his money back but did not do so, and having entered into the lease agreement without any protest he cannot later challenge the lease of the plot.[1413]

With reference to section 108(o), it has been held that the use of the premises for carrying on a wine trade did not, in the circumstances, amount to an act "destructive of or permanently injurious to" the premises. Use of premises as a gambling house or a brothel is very different, since the mere use will involve a slur or stigma, and will also decrease the value. But the use of the premises as a wine shop cannot have the same effect merely because the landlord's religion (Islam) does not view drinking with favour. In this case, the landlord was residing far away from the premises. The argument that the national policy of total prohibition was violated was also not material. Further, the positive covenant in the lease to carry on a business did not necessarily carry with it a negative covenant not to carry on any other business, and carrying on of wine trade would not, in this case, be inconsistent with the original purpose of the letting.[1414]

English cases mostly turn on express covenants, such as, to use the premises as a private residence only, and not to carry on a trade or business.[1415] A covenant to use premises for private residence in the occupation of one household is, therefore, violated by the tenant taking paying guests.[1416] Earlier Indian cases mostly arose with reference to agricultural tenancies, but the principle is the same. A tenant may not let lend for cultivation or to construct a tank[1417] or an orchard.[1418] When an agricultural tenant let his land temporarily to

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1408. *Sant Ram v Rajinder Lal,* AIR 1978 SC 1601 : (1979) 2 SCC 274.
1409. *Gurdial Batra v Raj Kumar Jain,* (1989) 3 SCC 441 : AIR 1989 SC 1841.
1410. *Bishamber Dass Kohli v Satya Bhalla,* (1993) 1 SCC 566; *M Arul Jothi v Lajja Bal,* (2000) 3 SCC 723.
1411. *Hari Rao v N Govindachari,* (2005) 7 SCC 643 : AIR 2005 SC 3389; *Kedarnath Jhunjhunwala v State of Bihar,* AIR 2000 Pat 123 : (2000) 2 PLJR 849. See also *Gurdial Batra v Rajkumar Jain,* AIR 1989 SC 1841, p 1843 : (1989) 4 SCC 35; *Mohanlal v Jai Bhagwan,* (1988) 2 SCC 474; and *Duport Steels Ltd v Sirs,* [1980] 1 All ER 529.
1412. *Keshavji v Sulochanabai,* AIR 1977 Bom 7 : 78 Bom LR 192.
1413. *Jinraj Estate Pvt Ltd v Nagpur Improvement Trust,* AIR 2013 Bom 116 : LNIND 2012 NGP 512 : JCNO B 2012 0896.
1414. *Raghavan Pillai v Sainaba,* (1977) KLT 417.
1415. *German v Chapman,* (1877) 7 Ch D 271 (CA) (Use as a school); *Hobson v Tulloch,* (1898) 1 Ch 424 (use as a boarding house); *Lorden v Brooke-Hitchin,* (1927) 2 KB 237 (use as a restaurant).
1416. *Segal Securities Ltd v Thoseby,* (1963) 1 QB 887 : [1963] 1 All ER 500.
1417. *Tarini Charan Bose v Debnarayan Mistri,* (1872) 8 Beng LR 69; *Monindro Chunder Sirkar v Muneeroodden Biswas,* (1873) 20 WR 230 (express covenant not to dig a tank); *Noyna Misser v Rupikun,* (1883) ILR 9 Cal 609.
1418. *Bholai v Rajah Bansi,* (1881) ILR 4 All 174; *Lakshmana v Ramachandra,* (1887) ILR 10 Mad 351; contra — *Venkayya v Ramachandra,* (1899) ILR 22 Mad 39 (because the tenancy was permanent and the act was good husbandry; cf *Krishna Doss v Venkatappa,* (1899) 9 Mad LJ 146.

a theatrical company, this was held to be a diversion.[1419] Thus, a land leased for the purposes of a grove cannot be used for building even temporary structures.[1420]

Waste

Waste is said to be voluntary, ie, doing an act which is destructive of the premises; or permissive, ie, an omission to make necessary repairs. The liability for permissive waste arises out of the obligation under section 108(m) to keep the property in a good condition, subject to fair wear and tear. This clause deals with voluntary waste and imposes a liability similar to that imposed upon bailees by sections 151 and 154 of the Indian Contract Act, 1872. An act which a person of ordinary prudence using his own property would commit is not waste, although it damages the property. Thus, where a warehouse was damaged by the weight of the goods placed in it, and the user was reasonable having regard to the class of building, the lessee was not liable.[1421] But even in a lease which permits excavation, the lessee will be liable if the excavation is done in such a manner as to cause damage.[1422] A mere omission of a tenant to put manure in the land does not amount to waste.[1423] It is not every construction or alteration that would result in material impairment to the value or utility of the building. The impairment must be of a material nature so as to substantially diminish the value of the building either from commercial or monetary point of view, or from the utilitarian aspect of the building. The burden of proof of such material impairment would be initially on the landlord. Thus, a hole eight inches in diameter bored by the tenant in the floor of the balcony on the first floor for the purpose of laying a pipe to drain out the accumulation in the urinal, was held not to amount to any waste or damage of the property leased.[1424] The mere fact that the building which is the subject matter of tenancy has fallen down does not, by itself, fasten the liability on the tenant to answer for its value. Liability must be proved. In the case of a tenant at will, it is well settled that the obligation is only to ensure that his own conduct does not contribute to the deterioration of the tenanted premises.[1425]

Structural additions and alterations

The tenant cannot make structural additions and alterations without the consent of the landlord. The putting up of a heavy overhead tank without adequate supports is not permissible because it constitutes waste.[1426] The Bombay High Court has held that an overhead cement concrete water tank erected by the tenant in the open space adjoining the premises was only a temporary structure which could be removed by dismantling, and no damages to the demised premises would be caused thereby.[1427] It has already been noted that alterations that are not authorised amount to a breach of the implied covenant mentioned in clause (m). Such alterations will also be a breach of the implied covenants mentioned in clauses (o) and (p). The Supreme Court in a case under a rent control Act observed that

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1419. *Yusuf Ali v Hira*, (1998) ILR 20 All 469.
1420. *Bansidhar Misra v Burdeshwari Dutt*, 190 IC 620 : AIR 1940 Oudh 411.
1421. *Manchester Bonded Warehouse Co v Carr*, (1880) 5 CPD 507; *Saner v Bilton*, (1878) 7 Ch D 815; *Koegler v Yule*, (1870) 14 WR 45 : 5 Beng LR 401.
1422. *Girish Chandra v Sirish Chandra*, (1904) 9 Cal WN 255.
1423. *Pokar v Lakshman*, AIR 1951 Raj 108.
1424. *Ratanlal Bansilal v Kishorilal Goenka*, AIR 1993 Cal 144, p 181; See *O M Pal v Anand Swarup*, (1988) 4 SCC, p 545.
1425. *V P Naidu v S Udayar*, AIR 1974 Ker 132.
1426. *Damodaram v Loganatha*, AIR 1956 Mad 54.
1427. *Parvati Kevolram Moorjani v Madanlal Anraj Porwal*, AIR 1988 Bom 354, p 358 (in context of section 13(1)(b) of the Bombay Rents, Hotel & Lodging Houses Rent Control Act, 1947).

"material" alterations would mean important alterations such as those which substantially changed the front or structure of the premises; it was immaterial whether such alterations damaged the premises or diminished the value of the premises.[1428]

Even if there was no contract between the parties, section 108(p) would have prevented the tenant from putting up a permanent structure on the land without the landlord's consent and eviction of tenant on the ground of erection of permanent structure on demised property is valid.[1429] Demolition of construction by the tenant without landlord's consent Destruction of a house or building constructed on the leasehold property does not determine the tenancy rights of the occupant as giving a building or structure on leased does not mean the lease of only the superstructure in exclusivity.[1430]

A tenant is entitled to make alternations or adjustments in the demised premises to make them suitable to his requirements, and the landlord cannot be heard to take exception to them, when no damage impairing the premises and material alteration has resulted which cannot be restored back to the original position by the tenant at his own cost, whenever he vacated the same. No order for removal would be called for in such a case. The tenant, however, should not obstruct the landlord or his agent from entering the premises at reasonable times to inspect its condition. The landlord should avail of this facility with due deference of the business of the tenant, without causing any obstruction or annoyance to him. In a suit for a declaration that the roof of the demised single storeyed building did not form part of the demised building, a rent note irrespective of its being unregistered or unstamped can be looked into in order to ascertain whether the roof of the building was not part of the document as alleged by the plaintiff, and the plaintiff is competent to refer to it to this extent. There is, therefore, no bar to looking into the document to ascertain whether a certain matter alleged to form part of it, in fact, is not part of it. This ascertainment is not with regard to what forms part of the documents, but the absence of it, ie, non-existence of something in the document or negative part thereof.[1431]

The lease deed in the absence of registration can be looked into for ascertaining the extent or portion of which the possession is granted to the lessee.[1432]

Special legislative provisions

Section 13(l)(h) of the West Bengal Premises Tenancy Act which specifically provide for cases of change of user of premises originally let out for residential purpose only, would supersede the general provisions of section 108(o) of the TP Act in respect of premises let out for residential purpose.[1433]

1428. *Mamnohandas v Bishnudas,* [1967] 1 SCR 836 : AIR 1967 SC 643.
1429. *Purushottam Das Bangur v Dayanand Gupta,* (2012) 10 SCC 409 : LNIND 2012 SC 696 : AIR 2013 SC 465 : 2012 (10) SCALE 607; *Nemai Chandra Kumar v Mani Square Ltd,* 2015 SCC OnLine SC 365; *Edmuond Francis Heberlet v Mustt Fatima Khatoon,* AIR 2011 Cal 13 : LNIND 2010 CAL 34 : 2010 AIHC 254 NOC; *Venkatlal G Pittie v Bright Bros (Pvt) Ltd,* AIR 1987 SC 1939 : LNIND 1987 SC 509 : JT 1987 (3) SC 139 : 1987 2 Ren CR 306.
1430. *Shaha Ratansi Khimji & Sons v Kumbhar Sons Hotel Pvt Ltd,* (2014) 14 SCC 1; see however, *Bharat Bhushan Deva v State of Bihar,* AIR 2008 Pat 29 wherein it was held that where the tenant demolishes the structures on the premises without the consent of the landlord, his existence on the leased premises is that of a trespasser and legal relationship of the landlord and the tenancy comes to a perpetual end. The tenant is liable to reconstruct the premises else he would be liable to pay compensation to the landlord.
1431. *Rawal Singh v Kwality Stores,* AIR 1986 Del 236.
1432. *Peter George v Janak J Gandhi,* (1996) 36 DRJ 248.
1433. *Mono Ranjan Dasgupta v Suchitra Ganguly,* AIR 1989 Cal 14, p 20.

Timber

Timbers as a rule are trees used for building or repairing houses. In this connection, note "Timber" under section 3 may be referred. Felling timber is an act of waste; and this applies to bamboos even though fresh bamboos sprout when cut.[1434] The words "or sell" have been inserted by the amending Act of 1929 apparently to make it clear that the lessee may not sell the standing timber to a vendee to be felled and carried away by him. The prohibition must refer to timber which was standing when lessee entered, for the lessee has the right under section 108(h) to fell and remove trees that he has planted himself, but not those which he has not planted.[1435]

Building

The words "belonging to the lessor" have been inserted by the amending Act of 1929. They make it clear that the right of the tenant to remove the material of buildings erected by himself recognised in section 108(h) is not affected. The prohibition against pulling down buildings of the lessor includes making any structural alterations.[1436] Pulling down a house is waste even if it is rebuilt.[1437]

Mines and quarries

The right of the lessee to minerals depends upon the terms of the leases. The note "Attached to the earth" under section 8 may be referred.

In the absence of such right the lessee has no right to work quarries or mines other than those open when he entered;[1438] or to dig and carry away soil;[1439] or shells;[1440] or even to take stones lying loose and exposed on the surface.[1441] The lessee may not make bricks on land not let for that purpose.[1442] Subsoil rights in tenure are assumed not to have been granted, unless an express grant is made.[1443] A tenant may, however, have a right to make bricks for his own domestic or agricultural purpose.[1444] If the lease confers a right to work a mineral field, the right is, not cut down by this section.[1445]

Acts destructive or permanently injurious

The last clause embraces every act which causes permanent injury to the property. Thus, if the tenant merely converts the user of the premises from office to residential purpose, without affecting the property the same would not come within the prohibition of the statute.[1446] In order that the landlord may invoke the provisions of section 108(o), he must show not only that the property was used for a different purpose than that for which it was

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1434. *Mehra v State*, (1957) 55 All LJ 917.
1435. *Gur Prasad v Mehdi Husain*, 201 IC 728 : AIR 1942 Oudh 460.
1436. *Deo d Vickery v Jackson*, (1817) 2 Stark 293.
1437. 2 Roll Abr 816.
1438. *Christian v Tekaitni*, (1914) 20 Cal LJ 527; *Ras Behari v Jagdish Chandra*, 160 IC 114 : AIR 1936 Rang 111 (Shooting Stone).
1439. Re *Purmanandas Jeewandas*, (1883) ILR 7 Bom 109.
1440. *Chaladom v Kakkath Kunhambu*, (1902) ILR 25 Mad 669.
1441. *Kusum Kumari v Jagdish Chandra*, (1940) ILR 20 Pat 96 : 193 IC 760 : AIR 1941 Pat 13 dissenting from the case *Ras Behari v Jagdish Chandra*, AIR 1936 Pat 111.
1442. *Anund Coomar Mookerjee v Bissonat Banerjee*, (1872) 17 WR 416; *Nicholl v Tarinee Churn Bose*, (1875) 23 WR 298.
1443. *Hari Narayan v Sriram*, 37 IA 136 : 6 IC 785; *Onkarmal v Bireswar*, (1959) 61 Cal WN 970 : AIR 1959 Cal 195.
1444. *Purnandu Nath Narayan v Narendra Nath* 203 IC 442 : AIR 1943 Pat 31.
1445. *Satya Niranjan v Ram Lal*, (1925) ILR 4 Pat 244 : 52 IA 109 : 86 IC 289 : AIR 1925 PC 42.
1446. *Lakshman Chandra Saha v Bansari Mukherjee*, AIR 1992 Cal 148.

rented, but also that the use is destructive of or permanently injurious, to the property.[1447] If lands leased for construction of a reservoir is used as a rubbish shoot, this is waste, because the level of the land being raised it would be more expensive to lay the foundations of a house.[1448] But small excavations which caused no damage are not actionable.[1449]

(18) Clause (p)—Erection of buildings

Where the tenant raises unauthorised constructions, he is liable for eviction in view of section 108(p).[1450] The statutory requirement is that the lessee must not without lessor's consent erect any permanent structure on the property except for agricultural purposes.[1451] On an agricultural holding a tenant may not erect a building not connected with agricultural operations.[1452] An occupancy tenant in Bengal may build a *pucca* dwelling house as is suitable to his holding;[1453] or an indigo factory if indigo is grown on his holding.[1454]

The word "permanent" is used in opposition to "temporary".[1455] What is a permanent structure is a question of fact; it depends upon the nature of the structure, and the intention with which it is erected.[1456] The question whether the structure was permanent, can be judged from the intention of the party who put up the structure as may be gathered from the mode and degree of annexation, and from the fact whether it could be removed without causing irreparable damage to the demised premises, dimensions of the structure, the purpose of erecting it, the nature of the materials used in it and its durability.[1457] If a proper court has come to the conclusion on the examination of the nature of the structure, the nature of the duration of structure, the annexation and other relevant factors that the structures were permanent in nature which were violative of section 13(i)(b) of the Bombay Rent Act, 1947 as well as section 108 (p) of the TP Act and if such a finding is possible, it cannot be considered to be perverse, and the High Court cannot interfere with it under Article 227 of the Constitution.[1458] It must be of such a character that cannot be removed without damaging and/or impairing substantially any portion of the demised premises. Mere raising a wall, adjacent to demised premises either, mud or bricks which can be removed without any difficulty at any point of time, cannot be said to be a structure of permanent nature and character. Even if any roof is constructed either with asbestos or corrugated tin shed or even with concrete slab, it cannot be said to be permanent since it can be removed easily, unless such concrete roof is cast on a brick built missionary wall, which cannot be

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1447. *Dattatrey v Gulabrao*, (1978) Mah LJ 545.
1448. *West Ham Central Charity Board v East London Waterworks Co*, (1900) 1 Ch 624 : [1900-03] All ER Rep 1011.
1449. *Barada Prasad v Bhupendra Nath*, (1923) ILR 50 Cal 694 : 75 IC 55 : AIR 1924 Cal 56.
1450. *Nisha Rani Mookherjee v Puran Chand Jain*, (2004) 10 SCC 637.
1451. *Kacharulal Agarwal v Bhikam Chand Kothari*, AIR 2008 (NOC) 194 (Chh).
1452. *Jugut Chunder v Eshan Chunder*, (1874) 24 WR 220; *Lal Sahoo v Deo Narain*, (1878) ILR 3 Cal 781; *Ramanadhan v Zamindar of Ramnad*, (1893) ILR 16 Mad 407; *Orr v Mirthyunjaya*, (1901) ILR 24 Mad 65. See also *Venkayya v Ramasami*, (1899) ILR 22 Mad 39.
1453. *Hari Kisore Barna v Baroda Kisore*, (1904) ILR 31 Cal 1014; *Nyamutoola v Gobind Churn*, (1866) 6 WR 40.
1454. *Hari Mohun Misser v Surendra Narayan*, (1907) ILR 34 Cal 718 : 34 IA 133.
1455. *Atul Chandra v Sonatan Daw*, (1961) 65 Cal WN 626 : AIR 1962 Cal 78.
1456. *Surya Properties Pvt Ltd v Bimalendu Nath*, (1963) 67 Cal WN 977 : AIR 1964 Cal 1; and see *Surya Properties Pvt Ltd v Bimalendu Nath*, AIR 1965 Cal 408; *Ratnamala Dasi v Ratan Singh Bawa*, AIR 1990 Cal 26, p 29; *Venkatlal G Pittie v Bright Bros, (Pvt) Ltd*, AIR 1987 SC 1939; *Khureshi Ibrahim v Ahmed Haji*, AIR 1965 Guj 152; *Ramji Virji v Kadarbhai*, AIR 1973 Guj 110; *Ali Saheb Abdul Latif v Abdul Karim*, AIR 1981 Bom 253; *Venkatlal G Pittie v Mls Bright Bros, (Pvt) Ltd*, AIR 1987 SC 1939, p 1945; *Edmound Francis Heberlet v Fatima* Khatoon, AIR 2011 Cal 13.
1457. *Venkatlal G Pittie v Bright Bros, (Pvt) Ltd*, AIR 1987 SC 1939, p 1944 : (1987) 3 SCC 558.
1458. Ibid, p 1946, (1987) 3 SCC 558, p 569 : AIR 1987 SC 1939.

removed easily and need to be demolished with substantially or structural damage to the building.[1459]

In deciding whether a construction is permanent or temporary for the purpose of section 108(p), two factors are primarily important, namely, the nature of the structure, and the intention with which it is made. If the structure is such that it will endure for a long time, ie, so long as the tenant expects to remain there as a lessee and the lessee expects it to use it as long as he remains as a lessee, it will be regarded as a permanent structure even though the construction is removable without causing permanent damage to the leased premises. A kitchen constructed with brick walls, tiled roofs and unplastered walls, would be a permanent construction within the clause of section 108(p),[1460] but not when it can be removed easily.[1461] Similarly, replacing of worn out old tin shades with cement concrete slabs would not amount to erection of permanent structure,[1462] but where the lessee, a government school, demolished old rooms and constructed new ones in their place without the lessor's permission the breach was held sufficient for the eviction.[1463] Affixation of a collapsible gate at the entrance of the tenanted premises does not amount to erection of a permanent structure.[1464] Construction of septic privy outside the tenancy would not violate section 108(p).[1465]

The requirement of the law is that the lessee must refrain from erecting any permanent structure without the consent of the lessor and not without his prior consent. Thus consent of the landlord can be taken after making the construction, but such fact of not giving the consent has to be established by the lessor alone and not by any other person for fact of giving consent is within the special knowledge of the lessor under section 106 of the Indian Evidence Act.[1466]

(19) Clause (q)—Restoration of possession

At the expiration of the term whether it terminates by notice or by efflux of time, the lessee is bound to put the lessor in vacant possession.[1467] This is known as the rule in *Henderson v Squire.*[1468] In the absence of contract or local usage to the contrary, it is an obligation of the tenant to put his lessor into possession of the property on the termination of the lease.[1469] Where the period of the lease is fixed, the lessee must put the lessor in possession of the property on its expiry, notwithstanding the absence of a specific term to that effect. Such a term is implied under section 108(q), and need not be express.[1470] However, the lessor cannot put terms and conditions for taking the possession when it is delivered, and should accept it.[1471]

1459. *Edmound Francis Heberlet v Fatima Khatoon,* AIR 2011 Cal 13.
1460. *Leena Roy Choudhary v Indumati Bose,* AIR 1980 Pat 120; *Dukari Saha v Kumarish Chandra Garai,* AIR 1990 Cal 143, p 146.
1461. *Edmound Francis Heberlet v Fatima* Khatoon, AIR 2011 Cal 13.
1462. *Dayanand Gupta v Govindlal Bangur,* AIR 2007 Cal 247 : (2007) 3 Cal LT 379.
1463. *Bharat Bhushan Deva v State of Bihar,* AIR 2008 Pat 29 : (2008) 2 JCR 237.
1464. *Ratnamala Dasi v Ratan Singh Bawa,* AIR 1990 Cal 26, p 30.
1465. *Santosh Kumar Mazumdar v Rekha Bose,* AIR 2001 Cal 202.
1466. *Edmound Francis Heberlet v Fatima Khatoon,* AIR 2011 Cal 13.
1467. *Kewal Chand Mimani v S K Sen,* (2001) 6 SCC 512, para 27.
1468. *Henderson v Squire,* (1869) LR 4 QB 170; *Marsden v Edward Heyes Ltd,* (1927) 2 KB 1 : [1926] All ER Rep 329; *Venkatesh Narayan v Krishnaji Arjun,* (1884) ILR 8 Bom 160; *S Abraham v Nathavan,* AIR 1952 Tr & Coch 359.
1469. *Vashu Deo v Balkishan,* (2002) 2 SCC 50.
1470. *Thagarammal v People's Charity Fund,* AIR 1978 Kant 125.
1471. *Raja Laxman Singh v State of Rajasthan,* AIR 1988 Raj 44, p 51.

Till the time the lessee restores the possession, the obligation incurred by him as lessee does not come to an end. If he continues in possession even after the determination of the lease, the landlord obviously has a right to eject him forthwith.[1472]

In the case of an agricultural tenancy, Farran CJ said that the tenant not giving vacant possession after giving notice of relinquishment did not create a tenancy by holding over, but gave rise to a claim for damages by the landlord.[1473] When a tenant leaves the premises without placing the landlord in the possession thereof, that may entitle the landlord to claim rent or profits from him. But if the landlord acquires it in the act of the tenant, he cannot claim the tenancy to be subsisting.[1474] If there are several lessors and partition has not been effected between them, it is sufficient that vacant possession should be given to one of them.

If the landlord acquiesces in the act of the tenant, although he had not restored the possession, it cannot be held that the tenancy is subsisting.[1475]

ILLUSTRATION

A and *B* lease a shop to *C*. *C* gave notice to *A* and *B* determining the tenancy. *C* than gave vacant possession to *A* alone. *A* alone gave a fresh lease of the shop to another tenant. *B* sued *C* for rent. Held that the tenancy was determined and that *C* was not liable for not giving vacant possession to *B*, as he had given vacant possession to one landlord.[1476]

The liability under this clause as under the other clauses is subject to contract to the contrary. Thus, when the lease provided that the lessee shall always and in any event be entitled to be paid the price of the superstructure built (by the lessee) on the said plot of land before he surrenders possession of the land either on the expiry of the lease hereby granted or any other future lease or at any time; the price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment, the Privy Council held that the lessee was entitled to hold over as tenant by virtue of the above clause at the rent reserved by the lease until he was paid the then prevailing market price.[1477]

The burden of proving a contract to the contrary within the meaning of section 108(q) is on the lessee and before the burden can be held to have been duly discharged, there must be something to indicate an agreement to the contrary on such a matter involving a valuable right.[1478]

Restoration by force

It has been held by the Calcutta High Court[1479] that under the general law between a lessor and his lessee, there is no rule or principle which makes it obligatory for the lessor to resort to court and obtain an order for possession before he can put out the lessee who has refused to quit the land even after his right to remain on it has terminated. He is perfectly entitled to throw out the lessee himself, if he can and resume possession of his own property. This judgment was followed by a Full Bench of Jammu & Kashmir High Court[1480] holding that a lessor while enforcing his right of forfeiture has every right to take possession of the premises without his having resort to the court to obtain an order for possession, provided

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1472. *Society for Health & Social Transformation, Rehabilitation v Kimtu Devi,* 2010 SCC OnLine HP 3779.
1473. *Baliaramgri v Vasudev,* (1898) ILR 22 Bom 348.
1474. *Meharmal v Deputy Commr of Bilaspur,* (1954) ILR Nag 414 : AIR 1954 Nag 305.
1475. Ibid.
1476. *Ram Gopal v Parmeshri,* (1924) 6 Lah LJ 197 : 78 IC 570 : AIR 1924 Lah 474.
1477. *Ethirajulu Naidu v Ranganathan Chetti* 72 IA 72.
1478. *Madan Lal v Bhai Anand Singh,* AIR 1973 SC 721 : (1973) 1 SCC 84.
1479. *State of West Bengal v Birendra Nath Basunia,* AIR 1955 Cal 601, p 604 (Government's right to resume land was established in court).
1480. *Bhagat Rajinder Kumar Sawhney v State of Jammu & Kashmir,* AIR 1960 J & K 50.

it is done peacefully and without actual resistance. The Punjab & Haryana High Court following these decisions has held[1481] that the lessor having enforced his right of forfeiture, has every right to take possession of the disputed premises. Possession so taken cannot be termed either illegal or unlawful, and the defaulting lessee whose lease already stood terminated on the breach of express covenants of the lease deed could not move the court for restoration of possession to him so that he could remain in possession for the unexpired lease period.

Damages

If the lessee fails to restore vacant possession, he is liable in damages for the breach of this obligation,[1482] and is also liable to a penalty at the rate of double the value of the premises. This premise has been taken as a guide in Punjab for the assessment of damages when the lessee contumaciously holds over.[1483] The proper measure of damages is the loss sustained by the landlord. This will be mesne profits and damages in tort for trespass.[1484] Damages will also include premium received from a sub-tenant,[1485] and the cost of evicting a sub-tenant.[1486] If the tenant does not vacate the premises on efflux of time and unauthorisedly remains in occupation thereafter, damages can be awarded at market rate for such unauthorised use and occupancy.[1487]

Joint lessee

If one of two joint lessee fails to restore vacant possession to the lessor, both will be liable;[1488] unless the other has not assented to the holding over.[1489]

With reference to section 108(g), it has been held by the Allahabad High Court that it is not open to proceed against all the joint tenants on the basis of a decree of eviction obtained only against some of them. The question of enforceability of the decree has to be kept apart from the question of the nature of the substantive rights of the parties. The fact that, in a case of joint promisors and joint promisees, the right and obligation are joint, has no bearing on the enforceability of the decree in such cases.[1490] Where the husband and wife were statutory co-tenants, it was held that even after the husband obtained a decree of divorce against her, the wife continued to be a co-tenant.[1491]

Boundaries

It is the duty of the lessee to preserve the boundaries of the land intact and to leave them distinct at the end of the term,[1492] particularly if his own land is adjoining. If there is a confusion of boundaries, the lessor is entitled to have them ascertained at the end of the

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1481. *Saraswati Gir v Dhanpal Singh*, AIR 1992 P & H 13, p 15.
1482. *Wright v Smith*, (1805) 5 Esp 203.
1483. *Narain Dass v Dharam Das*, (1932) ILR 13 Lah 216 : 138 IC 290 : AIR 1932 Lah 275; *Sunder Singh v Ram Saran Das*, (1932) ILR 14 Lah 137 : 142 IC 754 : AIR 1933 Lah 61.
1484. *Sundermull v Ladhuram*, (1923) ILR 50 Cal 667 : 83 IC 757 : AIR 1924 Cal 240.
1485. *Gulam Mohiuddin v Dayabhai*, (1923) 25 Bom LR 447 : 73 IC 442 : AIR 1923 Bom 398; *Obedul Rahman v Darbari* 146 IC 845 : AIR 1933 Lah 509.
1486. *Henderson v Squire*, (1869) LJ 4 QB 170; *Baliaramgri v Vasudev*, (1898) ILR 22 Bom 348; but see *Sita Ram v Mohmmnad Mehdi*, AIR 1959 Pat 139.
1487. *PS Bedi v Project Equipment Corp of India*, AIR 1994 Del 25.
1488. *Christy v Tancred*, (1840) 7 M & W 127; *Marthandammal v Azimunnissa Begum*, AIR 1954 Mad 92 : (1952) 2 Mad LJ 883.
1489. *Draper v Crofts*, (1846) 15 M & W 166.
1490. *Mohd Mustafa v Mansoor*, AIR 1977 All 239.
1491. *Bai Amina v Abdulrehman Gulam Mohamed Mansrui*, AIR 1992 Guj 67.
1492. *Dugappa v Tirthansami*, (1883) ILR 6 Mad 263; *Khemamoyee v Shushee Bhoosun*, (1868) 9 WR 94; *Brojonauth v Gilmore*, (1865) 2 WR 48; *AG v Fullerton*, (1813) 2 Ve & B 263.

term.[1493] If the boundary cannot be ascertained, the lessee will be compelled to make up land of equal value.[1494] A lessee is bound to keep identity of the leased property in the same condition as it was when it was put in his possession and to put the lessor in possession of the said property, on determination of the lease. If the lessee, by his own act, default or negligence has interfered with the boundaries or mixed up the leased property with his own land, he cannot dispute identity of the leased property and take advantage of his own act, default or negligence.[1495]

Rent control legislation

It should be pointed out, that in many states, rent control legislation, generally applicable to urban areas, are at present in force and regulate a number of important matters concerning the relationship of tenancy, particularly the grounds on which the tenant can be evicted, the cutting off of amenities by the landlord, the circumstances in which rent may not be increased and the forum in which proceedings for determination of the rent or eviction of the lessee may be taken. The net effect of these provisions of such legislation is to modify a number of important rights otherwise available to the lessor under the TP Act. In particular, the general position that on the expiry of a contractual lease, the lessee is bound to vacate the premises has been largely restricted by such legislation in regard to tenancies that can be terminated by a notice to quit. Notwithstanding the giving of such a notice, the tenant is, by virtue of the protection given by such legislation, entitled to continue in occupation of the premises, unless the landlord can establish before the appropriate forum the existence of facts that warrant eviction under those special enactments. A tenant so continuing in occupation by virtue of the statutory protection has come to be known as a "statutory tenant", although that expression does not usually occur in the legislation on the subject. The treatment in this commentary of landlord-tenant relationship should be read as subject to legislation of the nature referred to above, wherever applicable. It is needless to state that in other respects, the provisions of the TP Act still continue to govern such relationships. Those provisions also apply to premises situated in areas to which special enactments of the nature referred to above do not extend.

In *Kailash Paliwal v Subhash Chandra Agrawal*,[1496] the Supreme Court held that where relationship of landlord and tenant had not been established by the plaintiff, the only option left for the plaintiff was to sue for possession based on title of the property.

109. Rights of lessor's transferee.—If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor shall not be liable to pay such rent over again to the transferee.

1493. *Spike v Hording*, (1878) 7 Ch D 871.
1494. *Mahomed v Brougrton*, (1900) 5 Cal WN 846; *Aston v Exeter, (Lord)* (1801) 6 Ves 288.
1495. *Poddar Plantations v Thekkemariveettil Madhavi Amma*, ILR 2014 (1) Ker 813 : 2013 (4) KLJ 781 : 2014 (1) KLT 439.
1496. *Kailash Paliwal v Subhash Chandra Agrawal*, AIR 2013 SC 2923 : (2013) 9 SCC 372 : 2013 (2) WLN 55 : 2013 (4) AJR 145 : 2013 (3) AKR 524.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Synopsis

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(1) Transfer of Lease Property

Section 109 enacts the law laid down in *Wordsley Brewery Co v Halford*[1497] that on the lessor assigning the reversion wholly or in part, the assignee shall possess all his rights, and be also subject to all the liaiblities of the lessor provided the lessee agrees thereto. By a mere assignment, the lessor is not discharged from liabilities unless the lessee agrees to exonerate him, and hold the assignee as the person liable. The transfer may be of the whole property or a part of it, or it may be part of the lessor's interest therein. The grant of a lease passes the reversion so that where a person has let his lands for 30 years, and he lets to another for 40 years, this passess the reversionary interest.

English Law

On an assignment of the reversion, the assignee succeeds to the rights and liabilities of the lessor in respect of covenants which run with the land. The assignee takes the benefits of the lessor's covenants, eg to pay rent,[1498] or to repair,[1499] and the burden of the lessor's covenants, eg for quiet enjoyment.[1500]

The assignor cannot, after the assignment, maintain an action for the breach of any covenant by the lessee.[1501] The lessee was held to be the assignee for rent even though he had, after the assignment, made an invalid surrender of the lease to the original lessor.[1502] The words "as to the property" in this section no doubt refer to covenants running with the land.[1503] The assignee of the reversion, accordingly, is not liable in respect of the lessor's covenants which do not run with the land. Thus, a covenant by the lessor to pay a sum to the lessee on the expiration or some determination of the lease, does not touch and concern the demised property, and so does not bind the assignee of the reversion, even if the lease also provides that, should the lessor be unwilling to pay the sum, the lessee may hold over the demand a new lease on the same terms including the term as to payment.[1504] On the other hand, where in a lease there was a covenant by the lessee that a particular individual should

1497. *Wordsley Brewery Co v Halford*, (1903) 90 LT 89.
1498. *Stevenson v Lombard*, (1802) 2 East 575.
1499. *Narayan Das v Parasram*, (1891) 4 CPLR 61.
1500. *Iswara v Ramappa*, 152 IC 201 : AIR 1934 Mad 658; *Campbell v Lawis*, (1890) 3 B & AJd 392.
1501. Re *King*, (1963) Ch 459 : [1963] 1 All ER 789 (CA).
1502. *Ramachandra v Sheikh Hussain*, (1901) 3 Bom LR 679.
1503. See instances cited under note "Covenants running with the land" under section 108(j).
1504. Re *Hunters Lease Giles v Hutchings*, (1942) 1 Ch 124 : [1942] 1 All ER 27.

not be concerned in the conduct of the business to be carried on the demised premises, it has been held that the covenant was one running with the land as touching and concerning the thing demised, and could be enforced by the assignee of the reversion against the assignee of the lessee by terminating the lease on the ground of forfeiture for breach of the covenant.[1505]

Indian Law

The lessor's right to resume possession and terminate the lease would both co-exist.[1506] Since, the transfer of lessor's reversion/renthold absolutely to a third person does not terminate the lease and after the transfer of lessor's right in favour of the transferee, the latter gets all rights and liabilities of the lessor in respect of subsisting tenancy.[1507]

This, is a statutory attornment and no other permission is necessary in law.[1508] The section does not insist that transfer will take effect only when the tenant acknowleges/attorns the new owner.[1509] Attornment by the tenant is unnecessary to confer validity to the transfer of the lessor's rights.[1510] Nevertheless, the section protects payment of rent by the tenant to the transferor without notice of the transfer. It is well settled that a transferee of the landlord's rights steps into the shoes of the landlord with all the rights and liabilities of the transferor landlord in respect of the subsisting tenancy. An assignment of the reversion is an assignment of the lessor's interest. The case of an assignment of the term, ie, the lessee's interest, has been dealt with under section 108(j). An assignment of the reversion may be as the section indicates—(1) an assignment of the whole reversion or an absolute assignment; or (2) an assignment of the reversion in part of the property; or (3) an assignment of part of the reversion in the property. In the first case, there is no severance of the reversion. In the second and third cases, there is a severance of the reversion. The arrears do not pass the new properties along with the *patta*.[1511]

This section applies to a partition among the lessors: but that even if it does not, the section would be applied as embodying a rule of justice and equity,[1512] but has no application where the transfer is effected after the lessor has ceased to have an interest in the property.[1513] The section only governs a case where the lessor transfers his existing interest. In such a case a new lease does not come into existence, and an eviction order obtained by the transferor may be executed by the assignee of the reversion.[1514]

The general law under section 109 is that the assignee of the lessor has against the lessee all the rights that the lessor had, and can enforce not only covenants, but also conditions.[1515] However, the liability of the lessor continues after the assignment, and the lessee is given the option of holding either the lessor, or the assignee liable. A lessee paid off a mortgage for which his lessor was liable and then sued to recover the amount from the assignee of the lessor in enforcement of the liability under section 108(g). Having exercised his election against the assignee, he could not also make the lessor liable.[1516] This has been said to be an illustration of the equitable principle that a man cannot assign obligations, ie, cannot substitute someone else

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1505. *Lewin v American and Colonial Distributors Ltd*, (1945) 1 Ch 225 : [1945] 2 All ER 271.
1506. *Tata Steel v State of Jharkhand*, AIR 2013 Jhar 24 : LNIND 2012 JHAR 41 : 2013 (1) J.L.J.R. 188 : 2013 (1) JCR JHA 714.
1507. *Shaha Ratansi Khimji & Sons v Kumbhar Sons Hotel Pvt Ltd*, (2014) 14 SCC 1.
1508. *Rajan v Rakesh Kumar*,(2010) 1 RCR (Rent) 386 (DB).
1509. *Basavaraj v Puttaraju*, (2010) 3 Kant LJ 619 : (2011) 1 AIR Kant R 223.
1510. *Ambica Prasad v Md Alam*, 2015 SCC OnLine SC 308 : AIR 2015 SC 2459.
1511. *Shrikrishnadas v Gangla*, AIR 1951 Mys 292.
1512. *Banarsilal v Bhagwan*, AIR 1955 Raj 167; *Sattar Singh v Rawela*, AIR 1952 J & K 18.
1513. *Ram Bhagwandas v Bombay Municipal Corpn*, AIR 1956 Bom 364.
1514. *Manavar Basha v Narayanan*, (1961) 2 Mad LJ 176 : AIR 1961 Mad 200.
1515. See note "Rights of the Assignee".
1516. *Iswara v Ramappa*, 153 IC 201, p 658.

as the performer of his duties, without the consent or the authority of those to whom the duty is owing.[1517] The lessor remains under a contractual liability under his express covenants.[1518]

In *Ambica Prasad v Alam*,[1519] *A* transferred his property to *B*, but entered into a tenancy agreement with *T*, subsequent to the transfer *A*. *T* was never informed about the exchange deed and even after the execution of the exchange deed, *A* continued collecting rent from the tenants. Thereafter, *B* filed for eviction of the tenant on the grounds of non-payment of rent and need for bonafide use. The issue was whether attornment by the tenant in case of transfer of tenanted land is requisite under section 109 of the Transfer of Property Act, 1882? The Apex court held that attornment by the tenant is not necessary to confer validity of the transfer of the landlord's rights. Since attornment by the tenant is not required, a notice under section 106 in terms of the old terms of lease by the transferor landlord would be proper and so also the suit for ejectment.

When there is no written agreement between the parties then section 109 of the Transfer of Property Act, 1882 is not attracted.[1520]

(2) So Long as He is the Owner of it

These words indicate that the liability of the assignee lasts only so long as his estate lasts. He can get rid of his liability for that period by a re-assignment. This is because his liability depends upon privity of estate. This is also the case with the liability of the lessee's assignee to the lessor. Note "Liability of assignee to lessor" under section 108(j) may be referred.

(3) Rights of the Transferee

The right of lessee springs only from letter of allotment and lease agreement and he is obliged to comply with and adhere to conditions of letter of allottment and lease agreement, and cannot compel the lessor to allow it to use the land for some other purpose than specified in such letter of allotment and lease agreement.[1521] The doctrine of estoppel applies in the case there the tenants try to assail the title of the property in different capacities.[1522] In case the landlord sells the premises but repurchases the same after a short time period, the transfer of these premises for short period would not disentitle him to file a suit for eviction as against the tenant for non payment of rent as his status to that of the landlord was restored.[1523]

The assignee of the lessor has against the lessee all the rights that the lessor had, and can enforce not only covenants, but also conditions.[1524] The TP Act does not distinguish conditions from covenants. He can recover rent due subsequent to the assignment, and he can give notice to quit under section 106,[1525] or maintain a suit for eviction.[1526] In view of

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1517. *Cherukomen v Ismala*, (1872) 6 Mad HC 145.
1518. *Stuart v Joy*, (1904) 1 KB 362.
1519. *Ambica Prasad v Alam*, AIR 2015 SC 2459 : LNIND 2015 SC 243 : 2015 (7) SCJ 123 : 2015 (4) SCALE 605.
1520. *Mumtaz v Puttaraju*, (2010) 6 Kant LJ 95 : (2011) 2 ICC 71; *Mannappa Gowda v Puttaraju*, (2010) 5 Kant LJ 132 : (2011) 1 ICC 341.
1521. *Shakti Commercial Premises Society Ltd v State of Maharashtra*, AIR 2012 (NOC) 379 (Bom); *P Rajamani Gurukal v Rama*, AIR 2010 Mad 197 : LNIND 2010 MAD 1246 : 2010 (2) CTC 660 : 2010 (4) MLJ 47.
1522. *Sri Gangai Vinaynagar Temple v Meenakshi Ammal*, (2015) 3 SCC 624 : LNIND 2014 SC 892 : 2014 (11) SCALE 654 : 2015 (5) SCJ 558.
1523. *P Abdul Kareem Thangal v Ummer Haji*, AIR 2013 (NOC) 261 (Ker).
1524. *Kannyan Baduvan v Alikutti*, (1919) ILR 42 Mad 603 : 51 IC 286.
1525. *Manickam Pillai v Ratnasami Nadar*, (1917) 33 Mad LJ 684 : 43 IC 210; *Parbhu Ram v Tek Chand*, (1919) ILR 1 Lah 241 : 53 IC 865.

section 109, the assignee of the lessor has, as against the lessee, all the rights that the lessor had, including the right to receive the rent in terms of lease and the lessee cannot say that he is not bound to pay the same to the assignee merely because there is no privity of contract. Attornment is not required.[1527] After the transfer of lessor's right in favour of the transferee, all the rights and liabilities of the lessor in respect of the subsisting tenancy devolve upon him. A fresh attornment by the lessee to the landlord's assignee is not necessary.[1528] The Supreme Court has observed that where in a deed by which right, title and interest in the property in dispute was released in favour of one of the co-owners, and no where was any assignment of rent made, the assignee was not entitled to rent before assignment, and the amount due prior to the deed could not constitute arrears of rent as it was merely an actionable claim. Consequently, notice demanding rent certain before relinquishment deed by the co-owner was not valid.[1529]

When a lessor of a leased property creates an usufructuary mortgage in respect of such property, what he transfers under section 109 of the TP Act as a mortgagor in favour of the usufructuary mortgagee includes his right to possession of such property, and the right to receive the rents and profits accruing from it. From this it follows that the tenanted premises, if mortgaged by the landlord by way of usufructuary mortgage, the usufructuary mortgagee thereunder would become entitled to receive the rents and profits accruing therefrom in his own right and on his own account. A mortgagee in possession would be entitled, as much as the owner himself, to seek recovery of possession of the leased premises from a tenant for his own bonafide requirements of use in absence of any negation of such rights under the rent Act.[1530] The assignee's rights, like his liabilities, commence with the assignment. The section expressly enacts that he cannot sue for arrears of rent before his assignment, and he cannot sue on breaches of covenant committed before the assignment.[1531] It was accordingly held that he could not determine a lease by forfeiture for a breach of condition before the assignment.[1532] In a Bombay case, the assignee of a lessor was allowed to forfeit a lease for a breach committed three years before the assignment.[1533] This seems altogether indefensible.

The applicability of writ jurisdiction to civil and private disputes of landlord-tenant relationship is limited to quashing the plaint or suit proceedings or to interfere with the injunction order passed by the trial court. The tenancy claims with allegations of harassment are not entertainable under Articles 226 and 227.[1534]

(4) Transfer of Any Part of Leasehold Property Leased or Interest Therein (Splitting of tenancy)

It is trite proposition that a landlo[illegible]nnot split the unity and integrity of the tenancy, and recover possession of a part of the demised premises from the tenant. However, section 109 provides a statutory exception to this rule and enables an assignee of a part of the

1526. *Mujawar v Fazlur Rehman,* AIR 2008 Kant 32 : (2008) 2 Kar LJ 365; *Rajamani Gurukal v Raajagopalan,* AIR 2010 Mad 197 : (2011) 2 RCR (Civil) 52.
1527. *Brij Bihari Prasad v Deoki Devi,* AIR 1978 Pat 117; *Hajee K Assainar Co v Chacko Joseph,* AIR 1984 Ker 113, p 115. For meaning of the word "attornment", see *Mohd Ilyas v Mohd Adil,* AIR 1994 Del 212.
1528. *Kalawati Tripathi v Damayanti Devi,* AIR 1993 Pat 1, p 9.
1529. *N M Engineer v Narendra Singh Virdi,* AIR 1995 SC 448.
1530. *Narpatchand A Bhandari v Shantilal Moolshankar Jani,* AIR 1993 SC 1712, p 1716; *S B Abdul Azeez v M Maniyappa Setty,* AIR 1989 SC 553 : (1988) 4 SCC 727.
1531. *Martyn v Williams,* (1867) 1 H & N; *Johnson v St Peters-Hereford Churchwardens,* (1836) 4 Ad & El 520.
1532. *Fenn d Matthew's and Lewis v Smart,* (1810) 12 East 444; *Cohen v Tannar,* (1900) 2 QB 609; *Kristo Nath v Brown,* (1887) ILR 14 Cal 176.
1533. *Vishveshwar v Mahableshwar,* (1919) ILR 4 Bom 28 : 47 IC 198.
1534. *Jacky v Tiny,* (2014) 6 SCC 508 : LNIND 2014 SC 491 : AIR 2014 SC 1615 : 2014 (4) SCALE 597.

reversion to exercise all the rights of the landlord in respect of the portion respecting which the reversion is so assigned subject, of court, to the other covenant running with the land. This is the true effect of the words "shall possess all the rights ... of the lessor as to the property or part transferred ..." occuring section 109. There is no need for a consensual attornment. The attornment is brought about by operation of law. The limitation on the right of the landlord against splitting up of the integrity of the tenancy, inhering in the inhibitions of his own contract, does not visit the assignee of the part of reversion. There is no need for the consent of the tenant for the severance of the reversion, and the assignment of the part so severed.[1535]

ILLUSTRATION

A leases a house and stable to *B* who covenants to keep the premises in good repair. During the term. *A* sells the stable to *C*. *C* can enforce the covenant to repair as regards the stable.

At the expiry of the term, the lessor's assignee can sue to evict the lessee from that part.[1536]

A co-sharer cannot initiate action for eviction of the tenant from the portion of the tenanted accommodation, nor can he sue for his part of the rent. The tenancy cannot be split up either in estate, or in rent or any other obligation by a unilateral act of one of the co-owners. If, however, all the co-owners or the co-lessors agree among themselves and split by partition the demised property by metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion, and can deal with that portion as also the tenant thereof as individual owner/lessor. The right of the joint lessor contemplated by section 109 comes to be possessed by each of them separately and individually.[1537] A usufructuary mortgagee is an assignee of part of the reversion, but as the right of enjoyment and the right of possession have been transferred to him, he can sue to recover all the rents. He can also give notice to quit determining a periodical lease.[1538] After the transfer of the reversion by usufructuary mortgage, the lessor-mortgagor cannot accept a surrender of the lease.[1539] A lessee for a term is assignee of part of the reversion, and can give notice to quit to a monthly tenant of the original lessor.[1540] According to the Madhya Pradesh High Court, a transferee of a part of the leased property acquires all the rights of the lessor in respect of that part as if that part alone had comprised the lease, and a new relationship is created between the transferee and the lessee.[1541] Section 109 creates a statutory attornment, that the title of the assignee is complete on execution of the deed of assignment, and is not postponed till the notice of assignment is given. It cannot be contended that since the lessor had no right to terminate a tenancy by notice to quit in respect of a part of the demised premises, the transferee could not, therefore, have such a right. The transferee is entitled to evict the tenant from that part which is transferred to him, not only when the lease has been determined before the transfer, but also where it had been determined after the transfer.[1542]

1535. *Mohar Singh v Devi Charan,* AIR 1988 SC 1365; *Kannyan v Alikutty,* AIR 1920 Mad 838, p 840; *Sumant Chandra Mishra v Anjali Ghatak,* AIR 1993 Cal 275, p 278
1536. *Kannyan Baduvan v Alikutti,* (1919) ILR 42 Mad 603 : 51 IC 286; *Devsay George v Lekshmi Amma,* AIR 1956 Tr & Coch 265.
1537. *Sk Sattar Sk Mohd Choudhari v Goundappa Amabadas Bukate,* AIR 1997 SC 998.
1538. *Barjorji v Shripatprasadji,* (1927) 29 Bom LR 215 : 100 IC 1033 : AIR 1927 Bom 145.
1539. *Havu v Ganapati,* (1930) 32 Bom LR 679 : 125 IC 689 : AIR 1930 Bom 329.
1540. *Manickam Pillai v Ramasami Nadar,* (1917) 33 Mad LJ 684 : 43 IC 210; *Prabhu Ram v Tek Chand,* (1919) ILR I Lah 241 : 53 IC 865.
1541. *Swaroop Devi v Murti Bhagwan Satya Narain Temple of Satya Narainji,* AIR 2008 (NOC) 491 (Raj); *Achal Mishra v Rama Shanker Singh,* (2005) 5 SCC 531 : (2005) 4 SCALE 32.
1542. *B P Pathak v Dr Riyazuddin,* AIR 1976 MP 55.

Section 109 enables the transferee to exercise all rights of the lessor, including the right to terminate a lease by giving notice to quit. When a part of the property leased is transferred, the transferee of the part can terminate the lease of that part by notice. The provision for the apportionment of rent, irrespective of the consent of the lessee is an indication that section 109 intends to affect a severance of the lease.[1543] Where out of the tenanted premises, only the residential room was sold and the bathroom and latrine was retained by the landlord, it was held that under section 109 of the TP Act, the original tenancy had been split on account of the transfer, so that the purchaser became the landlord on receipt of the residential room, while the vendor continued to be a landlord in respect of the portion retained by him.[1544] It is open to the transferor and the transferee to agree that notwithstanding the transfer, the rights to terminate the lease and to enforce the right of reversion, shall continue to vest in the lessor.[1545] In an Allahabad case, the lessor transferred the premises to two brothers jointly. One of them died, leaving a son. It was held that the surviving brother being a joint transferee was alone to be treated as the lessor, and the son could not be regarded as a transferee of the former lessor.[1546]

Partition

The Supreme Court in *Mohar Singh v Devi Charan*[1547] left the law undisturbed to the effect that section 109 is applicable in case of partition even though it is not a "transfer" within section 5 of the TP Act. It was held that a partition is not actually a transfer of property, but would only signify the surrender of a portion of a right in exchange for a similar right from the other co-sharer or c-sharers. It also observed that though a few High Courts[1548] have taken the view that section 109 is attracted to the case of partition, several other High Courts have been content to rest the conclusion on the general principle underlying section 109 as a rule of justice, equity and good conscience. If two joint lessors affect partition, one of them can enforce a forfeiture for non-payment of the rent of his moiety.[1549]

(5) Proviso—Rents

The substantive part of section 109 read with proviso necessarily indicates that the arrears of rent due is one of lessor's right as to the property transferred. Right to recover the arrears of rent vested with the original owner, and on transfer of all his rights the same vests in the transferee as per the provisions of section 109. Proviso to section 109 clearly indicates that if there is an assignment of rent due, then the transferee/landlord would be entitled to recover the same from the tenant as arrears of rent. The correct position of law is that a transferee is not entitled to recover the arrears of rent for the property on transfer, unless the right to recover the arrears is also transferred. If right to recover the arrears is assigned, then the transferee/landlord can recover those arrears as well.[1550]

1543. *Sardarila v Narayanlal,* AIR 1980 MP 8; *Hafiz Mohammad v Masoodbi,* AIR 1991 MP 23, p 25.
1544. *Krishna Gopal v Laxminarayan,* AIR 1990 MP 37, p 40.
1545. *Hafiz Mohammad v Masoodbi,* AIR 1991 MP 23, p 25.
1546. *Mahboob Ullah v Jwala Prasad Kajriwal,* AIR 1974 All 413.
1547. *Mohar Singh v Devi Charan,* (1988) 3 SCC 63 : AIR 1988 SC 1365.
1548. *Ram Chandra Singh v Ram saran,* AIR 1978 All 173; *Banarasilal v Bhagwan,* AIR 1955 Raj 167, p 171; *Sattar Singh v Rawela,* AIR 1952 J&K 18.
1549. *Korapalu v Narayana,* (1914) ILR 38 Mad 445 : 20 IC 930; *Badri Prasad v Shyam Lal,* AIR 1963 Pat 85; see also *Ram Chandra v Ram Saran,* AIR 1978 All 173, p 175.
1550. *Sheikh Noor v Sheikh GS Ibrahim,* AIR 2003 SC 4163, paras 12, 18 : (2003) 7 SCC 321; *Giridharilal v Hukum Singh,* AIR 1977 SC 129; *Ram Prakash Ghai v Karam Chand,* AIR 1963 All 47; *Champak Lal Dahyabhai Natali v Saraswatiben,* AIR 1977 Guj 48; *Pratap Muktassa Tak v Vishnu Gopal Pathak,* 1997 Bom RC 416; *Masuryadin v Special Judge,* AIR 2000 All 162.

In the case of *Satti Krishna Reddy v Nallamilli Venkata Reddy*[1551] the Supreme Court held that the arrears of rent assigned to the transferee landlord do not lose their character and become an actionable claim, and eviction proceedings can be maintained by the successor landlord on the ground of arrears of rent. In absence of any assignment in favour of the transferee, he is not entitled to rent before the assignment. Such rent is not part of the reversion, but is a mere debt.[1552]

The right to recover such a debt is not transferred by the section, but it does not prohibit such an assignment.[1553] There is no obligation on the assignee to give notice of the assignment to the lessee, but it is desirable to do so, for if in the absence of notice the lessee pays rent to the lessor, he will not be liable to pay it again to the assignee.[1554] In a Gauhati case, rent was paid by the tenant to the former landlord before the landlord had transferred his rights in the land. It was held that in view of section 109, the tenant was not liable to pay the rent over again to the transferee landlord.[1555] During the pendency of a suit for eviction of the tenant, the landlord transferred the suit property to another person (the transferee), by a registered sale deed, and the trial court allowed the transferee landlord to prosecute the suit on the ground of default committed by the tenant in paying rent for the period long before the date of transfer. It was held that although the transferee acquires all the rights of his transferor, in view of section 109, proviso, the transferee, ipso facto, is not entitled to the arrears of rent accrued before the transfer. Section 8 of the TP Act provides that on transfer, the transferee is entitled to the rents and profits thereof accruing after the transfer.[1556]

(6) Contract to the Contrary

It is open to the transferor-lessor and his transferee to agree to terms which may be inconsistent with the provisions of section 109. And even after transfer of the entire ownership of the property leased, it is open to the transferor and transferee to agree that notwithstanding the transfer, the right to terminate the lease and to enforce the right of reversion shall continue to vest in the lessor. Such a term shall be inconsistent with the provisions of section 109 and, therefore, the expression "in the absence of a contract to the contrary" appearing in that section enables a transferor and the transferee of a property leased to agree to such a term.[1557] In such an event, it shall be permissible for the lessor despite such transfer of the property leased, to enforce the right of reversion by filing a suit against the tenant.[1558]

(7) Attornment

To "attorn" means to acknolwedge the relation of a tenant to a new landlord. Attornment means acceptance of the new owner of the property as the landlord, thereby estopping the tenant to dispute the new landlord's title at a later stage. Attornment is not necessary under the TP Act.[1559] A fresh attornment by the lessee to the lessor's assignee, is not necessary under TP Act.[1560] In practice, however, attornment is generally insisted upon, as it is useful as an

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1551. *Satti Krishna Reddy v Nallamilli Venkata Reddy,* (1982) 3 SCC 364.
1552. *N M Engineers v Narendra Singh Virdi,* AIR 1995 SC 448.
1553. *Ram Prakash v Karam Chand,* (1962) All LJ 828 : AIR 1963 All 47.
1554. *Bhola Nath v Supper,* 72 IC 86 : AIR 1923 Lah 389. Also see Transfer of Property Act, 1882, section 50.
1555. *Provati Devi v Bokur Chandra Nath,* AIR 1981 Gauhati 52.
1556. *Ram Tahal Modi v Ratan Lal,* AIR 1989 Pat 13.
1557. *Newai Bank v Kalyani Rakshit,* AIR 2005 Cal 163 : (2004) ILR (1) Cal 503.
1558. *Hafiz Mohammad v Masoodbi,* AIR 1991 MP 23.
1559. See *Hajee K Assainar & Co v Chacko Joseph,* AIR 1984 Ker 113, p 115.
1560. *Daulat Ram v Haveli Shah,* AIR 1939 Lah 49 : 41 Punj LR 346 : 182 IC 533; *Manindra Chandra v Gita Sen,* (1969) 73 Cal WN 856. See also *Pasupati v Durjadhan,* (1942) ILR 2 Cal 546 : 46 Cal WN 893 : 204 IC 349 : AIR 1943 Cal 160 (a decision under O 39, rule 9 of the Code of Civil Procedure).

acknowledgement of the tenancy. The Supreme Court has held that there is no need for a consensual attornment. The attornment is brought about by operation of law. The limitation on the right of the landlord against splitting up of the integrity of the tenancy, inhering in the inhibitions of his own contract, does not visit the assignee of the part of the reversion. There is no need for the consent of the tenant for the severance of the reversion, and the assignment of the part so severed.[1561] It has, however, been held that attornment would be desirable as it means the acknowledgement of relation of a tenant to a new landlord. It also implies continuity of tenancy.[1562] Under the Indian law, a letter of attornment is not necessary to complete the title of the assignee of the reversion.[1563] An attornment by the tenant is not necessary to confer validity of transfer of landlord's rights where the tenant against whom the eviction proceedings commenced owing to non payment of rent received written intimation from managing officer-cum-custodian of evacuee property being sold to auction purchaser, more so as the tenant never paid rent to the auction purchaser and the auction purchaser acquired all rights and liability of the landlord in respect of subsisting tenancy by operation of law. Simultaneous pleas taken by tenant of being owner of suit premises and of adverse possession are mutually inconsistent. Where the Landlord gave due notice to the tenant terminating the tenancy, seeking vacant possession and arrears of rent and the tenant never specifically denied receipt of notice from the landlord and did send a reply, the suit filed would be within the limitation period of 12 years.[1564] An attornment by the tenant is also not necessary when the original landlord after the transfer of property admits the same and records the property in the name of the new owner and the existence of jural relationship of landlord and the tenant between the owner and the tenant would be established.[1565]

(8) Apportionment

Notice to the tenant is, by virtue of section 37 sufficient to convert the single obligation to pay rent to the lessor, into a multiple obligation to pay rent to the lessor, and the assignee of part. On receipt of notice, the lessee is bound to pay to each the proportionate part of the rent.[1566] The lessor, the assignee and the lessee may make the apportionment amicably, or failing an agreement, a suit may be filed for the purpose. Even if there was some apportionment of rent in between co-landlords, such apportionment does not have the effect of severing the tenancy.[1567]

(9) Statutory Transfers

Though section 109 contemplates transfer of lessor's right inter vivos, the spirit behind it is held to apply even when right, title and interest in immovable property stands transferred by operation of law, and the successor in interest would be entitled to the rights of the predecessor. Thus, terminating the tenancy issued by the predecessor Board under the state

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1561. *Mohar Singh v Devi Charan*, (1988) 3 SCC 63 : AIR 1988 SC 1365; See also *Kalawati Tripathi v Damayanti Devi*, AIR 1993 Pat 1, pp 8,9; *Gulamminya v Sakhavatkhan*, (2001) 2 Guj LR 1068; *Ram Saren Sharma v Kamala Acharya*, 2001 AIHC 2369 (Raj); *SM Sultan Rowthar v Kothandarama Naidu*, 2000 AIHC 3063 (Mad); *Ashok Kumar Thakur v Surinder Singh Grover*, 1997 AIHC 2838, p 2842 (HP).
1562. *Mahendra Raghunathdas Gupta v Vishvanath Bhikaji Mogul*, (1997) 5 SCC 329 : AIR 1997 SC 2437.
1563. *Pulin Behari Shaw v Lila Dey* ILR, (1958) ILR 2 Cal 427; *Kalawati Tripathi v Damayanti Devi*, AIR 1993 Pat 1, p 10; *Yelamati Veera Venkata Jaganadha Gupta v Vejju Venkateswara Rao*, AIR 2002 AP 369.
1564. *Shakuntala Guha v Jasmit Kaur Narula*, AIR 2017 (NOC) 910 (MP).
1565. *Yogesh Verma v Shiv Kumar Agarwal*, AIR 2018 (NOC) 278 (Sikkim).
1566. *Sri Raja Simhadri v Prattipatti Ramayya*, (1908) ILR 29 Mad 29
1567. See *Amar Prosad Gupta v Arun Kumar Shaw*, AIR 1979 Cal 367.

Act to the lessee under section 106 read with section 111(h) of the TP Act terminating the tenancy in terms of the covenants of the lease, would ensure to the benefit of the transferee successor-in-interest Board under the central Act.[1568]

110. Exclusion of the day on which term commences.—Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Duration of lease for a year.—Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Option to determine lease.—Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Synopsis

(1) Application of section 984
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(1) Application of Section

There is a difference of opinion on whether the section applies to oral leases, or is confined to written leases only. It has been held in some cases that it only applies to written leases.[1569] In another case, it was held that it was not confined to written leases, but could apply to an oral lease.[1570] In *Calcutta Landing and Shipping Co v Victor Oil Co,*[1571] it was said that the first paragraph of the section contemplated that a time or period should be limited by the lease and the period must be expressed to commence from a particular day, and that when these two conditions were fulfilled, the rule of interpretation laid down in the section would apply. It follows from this, that as a monthly tenancy does not limit the time within the meaning of the section, the section cannot apply to such tenancy and so it has been held.[1572] The Supreme Court in a case where month to month tenancy by holding over ended the 9th of every month, held that in view of section 110, in computing the period, the date of commencing, ie, 9th has to be excluded.[1573] However, the Andhra Pradesh High Court held

1568. *Vasant Kumar Radha Kishan Vora v Board of Trustees of the Port of Bombay,* (1991) 1 SCC 761, p 772 : AIR 1991 SC 14, p 19, overruling *Gurumurthappa v Chickmunisamappa,* AIR 1953 Mys 62.
1569. *Calcutta Landing and Shipping Co v Victor Oil Co,* AIR 1944 Cal 84 : 48 Cal WN 76; *Kedar Nath v Ramendra Nath,* (1946) 50 Cal WN 306 : 224 IC 466 : AIR 1946 Cal 460; *Dudmera v Hari Bhakta* AIR, 1970 Ass & N 115; *Nisaddar Ali v Kona Mia,* AIR 1970 Ass & N 116.
1570. *Kedar Nath v Ramendra Nath,* AIR 1946 Cal 460; *Chand Mahomed v Munaza,* (1950) ILR Nag 407.
1571. *Calcutta Landing and Shipping Co v Victor Oil Co,* AIR 1944 Cal 84 : 48 Cal WN 76.
1572. *Utility Articles Mfg Co v Raja Bahadur Motilal Mills,* (1943) ILR Bom 553 : AIR 1943 Bom 306; *Usharani v The Research Industries Ltd,* (1945) 50 Cal WN 461; *Chand Mahomed v Munazu Khan,* (1950) ILR Nag 407.
1573. *Dattonpat Gopalvarao Devakate v Vithalrao Maruthirao Janagaval,* (1975) 2 SCC 246 : AIR 1975 SC 1111.

that section 110 is not applicable to a tenancy from month to month by holding over, and it applies only to the periodical lease with a specific date of commencement of lease.[1574]

Where a lease for years expressed to commence from the first day of a particular year also expressly stipulates that the lease is to terminate with the end of the last year of the term, such term is "an express agreement to the contrary" within the meaning of the second paragraph.[1575] In such a case, the strict application of the first paragraph will make the lease self-contradictory, and, therefore, it has been suggested in the *Calcutta Landing and Shipping Co*'s case, that the first paragraph should be read as qualified by some such expression as "unless the context otherwise requires".

It has been held that the rules contained in this section are technical and will not be applied in Punjab, where the TP Act is not in force.[1576]

Even where a period is fixed for the lease, it can provide for its early termination by an express covenant which clearly entitles the lessor to determine the lease. The recitals in the preamble to the lease cannot control its express terms and covenants laid down in the operative part of the document.[1577]

(2) Computation of Time

The rule here enacted for the computation of time is the same as that in section 9(1) of the General Clauses Act, 1897. A lease "from the day of date" or a lease "from henceforth" means a lease from the day of execution.[1578] Thus, if no date of commencement is named, the lease begins from the date of execution,[1579] or from the first day of the month in which it was executed.[1580] The date on which notice is given cannot be excluded in computing the period of notice.[1581] In *Benoy Krishna Das v Salsiccioni*,[1582] the Privy Council held that a lease for four years from June 1921, expired on June 1925. The tenant held over on a monthly tenancy, each month of which expired on the 1st of each succeeding month, and this monthly tenancy was validly terminated by a notice to quit of February 1928, which treated the tenancy as expiring at midnight of March 1928. This decision has been followed in the under noted cases.[1583] But there may be an express contract to the contrary within the meaning of the second paragraph,[1584] and the section has no application where the lease provides as to when it will determine;[1585]

1574. *B Chitra Ramacharandas v National Remote Sensing Agency*, AIR 2001 AP 20, para 12 : (2000) 5 Andh LT 161; following *PSP Seshagirirao & Co v Kalabai Rathi*, AIR 1982 AP 186; *AV Prasad v G K Ramaiah*, (1995) 1 Andh LT 90.
1575. *Deb Da & Lala v Abdul Gani*, (1938) ILR 2 Cal 134 : 42 Cal WN 444.
1576. *Mul Raj v Prem Chand*, (1955) ILR Punj 1274 : 57 Punj LR 473 : AIR 1955 Punj 238.
1577. *Mufti Mohammad v Rashkey Jahan*, AIR 1977 All 135.
1578. *Llewellyn v Williams*, (1611) Cro Jac 258; *Underbill v Horwood*, (1804) 10 Ves 209.
1579. *Dina Nath Kundu v Janaki Nath*, (1928) ILR 55 Cal 435 : 110 IC 368 : AIR 1928 Cal 392; on app *Janaki Nath v Dina Nath*, (1931) 54 Cal LJ 412 : 133 IC 732 : AIR 1931 All PC 207; *Kailash Chandra v Bejoy Kama*, (1919) 3 Cal WN 190 : 50 IC 177; *Raja of Vizianagram v Maharaja of Jaipur*, AIR 1944 Mad 518; *Amar Singh v Hoshiar Singh*, AIR 1952 All 141; *Sunder Singh v Arjun Singh*, AIR 1947 Ajm 38.
1580. *P Krishnaiah Setty v AV Laxshmana Rao*, (1953) ILR Mys 7 : AIR 1952 Mys 139.
1581. *Kishan Chand v Sayeeda Khatoon*, AIR 1983 Pat 253.
1582. *Benoy Krishna Das v Salsiccioni*, 59 IA 414 : 37 Cal WN 1 : 56 Cal LJ 319 : 63 Mad LJ 685 : 35 Bom LR 6 : 1933 All LJ 423 : 141 IC 514 : AIR 1932 PC 270.
1583. *Susil Chunder Neogy v Birendrajit Shaw*, (1934) 38 Cal WN 782 : AIR 1934 Cal 837; *Charu Chandra v Bankim Chandra*, (1938) 42 Cal WN 1115; *Rahmat Ullah v Md Hussain*, (1940) All LJ 502 : 191 IC 223 : AIR 1940 All 444; *Gastho Behari v Orniyo Prasad*, AIR 1960 Cal 361; *Murlidhar Garodia v Purshottam Lal*, AIR 1961Cal 175.
1584. *Ganeshi Lal v Sm Snehalata Dassi*, AIR 1947 Cal 68.
1585. *Haralal Das v Pashupati Charan*, (1954) 58 Cal WN 696 : AIR 1955 Cal 226.

The joint effect of the first two paragraphs of section 110 is that while the day of commencement is to be excluded, its anniversary is to be included to make a complete year. However, para 2 makes this subject to an express agreement to the contrary. Both these paragraphs of section 110 are integrally related and the duration cannot be determined, unless the date of commencement is also taken into consideration.[1586]

(3) Option to Break

A lease "for three, six or nine years" is a lease of nine years terminable at the end of three, or six years.[1587] A lease may be for a term of years with option to "break" or determine the lease at the expiry of the earlier periods, eg a lease for 21 years terminable at the expiry of 7 or 14 years. If the option is given to each party, then either the lessor or the lessee may determine the lease.[1588] If the lease is "for the term of 21 years, determinable nevertheless, at the expiration of 7 or 14 years, if the said parties shall so think fit", it is determinable only by the consent of both the parties,[1589] although it may be the intention that either party should have the option of determining it.

But if the lease is silent as to who shall have the option, the section enacts that the lessee shall have the option. This follows the English case of *Dann v Spurrier*,[1590] and rests upon the principle that when words of grant are ambiguous, they are to be construed most strictly against the grantor.[1591] The exercise by the lessee of this power does not prejudice the lessor's remedy for previous breaches of covenant.[1592]

Condition of the option

Any condition expressed in the lease as to the exercise of the option must be strictly complied with. If the lessor has the option, in case he requires the premises for building purposes, he must show a bona fide intention and that he has entered into an agreement to build.[1593] If the lessee has the option and the terms of the option are that he shall have paid the rent and performed the covenants of the lease, this is a condition precedent.[1594]

111. Determination of lease.—A lease of immovable property determines—

(a) by efflux of the time limited thereby;

(b) where such time is limited conditionally on the happening of some event—by the happening of such event;

(c) where the interest of the lessor in the property terminates on, or his power to dispose off the same extends only to, the happening of any event—by the happening of such event;

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;

1586. *Nanda Rani v Brojo Mohan Kundu*, AIR 1986 Cal 279, p 282.
1587. *Goodright d Hall v Richardson*, (1789) 3 Term Rep 462.
1588. *Goodright d Nicholls v Mark*, (1815) 4 M & S 30; *Lucas v Ridcoul*, (1868) LR 3 HL 153.
1589. *Fowel v Tranter*, (1864) 3 H & C 458.
1590. *Dann v Spurrier*, (1802) 3 Bos & PNR 399, p 442.
1591. *Deo d Webb v Dixon*, (1807) 9 East 15.
1592. *Blore v Giulini*, (1903) 1 KB 856.
1593. *Russell v Coggins*, (1802) 8 Ves 34; *Southend-on-Sea Estates Co v Inland Revenue Commissioners*, AIR 1915 Cal 428.
1594. *Burch v Farrows Bank*, (1917) 1 Ch 606; *Kirklington Wood*, (1917) 11 KB 332 : [1916–17] All ER Rep 813; *Grey v Friar*, (1854) 4 HL Cas 565.

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

(f) by implied surrender;

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter [1595][***]; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; [1596][or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in [1597][any of these cases] the lessor or his transferee [1598][gives notice in writing to the lessee of] his intention to determine the lease;

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

ILLUSTRATION TO CLAUSE (f)

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

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1595. The words "or the lease shall become void" omitted by Act 20 of 1929, sec. 57.
1596. Ins. by Act 20 of 1929, sec. 57.
1597. Subs. by Act 20 of 1929, sec. 57, for "either case".
1598. Subs. by Act 20 of 1929, sec. 57, for "does some act showing".

(1) Amendment

Clause (g) has been amended by Act 20 of 1929.

(2) Determination of leases

Under the general law and in cases where the tenancy is governed only by the provisions of TP Act, once the tenancy comes to an end by determination of lease under section 111, the right of the tenant to continue in possession of the premises comes to an end, and for any period thereafter, for which he continues to occupy the premises, he becomes liable to pay damages for use and occupation at the rate of which the landlord could have let out the premises on being vacated by the tenant.[1599] A tenancy at will or a tenancy at sufferance is determined by demand for possession or, by entry by the landlord without notice or, by the tenant quitting. Other tenancies are determined in one or other of the eight ways indicated by this section. To these may be added determination under a power or option to break. The principles of this section have been applied to leases in Punjab,[1600] Haryana,[1601] and to agricultural leases.[1602]

Except by following the provisions of sections 106 and 111 of the Transfer of Property Act, 1882, tenancy cannot be determined. Both these provisions are to be read conjointly in order to come to the requirements of a valid notice.[1603] In suit for recovery of possession of property from tenant whose tenancy is not protected under Rent Control Act, landlord is required to establish existence of jural relationship of landlord and tenant between the parties, and termination of tenancy either by lapse of time or by service of notice.[1604] The courts have also expressed concerns about the tendency of the landlords to evict the tenants on one pretext or the other so that the former can rent out the premises at a higher rate of rent and have held that the provisions of the rent law must be construed harmoniously so as to balance the rights and obligations of the tenant and the landlord.[1605] Therefore, the Rent Act, severely restricting the grounds for enhancement of rent and for eviction of the tenant from the rented premises, regulates the relationship between the landlord and the tenant beyond the general law under the Transfer of Property Act, 1882.[1606]

Under the general law, and in cases where the tenancy is governed only by the provisions of Transfer of Property Act, 1882, once the tenancy comes to an end by determination of lease under section 111 of the Transfer of Property Act, the right of the tenant to continue in possession of the premises comes to an end and for any period thereafter, for which he continues to occupy the premises, he becomes liable to pay damages for use and occupation at the rate at which the landlord could have let out the premises on being vacated by the tenant.[1607] In *Coal India Limited v Apeejay House Private Ltd*,[1608] a tenant under a lease deed

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1599. *Atma Ram Properties (P) Ltd v Federal Motors (P) Ltd*, (2005) 1 SCC 705, para 11.
1600. *Chiragh Din v Mohammad Usman*, 70 IC 349 : AIR 1974 Lah 281; *Karam Chand v Amar Nath*, 145 IC 992 : AIR 1933 Lah 377.
1601. *Om Prakash Gupta v Ranbir B Goyal*, (2002) 2 SCC 256, para 8.
1602. *Krishna Shetti v Gilbert Pinto*, (1919) ILR 42 Mad 654 : 50 IC 899; *Gangamma v Bhommakka*, (1910) ILR 33 Mad 253 : 5 IC 437; *Vasudevan v Valia*, (1901) ILR 24 Mad 47. But see *Sureshwari Datt v Panna*, AIR 1963 HP 34.
1603. *State of Rajasthan v Bal Kishan Mathur*, 2013(9) CPSC 44 (SC); *Babu Tandon Lal v Addl District Judge*, 2010 SCC OnLine All 1675 : (2010) 82 ALR 719 : (2010) 6 All LJ 587
1604. *Payal Vision Ltd v Radhika Choudhary*, (2012) 11 SCC 405 : LNIND 2012 SC 560 : 2012 (9) SCALE 105 : JT 2012 (9) SC 214.
1605. *Dina Nath v Subhash Chandra Saini*, (2014) 11 SCC 20 : 2014 (5) SCALE 147 : 2014 (107) ALR 145 : JT 2014 (5) SC 326.
1606. *Manhar Auto Stores v Kalpesh Hemantbhai Shah*, (2010) 3 Mah LJ 331 : (2010) 6 Bom CR 309
1607. *Babu Tandon Lal v Addl District Judge*, 2010 SCC OnLine All 1675: (2010) 82 ALR 719 : (2010) 6 All LJ 587.

had enjoyed the protection under old tenancy laws (The West Bengal Premises Tenancy Act, 1956, that stood repealed by the new tenancy law that came in force in 1997). As lease was for a period of ten years being less than 20 years, with the repeal of old laws, the protection of enjoyment was granted to him for two years and on the expiry of such two years, it was held that no more protection would be available. Once a suit is also for enforcement of a legal right under the law of land and the enforcement of such right does not arise out of any express terms of the contract then it stands completely outside the sweep of section 69(2) of the Partnership Act and is not barred by the same.[1609]

The Supreme Court of India has considered the application of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in cases of lease and declared that "until lease of an immoveable property gets determined, lessee has right to enjoy the property and this right to property cannot be taken away without the authority of law. There is no provision in section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when secured creditor takes steps mentioned in section 13.[1610]

For maintaining a suit for declaration that termination of lease was invalid, the lessee need not show that he was dispossessed from leased property. Dispossession is different from termination of lease.[1611]

A right to evict the tenant upon expiry of the lease is not a right "arising from a contract" but is a common law right or a statutory right under the Transfer of Property Act, 1882.[1612] and can be exercised by the owner/lessor. If the property is owned by several owners, the suit for eviction can be filed by one co-owner.[1613] If the execution of the lease deed was as per the decision by the competent authority, the lease can be terminated by the same authority who executed the lease deed, after a decision has been made in that regard by such competent authority.[1614]

(3) Emergency legislation

The effect of this section as of sections 106 and 108, clause (q) has been practically superseded by special legislation in some places to give greater protection to tenants against eviction. Note "Emergency Legislation" under section 108, clause (q) may be referred.

(4) Summary Eviction in case of appointment of a Court Receiver

Order 40, rule 1(2) of the Code of Civil Procedure provides that nothing in O 40 rule 1 shall authorise the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. The Supreme Court has held that a receiver appointed by the Court will be bound by the incidences of tenancy flowing from the statute regulating and determining inter se rights of landlord and tenant. No order for eviction of the tenant can be passed by the court at the instance of its officer, the receiver, without taking recourse to appropriate proceedings for eviction of the tenant under the appropriate statute regulating and governing the inter se rights of landlord and

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1608. *Coal India Limited v Apeejay House Private Ltd,* AIR 2013 Cal 66 : LNIND 2013 CAL 40.
1609. *Hindi Printing Press v Manjit Singh,* ILR (2010) 4 Del 457 : (2010) 115 DRJ 193(Delhi).
1610. *Harshad Govardhan Sondagar v International Assets Reconstruction Company Ltd,* 2014 (6) SCC 1 : JT 2014 (5) SC 75 : 2014 (3) KLJ 495 : 2014 (4) SCALE 484.
1611. *Board of Trustees of Port of Kandla v Hargovind Jasraj,* 2013 (3) SCC 182 : JT 2013 (2) SC 312 : 2013 (1) SCALE 630.
1612. *Rathore Trading Co v Smt Harminder Kaur,* (2010) 96 AIC 504 : 2010 AIHC (NOC 992) 305(Chh).
1613. *Ratan Lal v Gopal,* AIR 2014 Raj 53.
1614. *Sidhartha Sarawgi v Board of Trustees for the Port of Kolkata,* 2014 SCC OnLine SC 333.

tenant. The court has no jurisdiction to pass orders and directions affecting the right of the tenant protected, controlled or regulated by the rent legislation on the score of expediency in passing some order or direction for the maintenance and preservation of the property in *custodia legis*. It is desirable that the court should refrain from such determination in a summary proceeding initiated before it.[1615] However, the same would be inapplicable in case the trespasser or any person who obtains the possession after the Receiver took over symbolic possession or actual possession of the property.[1616] In case the lessee came in possession of the premises by an order of the court pursuant to a report of the court Receiver, summary eviction cannot be proceeded against such tenant.[1617]

(5) Clause (a)—Efflux of time[1618]

Leases for a definite period, such as a lease for a year or for a term of year expires on the last day of the term,[1619] and the lessor or person entitled to the reversion may enter without notice or any other formality.[1620] A lease merely stating that it is for a period of less than one year is *ex-facie* for an indefinite period and, as such, cannot expire by efflux of time.[1621] As a lease is a transfer of an estate of inheritance, it does not terminate with the death of the original lessee, but survives during the remainder of the term of his heirs and representatives.[1622] Where on the death of a tenant intestate, the landlord instituted summary proceedings for eviction against the grandson of the tenant (who had moved into the premises) without the landlord giving notice of eviction. It was held that on the death of the tenant intestate, the tenancy vested in the president of the family division. As no notice had been served on the president or any other appropriate person, the proceedings failed. A suit for eviction could not be brought unless the landlord had an immediate right to possession, which right did not arise in this case since the landlord had not terminated the tenancy by giving notice.[1623] The lessee cannot dispute the title of the lessor as a ground for refusing to give up possession at the expiry of the lease; for if he has been let into possession by the lessor, he cannot deny the title under which he entered without first surrendering possession.[1624] After expiry of the period of termination of the lease, the possession of the lessee is that of a tenant-at-sufferance as being one who came in by right and held over without right[1625] and if the premises remain in the possession of the tenant or sub-tenant after

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1615. *Anthony C'Leo v Nandlal Bal Krishnan*, (1996) 11 SCC 376 : AIR 1997 SC 173.
1616. *Usha Harshadkumar Dalal v ORG Systems*, (2000) 1 SCC 742 : AIR 2000 SC 2719.
1617. *Credible Trading & Investment Ltd v Nandlal Balkrishna*, AIR 2000 Bom 467.
1618. See also note "Applicability of Rent Acts" under section 106.
1619. *K M Mishra v District Collector, Vellore*, AIR 2006 Mad 65; *Vithalbhai Pvt Ltd v UOI*, AIR 2005 SC 1891; *UOI v Jagdish Kaur*, AIR 2007 All 67; *Cordcell Pvt Ltd v Marazaria Product Pvt Ltd*, AIR 2007 Kant162; *M C Mohammed v Gouramma*, AIR 2007 Kant 46; *Prithvi Raj Bhalla v Industrial Cable (India) Ltd*, AIR 2002 Del 539.
1620. *Sunder Singh v Ram Saran Das*, (1932) ILR 14 Lah 137 : 142 IC 754 : AIR 1933 Lah 61; *Hakim Mohmd Fazihzaman v Anwar Hussain*, (1932) All LJ 126 : 139 IC 828 : AIR 1932 All 314; *Kundan Lal v Deepchand*, (1933) All LJ 682 : 146 IC 762 : AIR 1933 All 756; *Suraj Bhan v Hafiz Abdul*, AIR 1944 Lah 1 : 43 Punj LR 75 : 195 IC 291; *Janardhanan Chandran v Govindan Shanmughan*, AIR 1990 Ker 46 (NOC); *Nabina Chadha v Usha Das*, AIR 2011 Ori 5 : (2010) 110 CLT 836; *Giriraj Prasad v Shyam Agarwal*, AIR 2010 (NOC) 1020 (All).
1621. *Rattan Lal v Vardesh Chander*, AIR 1976 SC 588 : [1976] 2 SCR 906 : (1976) 2 SCC 103.
1622. *Tez Chund v Sri Kanth Ghose*, (1844) 3 Mad IA 261; *Danoollah v Ananatoollah*, (1871) 16 WR 147.
1623. *Wirral Borough Council v Smith*, (1982) 5 Current Law 27. See also Commentary on section 105 : under note "The Demise".
1624. *Vasudev Daji v Babaji Ranu*, (1872) 8 Bom HC 175 (AC); *Muthuvaiyan v Sinna Samavalyan*, (1905) ILR 28 Mad 526; *Trimbak Ramchandra v Shekh Gulam Zilani*, (1909) ILR 34 Bom 329 : 5 IC 965; *Mujibar Rahaman v Isab Surati*, (1928) 32 Cal WN 867 : AIR 1928 Cal 546.
1625. *Champakalata Mohanty v Atmaranjan Mohapatra*, AIR 2011 Ori 136 : LNIND 2011 ORI 66.

the termination of the tenancy, then there is an obligation to pay mesne profits.[1626] If the lessee has not surrendered possession, the estoppel continues even after the termination of the tenancy.[1627]

ILLUSTRATION

A purchased land at a revenue sale in the name of *B* his benamidar. *A* then let the land to *C*. At the expiry of the lease *C* refused to give up the land alleging that the real owner was B. Held that *C* having been let into possession by *A* was estopped from disputing his title.[1628]

The estoppel extends to the assignee of the lessee,[1629] and to any person who has come in by collusion with the lessee.[1630] The Calcutta High Court has held that the estoppel applies only to the landlord who has let the tenant in.[1631] But the Bombay and Madras High Courts have held that even if a tenant has not been let into possession by the landlord, there is an estoppel when a tenancy arises on his attorning to that landlord.[1632] Section 116 of the Indian Evidence Act, 1872 limits the estoppel to the landlord's title at the beginning of the term, and the tenant may show that the landlord's title has determined since he took the lease.[1633]

Section 116 of the Indian Evidence Act, 1872 has been explained by the Privy Council in *Krishna Prasad Lal Singh Deo v Baraboni Coal Concern.*[1634] The Privy Council have held that section 116 does not deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant, but deals with one cardinal simple estoppel. It postulates that there is a tenancy still continuing and that it had its beginning at a given date from a given landlord, and provides that neither a tenant, nor anyone claiming through a tenant shall be heard to deny that, that particular landlord had at date a title to the property, and there is no exception even for the case where the lease itself discloses the defects of title. In the ordinary case of a lease intended as a present demise, the section applies against the lessee, any assignee of the term, and any sub-lessee or licensee. The Privy Council have further held that the principle of the section does not disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion and in that sense, the principle only applies to the title of the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end. Under section 116, "the tenancy" does not begin afresh every time the interest of the tenant or the landlord devolves upon a new individual by succession or assignment. Further, under that section, a tenant is estopped from denying his landlord's title irrespective of whether he was already in

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1626. *Kersi Commissariat v Maharashtra Deptt*, (2012) 5 SCC 187 : LNIND 2012 SC 219 : 2012 (4) SCALE 124.
1627. *Krishna Rao v Mungara Sanyasi*, (1932) ILR 55 Mad 601 : 62 Mad LJ 313 : 138 IC 34 : AIR 1932 Mad 298; *Mujibar Rahman v Isak Surati*, AIR 1928 Cal 546; *Bilas Kunwar v Desraj Ranjit Singh*, 42 IA 202 : 30 IC 299; *Vertannas v Robinson*, 54 IA 276 : 102 IC 639 : AIR 1927 PC 151; *Vithalbhai Pvt Ltd v Union Bank of India*, AIR 1992 Cal 283 following *Krishna Rao*.
1628. *Mulhuvaiyan v Sinna Samavaiyan*, (1905) ILR 28 Mad 526.
1629. *Parattahath v Parattahath*, (1906) 16 Mad LJ 351.
1630. *Pasupati v Narayana*, (1890) ILR 13 Mad 335; *Deo d Bullen v Mills*, (1834) 2 Ad & El 17.
1631. *Lal Mahomed v Kallanus*, (1885) ILR 11 Cal 519; *Ketu Das v Surendra Nath Sinha*, (1903) 7 Cal WN 596.
1632. *Shankar v Jagannath*, (1928) 30 Bom LR 741 : 111 IC 911 : AIR 1928 Bom 265; *Nagindas Sankal Chand v Bapalal Purshottam*, (1930) ILR 54 Bom 487 : 125 IC 695 : AIR 1930 Bom 395; *Krishnarao v Ghaman*, (1934) 36 Bom LR 1074 : 155 IC 249 : AIR 1935 Bom 144; *Venkata Chetty v Aiyanna Goundan*, (1917) ILR 40 Mad 561 : 36 IC 817.
1633. *Ammu v Ramakrishna Sastri*, (1879) ILR 2 Mad 226; *Hopcraft v Keys*, (1833) 9 Bing 613.
1634. *Krishna Prasad Lal Singh Deo v Baraboni Coal Concern*, 64 IA 311 : (1938) ILR 1 Cal 1 : (1937) All LJ 1389 : 39 Bom LR 1034 : 41 Cal WN 1253 : (1937) 2 Mad LJ 286 : 169 IC 556 : AIR 1937 PC 251.

possession of the property at the time when he took the lease. The Calcutta cases mentioned above have been explained as being outside section 116. In view of the observation of the Privy Council that neither a new tenant, nor a new *kabulayat* necessarily implies a new tenancy, the Bombay and the Madras decisions noted above may need reconsideration.

The lessee may resist eviction if a covenant for renewal gives him the option to take a lease for a further term.[1635] If in such a case the lessee continues in possession in exercise of his option as per the renewal clause over the leased property after the initial period is over, his continuance in possession would be deemed to be under the original registered deed. However, the period is to be treated in such a case as part of the period of the original registered deed.[1636] Where lease of land to petty shopkeepers came to an end by the efflux of time and the lessor city corporation refusing to renew it, evicted the lessees, it was held that the action of the corporation was not open to challenge as being in breach of Article 21 of the Constitution as it was only a case of a contractual obligation ceasing to exist.[1637]

A suit for eviction has to filed after the determination of tenancy by efflux of time and not before it. If it is instituted even before the expiry of the lease by efflux of time it would be a premature claim.[1638]

In *Delhi Development Authority v Anant Raj Agencies Pvt Ltd*,[1639] the Delhi Improvement Trust granted a lease in favour of original lessee. After enactment of the Delhi Development Act, 1957, and all properties, movable or immovable, vested in the DIT came to be vested in the DDA. The DDA terminated the lease of the said land on account of non-observation of the terms and conditions contained in the lease deed. But payments towards rent were continuously made by the lessee to the DDA's office. The issue was whether the original lessee has acquired any right, in respect of the property in question after the termination of lease by efflux of time and also termination by notice, in the absence of renewal of lease by the DDA in writing, by virtue of payment of rent in the office of the DDA? The apex court held that there cannot be an automatic renewal of lease in favour of the original lessee once it stands terminated by efflux of time and also by issuing notice terminating the lease. Merely accepting the amount towards the rent by the office of the DDA after expiry of the lease period shall not be construed as renewal of lease of the premises for another period of 20 years.

A dispute relating to eviction and recovery of rent in a lease made for a fixed period, coming to an end by efflux of time, would be a subject matter of civil suit and it cannot be referred to an arbitrator despite the fact that the lease deed entered into as between the parties contained an arbitration clause for resolving the disputes arising out of lease.[1640]

The premises protected under the relevant tenancy Act, are not governed by section 111(a).[1641]

1635. *Lewis v Stephenson*, (1898) 67 LJ (QB) 296.
1636. *Ranjit K Dutta v Tapan Shaw*, AIR 1997 Cal 278.
1637. *Vidyaranyangar Petty Shop Keepers' Association v The Corpn of the City of Bangalore*, AIR 1987 Kant 159, p 161.
1638. *Raghbinder Singh v Bant Kaur*, (2011) 1 SCC : 2010 (10) SCALE 59 : 2011 (84) ALR 748.
1639. *Delhi Development Authority v Anant Raj Agencies Pvt Ltd*, AIR 2016 SC 1806. See also, *Shanti Prasad Devi v Shankar Mahto*, (2005) 5 SCC 543 : AIR 2005 SC 2905 : JT 2005 (6) SC 6; *Sarup Singh Gupta v S Jagdish Singh*, (2006) 4 SCC 205; *Ashoka Marketing Ltd v Punjab National Bank*, (1990) 4 SCC 406 : AIR 1991 SC 855 : 1990 (2) SCALE 200.
1640. *Himangni Enterprises v Kamaljeet Singh Ahluwalia*, AIR 2017 SC 5137 : 2017 (10) SCJ 52 : 2017 (12) SCALE 565.
1641. *Ramdas Bansal v Kharag Singh Baid*, (2012) 2 SCC 548 : LNIND 2012 SC 59 : 2012 (1) SCALE 508 : JT 2012 (2) SC 270.

Covenant for renewal

The lease may contain a covenant for renewal, ie, a covenant to grant a renewal of the lease either at the end of the term, or at some stated period within the term. Such a covenant confers an immediate right to a further term, and as the covenant runs with the land, it is exercisable by the assignees of the lessee, and binds the assignees of the lessor.[1642] Such a covenant does not create an interest in property, and runs with the land, it cannot, therefore, infringe the rule against perpetuities.[1643] A covenant for renewal contained in a lease does not *ipso facto* extend the tenure or term of the lease, "but only entitles the lessee to obtain a fresh lease... in accordance with and in due satisfaction of the law governing the making of leases."[1644] The lease cannot be automatically renewed and the tenant has to exercise the option for renewal. If he does not do so, and the ground of expiration of term of the lease is enforced, and the lessor erroneously accepts the rent after determination of the lease through efflux of time though he never consented to continuation of possession by the tenant, and the notice that he sent to the tenant did not manifest any intention of renewal of tenancy, the suit filed by the landlord for recovery of possession would be proper.[1645] Acceptance of rent after the expiry of the period of lease would not convert a fixed duration tenancy into a perpetual lease without any intention of the parties to continue that lease.[1646] Even the payment of entire rent would not entitle the lessee for automatic renewal of lease when renewal is subject to consent of the lessor.[1647] Where the lease in respect of a restaurant belonging to the local authority had expired, and auctions were held in which the erstwhile lessee participated without insisting on his rights at the appropriate time under the relevant rules which enjoined upon the local authority to make an offer to the existing lessee in the event of a decision to revise the lease amount, it was held that he was precluded by his own conduct from protesting over the auctions later.[1648]

The terms of the lease agreement have paramount importance in renewal and extension of lease and the entire lease document should be considered in totality to decipher the terms and conditions of lease.[1649] In case, renewal was claimed under a clause of the previous lease, the lessor cannot be faulted for terminating the tenancy by a notice under the Transfer of Property Act, 1882.[1650] The covenant generally, requires the lessee to give notice of his intention to take a renewal before the expiry of the term, and if so, the right of renewal may be lost by not applying within the specified time,[1651] though relief will be granted in special circumstances against failure to give notice in time.[1652] If no time is mentioned for giving notice, it will suffice if notice is given in a reasonable time.[1653] But it is not to be inferred that the lessee will lose his right of renewal by not giving notice or by not having made an

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1642. *Kempraj v Barton Son & Co,* [1970] 2 SCR 140 : AIR 1970 SC 1872 : [1970] 1 SCJ 905 : (1969) 2 SCC 594; *Weg Motors Ltd v Hales,* (1961) Ch 176 : [1961] 3 All ER 181 (CA).
1643. *Ram Lal v Secretary of State,* (1919) 29 Cal LJ 314 : 51 IC 690; *Bayly v Leo-minister Corpn,* (1792) 1 Ves 476; *Wight v Hopetown (Earl),* (1864) 4 Macq 729 HL; *Nicholson v Smith,* (1882) 22 Ch D 640.
1644. *Hindustan Petroleum Corpn Ltd v Vummidi Kannan,* AIR 1992 Mad 190, p 199; *RM Mehta v Hindustan Photo Films Manufacturing Co,* AIR 1976 Mad 194; *Delhi Development Authority v Durga Chand,* AIR 1973 SC 2609.
1645. *R S Iron Industries Pvt Ltd v Calcutta Pinkjrapole Society,* AIR 2013 Cal 94 : LNIND 2012 CAL 573 : AIR 2013 Cal 97 : 2012 (120) All Ind Cas 715.
1646. *Vijay Kumar v Harbhajan Kaur,* AIR 2013 (NOC) 217 (J&K).
1647. *Sri Ram Builders v State of MP,* (2014) 14 SCC 102 : LNIND 2014 SC 398.
1648. *Murali Krishan v A Nagarajan,* AIR 1991 Mad 108, p 109.
1649. *Govind Impex Pvt Ltd v Appropriate Authority, Income Tax Dept,* (2011) 1 SCC 529 : LNIND 2010 SC 1189 : 2010 (13) SCALE 124 : AIR 2011 SC (Supp) 359.
1650. *Bharat Petroleum Corp Ltd vs Rama Chandrashkhar Vaidya,* (2014) 1 SCC 657.
1651. *Ram Lal v Secretary of State,* 51 IC 690; *Hunter v Hopetown (Earl),* (1885) 13 LT 130 HL.
1652. *Jaggi Lal v Sir WE Cooper,* (1905) ILR 27 All 696.
1653. *Buckland v Papillon,* (1866) 2 Ch 67; Foa, *Landlord and Tenant,* 6th Edn, pp 369 & 429.

application for renewal if he continues in possession with the assent of the lessor.[1654] Time is not regarded as of the essence of the contract for renewal, and if the lessee omits to exercise the option, the lessor may call upon him to decide whether he will take the lease, and any delay by the lessee after receiving such notice from the lessor will be fatal.[1655] In a Calcutta case, the landlord made a fresh settlement of a village after the term of the original lease had expired. But the settlement was held to be invalid because there was a covenant for renewal in the original lease, and the landlord had omitted to give notice to the original lessees who were still in possession. If the lessee merely holds over and does not exercise his right of renewal, he becomes an annual or monthly tenant, as the case may be.[1656] But where no notice of the exercise of the option was required to be given, an option may be exercised by continuing in possession, and payment of rent after the expiry of the lease.[1657]

On principle, a lessor may, after expiry of the period for which lease is granted, (i) renew the lease; or (ii) resume possession (ie, re-enter). But if he chooses to grant a fresh lease or, atleast creates that impression by his conduct spread over a long time, it results in abandonment of right of re-entry. Thus where the lessee continued in possession after the expiry of the lease of the nazul land granted by the government for a long period and no action was taken by the government, it was held that lessee can seek execution of fresh lease.[1658]

There may be conditions precedent to the exercise of the option, such as, performance of the conditions in the lease and as to repairs, and these will be very strictly construed.[1659] But where the covenant speaks of such an option being exercisable if the other covenants have been "reasonably fulfilled", compliance such as would be done by a reasonable man would suffice.[1660] Where the covenant of renewal is subject to conditions precedent, the right of renewal arises only when notice is given to the lessor in terms of the renewal clause and the lessee has performed all the conditions precedent as provided in the renewal clause. In an Allahabad case, the original lessee did not ask for the renewal of the lease, nor did he perform the other conditions precedent, though the municipal Board (lessor) had given him notice to do so. Hence, the lease did not stand renewed merely because of the approval of the district magistrate to the proposal of the municipal Board for renewal at an enhanced rent.[1661] A covenant for renewal must be definite as to the term, otherwise it may be void for uncertainty.[1662] A covenant in a lease that after the expiration thereof, the lessor shall be at liberty to lease out the premises and the lessee shall be entitled to take the lease at the lessee's will, was held as not amounting to a covenant for renewal.[1663] But, in *Indian Cotton Co v Raghunath,*[1664] a lease for five years with a convenant for renewal so long as the lease is renewable at the option of the lessee as long as the company lasted, was a covenant for renewal. So also, a clause allowing the lessee to remain if he wishes to remain a new

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1654. *Hersey v Gilbert,* (1851) 18 Beav 174.
1655. *Hemant Kumari Debi v Safutullah Biswas,* (1933) 37 Cal WN 9 : 144 IC 889 : AIR 1933 Cal 477.
1656. *Manilal v Nandlal,* (1920) 22 Bom LR 133 : 55 IC 610; *Bhikaji Vishnu v Ramchandra Krishna,* AIR 1944 Bom 210.
1657. *Gardner v Blaxill,* [1960] 2 All ER 457 : (1960) 1 WLR 752.
1658. *Purshottam Das Tandon v State of Uttar Pradesh,* AIR 1987 All 56.
1659. *Ram Lal v Secretary of State,* (1919) 29 Cal LJ 314 : 51 IC 690; *Job v Banister,* (1856) 2 K & J 374; *Finch v Underwood,* (1876) 2 Ch D 310 (CA); *Bastin v Didwell,* (1881) 18 Ch D 238; *Greville v Parker,* (1910) AC 335 (PC); *West Country Cleaners v Saly,* (1966) 1 WLR 1485 : [1966] 3 All ER 210 (CA).
1660. *Gardner v Maxill,* [1960] 2 All ER 457 : (1960) 1 WLR 752.
1661. *Munni Devi v State of Uttar Pradesh,* AIR 1977 All 386.
1662. *Surendra Nath Sen v Dinabandhu Nath,* (1908) 13 Cal WN 595 : 4 IC 535.
1663. *Narendra Nath v Rampal Singh,* AIR 1947 Cal 378.
1664. *Indian Cotton Co v Raghunath,* (1931) 33 Bom LR 111 : 130 IC 598 : AIR 1931 Bom 178.

bandobasta, was upheld as a covenant for renewal.[1665] Where the lessees of a plot leased by the government for manufacture of salt were allowed to induct financial partners and after doing so, they themselves retired without bringing it to the notice of the government and the renewal of lease was obtained in the name of the original lessees, it was held that the renewal was fraudulently obtained, and no estoppel could be pleaded against the government which refused the request for further renewal and resumed the plots.[1666] Where a lease that expired with efflux of time had a renewal clause that provided that the lease can be renewed subject to fresh terms and conditions mutually agreed upon by the parties and the arbitration clause referred to remedy for resolving disputes in connection with breach/termination of lease, this lease cannot be automatically renewed as a matter of right by the lessee under the guise of pending arbitration proceedings. Where such a lessee fails to hand over the vacant possession of property on the expiry of the lease the eviction proceedings initiated under the Act would be proper.[1667]

A covenant for renewal is not void for uncertainty or vagueness merely because it provides for renewal on terms to be agreed upon, or contingent to the tenant upon erecting a building as agreed upon; and that if parties do not agree, the court can settle the terms.[1668] Where a lease contained a covenant for renewal "for a rent and containing the like covenants and provisions as are herein contained" (save for the renewal clause); it was held that this was, in fact, to be a renewal of the old lease, so that the rent must be the same.[1669] The chief difficulty about a covenant for renewal is to distinguish a covenant for one renewal from a covenant for perpetual renewal. This is a matter of construction of the covenant,[1670] and the leaning of the courts always has been against perpetual renewal, and unless the intention is clearly shown, the agreement is exhausted by one renewal.[1671] A covenant for a perpetual renewal of the lease must always be unequivocal.[1672] A covenant for a new lease "with all covenants, grants, and articles" contained in the old lease will not include the covenant for renewal;[1673] for an option of renewal is not the same thing as an option for renewal after renewal.[1674] But the addition of the words "including this present covenant" will make the covenant one for perpetual renewal.[1675] In a Calcutta case, the lessee sub-let some portions of the leased premises to different persons. The lessor started realising rent from the sub-lessees, while the lessee continued to pay the original rent to the lessor. It was held that in the absence of evidence to show that there was even any agreement between the parties from which it could be inferred that a new relationship was created, it could not be said that there was implied surrender in

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1665. *Ramesh Chandra v Atul Chandra*, AIR 1959 Assam 22.
1666. *Ganapati Salt Works v State of Gujarat*, AIR 1995 Guj 61.
1667. *Gandhi Corporation v Gujarat University*, AIR 2017 (NOC) 1006 (Guj).
1668. *Jardine Skinner & Co v Rani Surat Sundari*, 5 IA 164; *Prodyot Coomar v Maynuddin Mia*, (1938) 68 Cal LJ 435 : AIR 1938 Cal 724; *Robinson v Thames Mead Park Estate Ltd*, (1947) Ch 334 : [1947] 1 All ER 366; *Ranjan v Gopal*, AIR 1961 Mys 29. But see *King's Motors v Lax*, (1970) 1 WLR 426 : [1969] 3 All ER 665.
1669. *Rothwell v Wakeling*, (1974) P&CR 234 : (1975) CLY 2834.
1670. *Swinburne v Milburn*, (1884) 9 App Cas 844; *Secretary of States Forbes*, (1912) 16 Cal LJ 217 : 17 IC 180.
1671. *Secretary of State v Forbes*, 17 IC 180; *Swinburne v Milburn*, (1884) 9 App Cas 844; *Baynham v Guys Hospital*, (1796) 3 Ves 295; *Srish Chandra v Doa Mahommad*, (1939) 68 Cal LJ 128 : 179 IC 813 : AIR 1939 Cal 77.
1672. *Sewakram v Meerut Municipal Board*, AIR 1937 All 328.
1673. *Iggulden v May*, (1804) 9 Ves 325; Re *Purmanandas Jeewandas*, (1883) ILR 7 Bom 109; *Yohannan v Vasudevan*, (1954) ILR Tr & Coch 1098 : AIR 1955 Tr & Coch 161; *Plumrose v Real & Leasehold Soc*, (1970) 1 WRL 52 : [1969] 3 All ER 1441.
1674. *Lewis v Stephenson*, (1898) 67 LJ (QB) 296.
1675. *Hare v Burgess*, (1857) 4 K&J 45; *Wynn v Conway Corpn*, (1914) 2 Ch 705 : [1914-15] All ER Rep 199 (CA).

respect of the premises sub-let.[1676] Where, however, the covenant gave the lessee an option "of continuing the tenancy for a further period of six months on the same terms and conditions including this clause", it was held that the lessee had the right to renew for one further period of six months and no more,[1677] but this decision has been criticised by the Court of Appeal, which observed that it ought not to be followed; such a clause must ordinarily be construed as entitling the lessee rights of perpetual renewal.[1678]

Where a covenant for renewal exists, its exercise is, of course, a unilateral act of the lessee, and the consent of the lessor is unnecessary.[1679] However, where the terms in a lease agreement provided for renewal of the lease on certain conditions, mere sending the letter to a person for renewal of lease, would not create a lease or allow renewal of the same more so if there was inaction of the lessee to pay market rent and also no appropriate claim for renewal of lease.[1680]

A tenancy created for a period of one year with a clause that the tenant would vacate the shop when required by landlord for her use, is not a perpetual lease and the landlord would be entitled to file a suit for eviction after a period of one year without the need to show her personal need for the premises.[1681]

Statutory Tenant

A person remaining in occupation of the premises let to him under a rent control legislation after the determination of or expiry of the period of the tenancy is commonly, though in law not accurately, called "a statutory tenant". Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute.[1682]

(6) Clause (b)—Contingent term

If a lease is not periodic or in perpetuity, it must be for a certain time; but it is sufficient if the time is certain with reference to a future event. The note "Lease for a certain time" under section 105 may be referred.

If the term depends upon the happening of a future event, the lease determines on the death of the lessee. A lease for the duration of the war[1683] determines when peace is declared. The word "certain" under section 105 of the TP Act cannot mean certain on the date of the lease. It is enough if it is capable of being made certain on a future date.[1684]

(7) Clause (c)—Termination of lessor's interest or power

If the lessor's interest is limited, the lease is determined with that interest. Thus, a lease by a tenant for life is void at his death.[1685] Accordingly, where a *Maharaja* made a grant of a

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1676. *Sushil Krishna Ray v Narayan Chandra Mukherjee,* AIR 1978 Cal 174.
1677. *Green v Palmer,* (1944) Ch 328 : [1944] 1 All ER 67.
1678. *Parkus v Greenwood,* (1950) Ch 644 : [1950] 1 All ER 436 (CA). And see *Northchurch Estates Ltd v Daniels,* (1947) Ch 117 : [1946] 2 All ER 524.
1679. *Baker v Merckel,* (1960) 1 QB 657 : [1960] 1 All ER 668.
1680. *Hindustan Petroleum Corpn Ltd v RP Agarwalla & Brothers Pvt Ltd,* AIR 1986 Cal 403.
1681. *Vijay Kumar v Harbhajan Kaur,* AIR 2013 (NOC) 217 (J&K).
1682. *Anand Nivas (P) Ltd v Anandji Kalyanji Pedhi,* AIR 1965 SC 414 : [1964] 4 SCR 892.
1683. *Great Northern Rly v Arnold,* (1916) 33 TLR 114; and see note under section 108(c).
1684. *Juthika Mulick v M Y Bal,* AIR 1995 SC 1142.
1685. *Deo d Simpson v Butcher,* (1778) 1 Doug (KB) 50; *Raghubir Singh v Jethu Mahton,* (1923) ILR 2 Pat 171 : 70 IC 290 : AIR 1923 Pat 130.

village for the maintenance of his nephew for his lifetime and the nephew granted a permanent lease, the lease determined and became void on the death of the nephew.[1686] Since, a sub-tenancy comes to an end when the main lease is determined though if lawfully created it may be protected by provision of Tenancy Act.[1687] In the renewal of a lease, there exists an inefficacy of renewal of sub-lease during subsistence of renewal of head lease.[1688] A sub lessee is estopped from denying the title of the landlord so long as he actually or ostensibly enjoys the possession under the lease created by such landlord and must deliver possession back to him even where the head lease had expired. where there was sale of the leasehold property by the lessor to the third party and sub-lessee entered into arrangement with the purchaser and started occupying the property under him, de-recognition of the lease by the sub-lessee would not be proper and after the expiry of the head lease, the sub lessee would be liable to be evicted.[1689] A lease granted by a Hindu widow having a widow's estate would determine at her death, unless justified by necessity. A lease under a statutory or testamentary power would determine at the expiry of the time limited by that power for the term.[1690] A mortgagee in possession cannot grant a lease extending beyond the term of the mortgage, and a lease made by a mortgagee determines on redemption.[1691] That does not mean that the lease created by the mortgagee is automatically determined. But the mortgagor is entitled to exercise his right to determine.[1692]

If a puisne mortgagee redeems a prior mortgagee, he may treat lessee of the latter who continues in possession as trespassers.[1693]

(8) Clause (d)—Merger

The doctrine of merger has been explained in the note under section 101. Merger is largely a question of intention, dependent on circumstances, and courts will presume against it when it operates to disadvantage of a party. "Merger" is generally defined as the absorption of a thing of less importance, by a greater whereby the lesser ceases to exist but the greater is not increased, and rights are said to be merged when the same person who is bound to pay is also entitled to receive. In a merger a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate. The less estate is immediately annihilated, or, in the legal terminology, is said to be merged, ie, sunk or drowned, in the greater. The rule in equity is the same as at law, with this modification that at law it is invariable and inflexible; in equity it is controlled by the expressed or implied intention of the party in whom the interest or estates unite. Thus, section 111(d) has to be read along with section 109, and not in isolation.[1694]

1686. *Beni Pershad Koeri v Dudhnath Roy,* (1900) ILR 27 Cal 156 : 26 IA 216.
1687. *Da'Cunha Associates Pvt Ltd v Dilip Jhangiani,* (2010) 6 Mah LJ 132 : (2011) 2 Bom CR 157 : (2010) 6 AIR Bom R 488.
1688. *Saroj Screens P Ltd v Ghanshyam,* (2012) 11 SCC 434 : LNIND 2012 SC 205 : 2012 (4) SCALE 25 : 2012 (1) CLR 950.
1689. *Kamini Kapoor v Punjab National Bank,* AIR 2013 Cal 206 : LNIND 2013 CAL 153 : 2013 (2) Cal LJ 207; *Kersi Commissariat v Maharashtra Deptt,* (2012) 5 SCC 187 : LNIND 2012 SC 219 : 2012 (4) SCALE 124 : AIR 2012 SC 1271.
1690. *Alexander v Alexander,* (1755) 2 Ves 640.
1691. *Jhagru Main v Raghunath,* 119 IC 551 : AIR 1929 Pat 630.
1692. *Hardei v Wahid Khan,* (1953) All LJ 467 : AIR 1954 All 16. See notes under section 76 (a).
1693. *Alagirisami Mudali v Akkrulu Naidu,* (1921) 41 Mad LJ 462 : 69 IC 651 : AIR 1921 Mad 393.
1694. *Nalakath Sainuddin v Koorikadan Sulaiman,* (2002) 6 SCC 1 : AIR 2002 SC 2562; see also *Burton v Barclay,* (1831) 7 Bing 745; *Dynevor (Lord) v Tenant,* (1888) 18 App Cas 279; *Hriday Narain v Kali Charan,* 107 IC 819 : AIR 1928 Pat 273; *Krishna Kishore Firm v The Government of Andhra Pradesh,* AIR 1990 SC 2292, p 2294; *Krishna Kishore (Firm) v Government of Andhra Pradesh,* (1991) 1 SCC 184, p 188; *Ramesh Kumar Jhamb v Official Assignee High Court of Bombay v ors,* AIR 1993 Bom 374, p 377.

Doctrine of merger, as statutorily recognised in India, contemplates (i) coalescence of the interest of the lessee and the interest of the lessor; (ii) in the whole of the property; (iii) at the same time;[1695] (iv) in one person; (v) in the same right. There must be a complete union of the whole interests of the lessor and the lessee so as to enable the lesser interest of the lessee sinking into the larger interest of the lessor in the reversion.[1696]

Thus, if the lessor purchases the lessee's interest, or the landlord executes a sale deed,[1697] the lease is extinguished, as the same man cannot be at the same time both landlord and tenant.[1698] But a mere agreement to sell cannot, of course, result in a merger.[1699] However, where the landlady entered into an agreement of sale with her tenant, accepted money towards the sale consideration, delivered possession in lieu of such agreement, it indicates that she had repudiated her old relationship of landlord and tenant.[1700] In *Shabbir Ahmed v Syed Mohammad Ali Ahmed Kabir*,[1701] a sale deed was executed for a portion of the tenanted premises in favour of the tenant who later claimed an extinguishment of the tenancy by merger. It was held that since there is no merger of the interest in the whole of the property, hence, the tenancy cannot be said to have been determined under section 111(d), and the tenant is not entitled to oust the landlord as there is no extinguishment of tenancy.

There can be no merger of lease and mortgage, even where the two transactions are in respect of the same property.[1702] Merger postulates that there should not remain any outstanding interest in the property, and that one of the interests should be higher than the other. A mortgage is not a higher or a lower interest than a lease. Even if the rights of the lessee and the mortgagee are vested in one person, the reversion (in regard to the lease) and the right of redemption (in regard to the mortgage) would be outstanding in the owner of the property, and accordingly, there would not be a complete fusion of all the rights of ownership in one person.[1703]

Where the issue is, whether, upon the redemption of an usufructuary mortgage, a tenant mortgagee could be directed to deliver actual or physical possession of the mortgaged property to the lessor mortgagor,[1704] the answer must depend on whether there was an implied surrender of the lessee's rights when the usufructuary mortgage was executed in favour of the lessor mortgagor. And this obviously depends upon what the intention of the parties was at the time of the execution of the mortgage-deed in favour of the sitting tenant. The intention is to be gathered from the terms and conditions of the mortgage transaction, in the light of the surrounding circumstances of the case. All in all, it depends upon whether, by executing a possessory or usufructuary mortgage in favour of a sitting tenant, the parties intended that there should be a surrender of the lessee's rights. It is only if such a surrender

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1695. *Pramod Kumar Jaiswal v Bibe Husn Bano,* (2005) 5 SCC 492 : AIR 2005 SC 2857; *Gulab Chand Verma v Badri Narain Mishra,* AIR 2005 All 133 : (2004) 3 AWC 3744; *India Umbrella Manufacturing Company v Bhagbandei Agarwalla,* AIR 2004 SC 1321 : (2004) 3 SCC 178.
1696. *T Lakshmipathi v P Nithyananda Reddy,* (2003) 5 SCC 150 : AIR 2003 SC 2427.
1697. *Shafiq Ahmad v Sayeedan.* A1R 1984 All 140.
1698. *Arun Kumar Tandon v Akash Telecom Pvt Ltd,* AIR 2010 (NOC) 744 (Del); *Puran Chand v Kirpal Singh,* AIR 2001 SC 423 : (2000) Supp (5) SCR 756.
1699. *Banshilal v Noor Mohammad,* (1970) ILR Raj 443 : AIR 1970 Raj 244.
1700. *R Kanthimathi v Beatrice Xavier,* (2000) 9 SCC 339 : AIR 2001 SC 4149.
1701. *Shabbir Ahmed v Syed Mohammad Ali Ahmed Kabir,* 2016 (2) ALJ 1. See also *Pramod Kumar Jaiswal v Bibi Husn Bano,* 2005 (5) SCC 492 : LNIND 2005 SC 453 : JT 2005 (5) SC 79 : [2006] 2 MLJ 372; *T Lakshmipathi v P Nithyananda Reddy,* (2003) 5 SCC 150 : 2003 (3) SCALE 523 : AIR 2003 SC 2427.
1702. *Tarachand v Sagarbai,* AIR 2007 SC 2059 : (2007) 5 SCC 392.
1703. *G Appalaswamy v B Venkataramanayya,* AIR 1984 SC 1728: followed in *Nand Lal v Sukh Dev,* (1987) SCC 87 (Supp).
1704. For discussion, see "Usufructuary mortgage" under section 58 and section 83.

can be inferred, that the mortgagor would be entitled to have delivery of physical possession upon redemption, but not otherwise.[1705]

Where an agreement for sale is entered into between the lessor and lessee, the old relationship (of landlord and tenant) comes to an end. The rights and liabilities have thereafter to be worked out on that basis. If the purchase money is not paid, the agreement stands cancelled in terms of the agreement for sale.[1706] There is no inconsistency or incompatibility in one person being the tenant and also the mortgagee of the same property. In such a case, instead of paying the rent to the landlord, he adjusts it against the amount claimable by him as a mortgagee from the landlord. In such a case, it would be unreasonable to attribute to a tenant the intention to surrender the tenancy, and to invoke the sophisticated doctrine of implied surrender—a doctrine about which an ignorant and often illiterate tenant knows nothing.[1707] Where the landlord mortgaged the leased premises to the lessee and the mortgage-deed stipulated that, 'so long as the house will remain mortgaged with you, there shall be no interest of amount to you and no rent of the house', the Supreme Court held that both, interest and rent, accrued and there was only an adjustment of one liability against the other, and it could not be said that there was any symbolic surrender of possession by the lessee upon execution of the mortgage-deed on the ground that no rent accrued during the period of mortgage. In other words, the relationship between the parties as lessor and lessee subsisted, and there was no merger of the lease and the mortgage, as no such merger could take place in law. The decree for redemption in such a case only redeemed the mortgage, and did not determine the lease.[1708] The mortgage of house by the landlord in favour of the tenant by a mortgage-deed results in implied surrender of tenancy rights.[1709] However, a different opinion was stated by the Supreme Court in an earlier case, wherein it was held that the conduct of parties and the deed in question did not show any intention to surrender tenancy. This being so, the redemption of mortgage would revive the tenancy. The only effect of mortgage was that the lessee's rights were kept in abeyance, and they stood revived upon the redemption of the mortgage.[1710] Where, apart from the provisions of section 111, merger is pleaded, it will have to be determined in each case as to what was the intention of the owner of the bigger estate.[1711] In an Allahabad case, a partnership firm entered in possession as sub-lease of the lessee, the main lease being for a fixed term and also prohibiting sub-letting. Subsequently, a partner of the firm became the landlord by transfer from the previous lessor. The landlord partner filed a suit for ejectment against the firm, alleging that it was his licensee. The firm denied the title of the landlord partner as a licensor and pleaded that they occupied the premises as sub-tenants, but did not adduce any evidence as to holding over in respect of the tenancy after its expiry. It was held that the lessor partner would be entitled to a decree of ejectment because there was no evidence that there was any act on the part of the lessor to accept the tenant as lessee. Had the tenancy continued, the landlord partners entry in the demised premises as a partner of the firm would determine the lease under section 111 (d), because the landlord partner would have been deemed to be in possession as a partner, over each and every parcel of the premises, and the lease would stand determined.[1712]

1705. *G Appalaswamy v B Venkataramanayya,* AIR 1984 SC 1728 : (1984) 4 SCC 382.
1706. *Arjunlal v Girish Chandra,* AIR 1973 SC 2256 : (1973) 2 SCC 197.
1707. *Patel Atmaram Nathudas v Patel Babubhai Keshavlal,* AIR 1975 Guj 120.
1708. *Nenri Chand v Onkarlal,* (1991) 3 SCC 464, p 467 : AIR 1991 SC 2046, p 2047.
1709. *A Arunugam Chettiyar v Lokanayakamma,* AIR 1997 SC 280.
1710. *N V Hendre v B S Kothawale,* AIR 1994 SC 368.
1711. *Takhat Singh v Prem Chand,* AIR 1973 P&H 204.
1712. *Ganesh Prasad v Badri Prasad,* AIR 1980 All 361.

The transfer of lessor's reversion/renthold absolutely to a third person does not terminate the lease.[1713] A condition of delivery of possession on determination of lease is not mandatory for such determination if it was not incorporated in the lease deed.[1714]

The whole of the property

The interests of the lessor and of the lessee must be in the whole of the property, otherwise there is no merger. The interest of the lessor and the lessee in the whole of the property should become vested at the same time in one person in the same right, ie, there must be the union of the entire interest of the lessor and the lessee.[1715] Thus, a lease is not extinguished because the lessee purchases a part of the reversion.[1716] Where a property is given on lease and a part of it is sold to the tenant and the remaining to another person, there is no merger as the sale to the tenant is not with respect to the whole property,[1717] but if one of the joint tenant section purchases the whole property leased to them and the other tenant neither pays rent nor claims tenancy rights joint tenancy would merge into a right of ownership.[1718]

If a co-lessee wife purchases the property which was leased to her along with her husband, there would be no determination of tenancy of the husband by the principle of merger, and the husband would be a tenant in the property now owned by his wife.[1719] Where sub-lease of portion of the premises was granted, the sub-lessee acquired only part of the interest of the superior lessor. The doctrine of merger does not apply. The sub-tenancy is not extinguished. Under section 111 (d), a lease of immovable property is determined, in case the interest of the lessee and the lessor in the whole of the property becomes vested at the same time in one person, in the same right. When a leasehold and a reversion coincide, there is a merger of the lesser estate in the greater. The lease determines, for it sinks into the reversion. Thus, if the lessor purchases the lessee's interest or the lessee purchases the lessor's interest, the lease is extinguished. But the interest of the lessor and the lessee must be in the whole of the property. A lease is not extinguished if the lessee purchases a part of the reversion. There is no merger, even though, by virtue of purchase, the sub-lessee becomes one of the co-sharer landlord of the lessee.[1720]

Illustration

A is the owner of a property and leases it to *B* for ₹ 1400 per mensem. *A* then sells seven-eighth of the property to *C* and the remaining one-eighth to the lessee *B*. *C* claims that *B*'s lease is extinguished by merger and that the reasonable profits of the property are ₹ 3500 per mensem and sues *B* for seven-eighth of that sum. Held that as seven-eighth purchase was not of the whole property the lease was not extinguished. *C* is therefore only entitled to seven-eighth of ₹ 1400 per mensem from *B*.[1721]

1713. *Shaha Ratansi Khimji & Sons v Kumbhar Sons Hotel Pvt Ltd,* (2014) 14 SCC 1.
1714. *Muneer Enterprises v Ramgad Minerals & Mining Pvt Ltd,* (2015) 5 SCC 366 : LNIND 2015 SC 159 : AIR 2015 SC 1834 : 2015 (3) SCALE 431.
1715. Statement of law in this passage was approved in *Usha Ranjan Roy Burman v Sova Das,* AIR 1990 Cal 1, p 3; *Maya Devi v Rajlakshmi Debi,* AIR 1950 Cal 1; *N Saimuddin v K Sulaiman,* AIR 2002 SC 2562, (2002) 6 SCC 1; *Pramod Kumar Jaiswal v Bibe Husn Bano,* (2005) 5 SCC 492 : (2002) 6 SCC 1; *Tarak Nath Sha v Bhutoria Bros,* AIR 2002 SC 2003.
1716. *Faqir Bakhsh v Murli Dhar,* (1931) ILR 6 Luck 197 : 58 IA 75 : 131 IC 334 : AIR 1931 PC 631; *Badri Narain Jha v Rameshwar,* [1951] SCR 153 : AIR 1951 SC 186; *Monmotha Paul v Mohendra Nath,* 65 IC 469 : AIR 1922 Cal 284; *Nathuni Prosad v Anwar Karim,* 53 IC 16; *Parmeshwar Singh v Sureba,* 88 IC 495 : AIR 1925 Pat 530; *Hari Pratap v Ramgopal,* (1960) ILR 10 Raj 753 : AIR 1961 Raj 18; *Bhoori Lal v Gehri Lal,* AIR 1967 Raj 22.
1717. *Murli Singh v Ram Singh,* AIR 2007 Utr 80 : (2007) 3 UC 1509.
1718. *Thrity Sam Shroff v Mehroo Meherji Vakil,* AIR 2010 Bom 170 : (2010) 1 Bom CR 462 : (2010) 112 Bom LR 2582.
1719. *Usha Ranjan Roy Burman v Sova Das,* AIR 1990 Cal 1, p 3.
1720. *Madanpal v Bashati Kumar Shet,* AIR 1989 Cal 223.
1721. *Faqir Baklish v Murli Dhar,* (1931) ILR 6 Luck 197 : 58 IA 75 : 131 IC 334 : AIR 1931 PC 63.

No intervening estate

The expression "the whole of the property" seems inadequate to express the further condition that the union must be of the entire interest of the lessor and of the lessee. With reference to section 101, the legislature had discarded the equitable rule of intention, and has adopted the simple rule that the existence of an encumbrance prevents merger. So also, with reference to the interest of the lessor and lessee, the union of the estates cannot occur if there is any intervening estate.[1722] Thus, in *Bunon v Barclay,*[1723] the lessee subleased for a term shorter by a few days, and then assigned his interest to his lessor. This did not operate as a merger of the sublease, for the term of a few days intervened. A mortgage in Indian form is not a transfer of the whole interest of the mortgagor, and it is submitted that a mortgage by a lessor of his reversion to the lessee would not effect a merger. An Allahabad case,[1724] though not decided under this section, illustrates this principle. A *zamindar* mortgaged to an occupancy tenant and on redemption claimed physical possession on the ground that the tenant's right had been extinguished by merger. The court, however, held that the only effect of the mortgage was to suspend the rent during the period of the mortgage. But in a later judgment,[1725] the same High Court has held that *Kallu v Diwan* had no application to cases of mortgages by conditional sale; where a lessee is such a mortgagee, there is a merger and the lease determines. Both the Madras[1726] and the Punjab[1727] High Courts have differed from the ratio of *Kallu v Diwan,* and held that there would be a merger if the demised property is mortgaged with possession to the lessee. However, in a Calcutta case, the court was inclined to the view that there would be no merger where a lessee purchased the equity of redemption of his lessor.[1728] The Andhra Pradesh High Court has considered and distinguished the Madras case.[1729] In *Lachman Das v Heera Lal,*[1730] the Allahabad High Court has reaffirmed *Kallu v Diwan.*

In the same right

Another requisite for the operation of merger is that the estates must be held in the same right, for, as said by Lord Kenyon, Nothing is dearer than that a term which is taken in *alieno jure* is not merged in a reversion acquired *suo jure*[1731] There is no merger if the lessee makes the lessor his executor,[1732] or if the lessee is administrator of the lessor.[1733] Accordingly, a device to prevent merger is to take a conveyance of one of the interests as a trustee;[1734] or the purchase of the interests by different members of a joint family.[1735]

1722. *Someshwari Prasad v Maheshwari,* (1931) ILR 10 Pat 630 : 135 IC 85 : AIR 1931 Pat 426.
1723. *Bunon v Barclay,* (1831) 7 Bing 745; *Amatoo v Sheikh Muksud,* (1915) 19 Cal WN 435 : 28 IC 314; *Lal Mahomed Sarkar v Jagir Sheikh,* (1909) 13 Cal WN 913 : 2 IC 654.
1724. *Kallu v Diwan,* (1902) ILR 24 All 487; *Kashi v Durga,* (1911) 7 Nag LR 154 : 12 IC 734; *Mallikarjunnaiah v Shivanna,* (1973) ILR 40 Mys.
1725. *Reoti Saran v Hargu Lal,* (1964) ILR 1 All 292 : (1964) All LJ 13 : AIR 1964 All 542.
1726. *Meenakshi Amma v K V Narayani,* (1956) 2 Mad LJ 235 : AIR 1957 Mad 212; relying upon *Velu v Lekshmi,* AIR 1953 Tr & Coch 584. And see *Ramrao v Pahumal,* AIR 1963 MP 296.
1727. *Sardarilal v Ramlal,* AIR 1962 Punj 48.
1728. *Suraj Chandra v Behari Lal,* AIR 1939 Cal 692 : (1939) 2 Cal LJ 551 : 70 Cal LJ 415 : 43 Cal WN 952.
1729. *Raju V D v K Avatharam,* AIR 1965 AP 86.
1730. *Lachman Das v Heera Lal,* AIR 1966 All 323.
1731. *Webb v Russel,* (1789) 3 Term Rep 393.
1732. 2 Bl Comm 177.
1733. *Chamber v Kingham,* (1878) 10 Ch D 743.
1734. *Belany v Belany,* (1867) 2 Ch App 138.
1735. *Dulhin Lachhanbati v Bodh Nath,* (1922) 26 Cal WN 565 : 48 IA 485 : 66 IC 551 : AIR 1922 PC 94.

Where section inapplicable

As to leases before the TP Act, it has been said that the doctrine of merger was not recognised by the law of India,[1736] and it is true that as to such leases, section 2(c) makes the section inapplicable.[1737] Both as to leases prior to the TP Act, and to leases to which the section does not apply, the question of merger is decided by the general law under which merger depends upon the intention of the parties.[1738] Accordingly, there is a merger if the conduct of the parties shows that there was no intention to keep the interests apart.[1739] Following this rule, the Calcutta High Court held that there was a merger in a case in which a *putni* interest was purchased by a *zamindar*,[1740] though in an earlier case the same High Court had said that the rule of merger was not applicable to *putnis*.[1741] In two Calcutta cases,[1742] the rule of merger was wrongly applied following a dictum of the Privy Council in *Rajah Kishendatt v Rajah Mumtaz Ali*,[1743] which was a case of accession, and of resumable tenures which fell into the parent estate.

(9) Clause (e)—Surrender

A surrender is yielding up of the term of the lessee's interest to him who has the immediate reversion or the lessor's interest.[1744] It takes effect, therefore, like a contract by mutual consent, on the lessor's acceptance of the act of the lessee.[1745] The lessee cannot, therefore, surrender, unless the term is vested in him;[1746] and the surrender must be to a person in whom the immediate reversion expectant on the term is vested.[1747] Thus, a lessee cannot surrender to a receiver in whom the reversion is not vested;[1748] or to a lessor after he has sold,[1749] or mortgaged[1750] the reversion. Nor can the lessee surrender if the lease is for a fixed term, and

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1736. *Womesh Chunder v Raj Narain*, (1868) 10 WR 15; *Jibanti Nath v Gokool Chunder*, (1891) ILR 19 Cal 760, p 764; *Amatoo v Sheikh Muksud*, (1915) 19 Cal WN 435 : 28 IC 314; *Lal Mohomed Sarkar v Jagir Sheikh*, (1909) 13 Cal WN 913 : 2 IC 654; *Prosunno v Jugut Chunder*, (1879) 3 Cal LR 159; *Chandra Singh v Surat Chandra*, AIR 1938 Cal 128; *Lakshan Chandra v Birendra Kumar*, (1944) 48 Cal WN 837.

1737. *Hirendra Nath v Hari Mohan Ghosh*, (1914) 18 Cal WN 860 : 22 IC 966; (referred to by the Privy Council in *Dulhin Lachhanbati v Bodh Nath*, AIR 1922 PC 94 as being a valuable review of decisions on this branch of Indian law); *Raja Bejoy Singh v Turini Charan*, (1935) 39 Cal WN 694.

1738. *Dulhin Lachhanbati v Bodh Nath*, 48 IA 485 : 26 Cal WN 565 : 66 IC 551 : AIR 1922 PC 94 citing *Ingle v Vaughan*, (1900) 2 Ch 368; *Lakshan Chandra v Birendra Kumar*, (1944) 48 Cal WN 837; *Satar Mohammad v Saraf-ud-Din*, AIR 1962 J & K 79; and see *Raju Singh v Nagendra Nath*, AIR 1954 Cal 219.

1739. *Ram Bissen Dutt v Haripada*, (1919) 23 Cal WN 830 : 51 IC 389; *Promotha v Kishore*, (1916) 21 Cal WN 304 : 38 IC 547; *Amatoo v Sheikh Maksud*, (1915) 19 Cal WN 435 : 28 IC 314; *Prosonno v Jugut Chunder*, (1879) 3 Cal LR 159 : (1935) 39 Cal WN 692.

1740. *Promotho Nath v Kali Prasann*, (1901) ILR 28 Cal 744.

1741. *Jibanti Nath v Gokool Chunder*, (1891) ILR 19 Cal 760.

1742. *Surja v Nanda Lal*, (1906) ILR 33 Cal 1212; *Ulfat Hussain v Gayany Das*, (1909) ILR 36 Cal 802 : 3 IC 994, both dissented from in 18 Cal 802 : 3 IC 994, both dissented from in 18 Cal WN 860.

1743. *Rajah Kishendatt v Rajah Mumtaz Ali*, (1879) ILR 5 Cal 198 : 6 IA 145.

1744. Co Litt, 337b. See *Shah Mathurdas Maganlal & Co v Nageppu Shankarappa Malage*, AIR 1976 SC 1565; *Kamlabhai v Mangilal Dulichand Mantri*, (1987) 4 SCC 585, p 597.

1745. *Heera Lall Pal v Neel Monee Pal*, (1873) 20 WR 383; *Judoonath v Schoene Kilburn & Co*, (1884) ILR 9 Cal 671; *Balaji Sitaram v Bhikaji Soyare*, (1884) ILR 8 Bom 164, p 167; *Krishna v Lakshminaranappa*, (1892) ILR 15 Mad 67; *Gardner v Ingram*, (1889) 61 LT 729 (the words "take notice that I intend to surrender" do not effect a surrender); *Sudhir Kumar v Phanindra Kumar*, (1958) 62 Cal WN 176.

1746. *Walter v Yalden*, (1902) 2 KB 304; *Venkataramanier v Ananda Chetty*, (1871) 5 Mad HC 120.

1747. *Edwards v Wickwar*, (1866) LR 1 Eq 403.

1748. *Cornish v Searell*, (1828) 8 B & C 471, p 476.

1749. *Ramachandra v Sheikh Hussain*, (1901) 3 Bom LR 679.

1750. *Havu v Ganapati*, (1930) 32 Bom LR 679 : 125 IC 689 : AIR 1930 Bom 329; *Robbins v Whyte*, (1906) 1 KB 125.

contains a clause expressly forbidding surrender.[1751] Where there are several lessees, one of them can surrender in favour of the lessor, in which case the lessor will be entitled to be called for partition of that interest alone.[1752] In a Gujarat case, the question arose whether, after the surrender of tenancy rights by the husband (who was admittedly the contracting party in the matter of agreement of lease), the wife, of her own, had any right to the premises. It was held that after a voluntary surrender by the husband, the wife had no legal right to be on the premises and, in the eye of the law, she was a trespasser and liable to be evicted in a suit for eviction.[1753]

Surrenders are either express or implied. This clause deals with express surrenders, and the next clause with implied surrenders.

Express surrender

In England, express surrenders are required by the Statute of Frauds to be in writing. No such formality is necessary in India.[1754] A deed of surrender need not be registered, if there are *facts de hors*.[1755] No particular form of words is essential to make a good surrender.[1756] In England, the words generally used are "surrender, grant and yield up," but they are not necessary if the intention to surrender is sufficiently expressed. Some local Acts provide for a written surrender in the case of agricultural tenancies.[1757]

An express surrender takes effect at once, and there can be no surrender in the future.[1758] But an agreement to surrender becomes effective as an implied surrender when the estate is yielded up; and such an agreement can be enforced by specific performance. But delivery of possession is necessary, and so an insufficient notice to quit accepted by the landlord does not operate as a surrender if the lessee remains in possession after the notice.[1759] When the parties surrendered the tenancy and substituted it by a fresh arrangement, it was held that merely the fact that physically the possession was not handed over, is not of much consequence.[1760] Creation of a subsequent usufructuary mortgage in favour of the tenant does not determine prior lease by merger. But where the mortgage-deed expressly mentions delivery of possession and the tenant mortgagee agrees to pay the market rent and not the fixed rent, the prior lease is determined by express surrender.[1761] Where the lessee, by a letter, intimates surrender of lease on a certain future date, no writing by the landlord is necessary as a token of acceptance. But if, after expiry of the date of surrender, the lessee continues in possession and the lessor gives to the lessee a notice to quit by the end of the next month, it indicates that the lessor has not acted on the surrender.[1762] Where tenant validly surrenders a portion of the lease-hold property, ie, a portion in possession of sub-tenant, the sub-tenant is bound by the surrender, and must deliver possession of the portion in his occupation to the landlord. But the lessee, having parted with a part of the interest in the property in favour of the sub-lessee, cannot surrender that part of the property which is in the possession of the sub-lease. He cannot restore possession of the same to the lessor. This is apart from the fact

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1751. *Jotindra Mohun v Emam Ali,* (1909) 9 Cal LJ 632 : 2 IC 633.
1752. *Rasappa Gounder v G N Ramaswamy,* AIR 1975 Mad 386, (1975) 2 Mad LJ 157.
1753. *Sumatilal Sarabhai v Manorama Jayantilal Shah,* (1977) Guj LR 512.
1754. *Imambandi Begun v Kamleswari Pershad,* (1894) ILR 14 Cal 109, p 119 : 13 IA 160.
1755. *Singeshwar Jha v Ajab Lal,* 190 IC 746 : AIR 1941 Pat 142.
1756. *Bhutia Dhondu v Ambo,* (1889) ILR 13 Bom 294.
1757. *Ram Singh, M S v B S Surana,* (1972) 76 Cal WN 217 : AIR 1972 Cal 190.
1758. See Madras Rent Recovery Act, 1889.
1759. *Johnstone v Hudlestone,* (1825) 4 B & C 922.
1760. *Kamlabai v Mangilal Dulichand Mantri,* (1987) 4 SCC 585, p 660; approving *Foster v Robinson,* [1950] 2 All ER 342.
1761. *Nand Lal v Ramji Lal,* AIR 1981 Raj 243.
1762. *Gosto Behare Ray v Ramesh Chandra Das,* AIR 1978 Cal 235 : 82 Cal WN 617.

that he can terminate the contract of lease, only as a whole, and not in respect of a part of it.[1763] Where conditions in the mortgage deed established surrender of tenancy rights for all time to come, no suit for eviction is maintainable, and the only remedy available to the landlord is to fall back upon his title as mortgagor and file suit for redemption of mortgage, and claim possession of suit house on the strength of mortgage deed.[1764]

(10) Clause (f)—Implied surrender

The principle which governs the doctrine of implied surrender of a lease is that when certain relationship existed between two parties in respect of a subject matter and a new relationship has come into existence regarding the same subject matter, the two sets cannot co-exist, being inconsistent and incompatible between each other, ie, if the latter can come into effect only on termination of the former, then if it would be deemed to have been terminated in order to enable the latter to operate. A mere alteration or improvement or even impairment for the former relationship would not ipso facto amount to implied surrender. It has to be ascertained on the terms of the new relationship vis-a-vis the erstwhile demise, and judge whether there was termination of the old jural relationship by implication.[1765]

Implied surrender or surrender by operation of law occurs—

(1) by the creation of a new relationship; or

(2) by relinquishment of possession.

The clause has been applied as embodying a rule of justice, equity and good conscience to agricultural leases.[1766]

Surrender of part of a tenancy does not amount to implied surrender of the entire tenancy. Likewise, the mere increase or reduction of rent also will not necessarily import a surrender of an existing lease, and the creation of a new tenancy.[1767] In *Manik Lal v Ravindra Kumar Gupta*,[1768] a tenancy was for a fixed period of 25 years, but the lessor pleaded that since the entire amount has been adjusted, the fresh tenancy would commence with enhanced rent. In such cases the mere acceptance of fresh tenancy by the tenant would not result in automatic determination of lease as implied surrender

In English law, delivery of possession by the tenant to a landlord and his acceptance of possession affects a surrender by the operation of law. It is also called implied surrender in contradistinction to express surrender which must be either by deed, or in writing. Directing the occupier to acknowledge the landlord as his landlord, ie, to attorn to the landlord, is a sufficient delivery of possession by the tenant to the landlord. Under the illustration to clause (f) of section 111 of the TP Act, there would be an implied surrender of the former lease if a lessee accepts from his lessor new lease of the property leased, taking effect during the continuance of the existing lease. This illustration is, however, not exhaustive of the cases in which there may be an implied surrender of the lease. There can be an implied surrender if the lessor grants a new lease to a third person with the assent of the lessee of the existing lease, who delivers the possession to such person, or where the lessee directs his sub-tenant to

1763. *Tirath Ram Gupta v Gurubachan Singh*, AIR 1987 SC 770.
1764. *Balkrishna Biharilal v Ushabai*, AIR 2003 MP 539 (NOC) : 2003 AIHC 2895.
1765. *T K Lathika v Seth Karsandas Jamnadas*, (1999) 6 SCC 632 : AIR 1999 SC 3335; *State of Rajasthan v Bhilwara Spinners Ltd*, AIR 2001 Raj 184 : (2001) 4 WLC 14 : (2001) 2 WLN 536.
1766. *Kuriminaidu v Padmanabham*, AIR 1964 Pat 539.
1767. *Krishna Kumar Khemka v Grindlays Bank PL*, (1990) 3 SCC 669, 677 : AIR 1991 SC 899, p 904; *N M Pormiah Nadar v Smt Kamalakshmi Ammal*, (1989) 1 SCC 64 : AIR 1989 SC 467.
1768. *Manik Lal v Ravindra Kumar Gupta*, AIR 2013 Pat 137 : LNIND 2013 PAT 54 : 2013 (128) All Ind Cas 328.

pay the rent directly to a lessor.[1769] Where the lessee becomes the mortgagee, his rights as lessee remain in abeyance so that the larger rights as a mortgagee come into effect; his rights as lessee are restored when the mortgagee right comes to an end.[1770] A surrender by one of the several joint lessee's is valid only as to his share,[1771] Where only some of the heirs of the lessor made a surrender, but the other heirs were never made parties to the suit, nor did they come up to assert their tenancy rights and had never paid any rent, it can be presumed that they had impliedly surrendered their tenancy rights, if any.[1772] The fact that co-tenants did not defend their rights by paying rent to the landlord and obtaining rent receipts in their own names prior to the filing of written statement, could not amount to implied surrender.[1773] Where there is a parol agreement to vary the rent stipulated in a registered lease for a term and there is no intention to create a new lease, there is no implied surrender to the earlier lease. In view of section 17(l)(b), Registration Act, 1908, the lessor is not (in the absence of a registered deed varying the rent) entitled to rent at enhanced rate.[1774]

The illustration to clause (f) of section 111 of the TP Act is not exhaustive of the cases in which there may be an implied surrender of the lease. Just as under the English law, there can be an implied surrender, under the law of transfer of property in India, if the lessor grants a new lease to a third person with the assent of the lessee under the existing lease who delivers the possession to such person, or where the lessee directs his sub-tenant to pay the rent directly to the lessor.[1775]

New relationship

If the lessee accepts a new lease, that in itself is a surrender of the old lease, for the new lease could not be granted, unless the old was surrendered.[1776] Such surrender can also be implied from the consent of the parties, or from such facts as the relinquishment of possession by the lessee, and taking over possession by the lessor.[1777] This has been put on the ground of estoppel, and surrender by operation of law has been said to be "an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing and which could not have been done if the particular estate continued to exist";[1778] and as the surrender is founded upon estoppel, the intention of the parties is immaterial. It does not matter that the old lease is by deed and the new one by parole,[1779] and a new lease of a part will operate as a surrender of that part of the old lease.[1780] However, the new lease must be immediately operative, and the surrender is void if the new lease proves to be void.[1781] Where

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1769. *P M C Kunhiraman Nair v C R Naganatha Iyer,* AIR 1993 SC 307, p 311.
1770. *Mallikarjuriaiah v Shivanna,* AIR 1973 Mys 40; *N V Hendre v B S Kathuwale,* AIR 1996 SC 368; for a different opinion see *A Arumugam Chettiyar v Lokanayakmma,* AIR 1997 SC 280.
1771. *Rindu v Vithoba,* AIR 1931 Nag 159.
1772. *Madhubala v Budhiya,* AIR 1980 All 266.
1773. *Indira Sharma v Gopal Dass,* AIR 1985 Del 118, p 122.
1774. *D S Commercial Private Ltd v S S Jain Sabhai,* AIR 1984 Cal 194.
1775. *P M C Kunhiraman Nair v C R Naganatha Iyer, (*1992) 4 SCC 254, p 261; *Konijeti Venkayya v Thammana Peda Venkata Subbarao,* AIR 1957 AP 619, pp 624, 625; *Noratmal v Mohanmal,* AIR 1960 Raj 89, p 90; See *Halsbury's Laws of England,* 4th edn, vol 27, paras 444, 445, 446 and 450.
1776. *Crowle v Vitty,* (1852) 7 Exch 319; *Upendra Singh v Meghnalli Singh,* (1939) ILR 18 Pat 370 : 163 IC 56 : AIR 1939 Pat 598; *Mahomed Ibrahim v Beni Madhav,* (1952) ILR 2 Cal 175 : AIR 1951 Cal 126; *A Sulaikha Beevi v K C Mathew,* AIR 2001 Ker 177 : (2001) 1 KLJ 221.
1777. *Amar Krishna v Nazir Hasan,* (1939) ILR 14 Luck 723 : 183 IC 821 : AIR 1939 Oudh 257.
1778. *Lyon v Reed,* (1844) 13 M & W 285, p 306; *Fenner v Blake,* (1900) 1 QB 426.
1779. *Dodd v Acklom,* (1843) 6 Man & G 672.
1780. *Carnarvon (Earl) v Acklom,* (1844) 13 M & W 313, p 342.
1781. *Deo d Berkeley (Earl) v York (Archbishop),* (1805) 6 East 86; *Zick v London United Tramways Ltd,* (1908) 2 KB 126, p 132 (CA); *Ramunni v Kerala Varma Valia Raja,* (1892) ILR 15 Mad 166; *Jamini Mohan v Debendra,* 71 IC 976 : AIR 1924 Cal 355; *Munnuswamy v Mumramiah,* AIR 1965 AP 167; *Mahindra & Mahindra Ltd v Kohinoor Debi,* AIR 1989 200 (NOC); *Subhash Kumar Lata v R C Chhiba,* (1988) 4 SCC 709, p 719.

the rent control Act was silent with regard to any procedure prescribed for surrendering the tenancy, it was held that the provisions of section 111(f) providing for implied surrender were not excluded.[1782] When a new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease. In the case of a surrender implied by law from the acceptance of a new lease, the condition ought also be implied by law, making void the surrender in case the new lease should be made void. Thus, where the sanction obtained from the rent Controller was vitiated by fraud and, therefore, a nullity, the Supreme Court held that it could not be said that by reason of the tenants having agreed to take limited tenancy rights under the order of the rent Controller for a period of two years, they must be deemed to have impliedly surrendered their earlier tenancy rights as envisaged under clause (f) of section 111 of the TP Act.[1783]

ILLUSTRATION

A, the karnavan of a Malabar tarvad, grants a lease for years to *B*. *A* then grants a perpetual lease to *B* which if valid would have implied a surrender of the lease for years. But the perpetual lease was in excess of *A*'s powers, and it was set aside by *A*'s successor. But *A*'s successor could not evict *B* as a trespasser, for the surrender being invalid, *B* was entitled to hold until the expiry of the lease for years.[1784]

There is an implied surrender if the lessor grants a new lease to his lessee to take effect during the continuance of the existing lease as in the illustration to the section. When during the continuance of demise, the lessee executed a fresh lease, this operates in law as a surrender of the original lease.[1785] The execution of a fresh *kabuliyet* will imply the surrender even of a permanent lease.[1786] There is an implied surrender when the lessor lets to a new lessee at the request of the first lessee.[1787] However, this rule was held not to apply if the two leases were not incompatible as when the first was a mining lease, and the second, a lease for coffee planting.[1788] Where the parties entered into a compendious lease covering both the portions which were previously leased out, it was held that there was no escape from the conclusion that two earlier leases were thereby surrendered, since there cannot co-exist a lease for the two portions together, as well as two other separate leases of these two portions.[1789] On the other hand, an agreement regarding a change in the rent which does not import a new demise will not operate as a surrender.[1790] There is no inflexible principle that every variation of the rate of rent payable under a registered deed of lease necessarily implies surrender of the said lease and creation of a new tenancy, or whenever the rate of rent is altered a new

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1782. *Anjuman-E-Islamiah v State of Andhra Pradesh*, AIR 1994 AP 28 (NOC).
1783. *Subhash Kumar Lata v R C Chhiba*, AIR 1989 SC 458, p 464 referring *Deo d Earl of Egrmont v Courtenay*, [1848-60] All ER Rep 685.
1784. *Ramunni v Kerala Vanna Valid Raja*, (1892) ILR 15 Mad 166.
1785. *Shantilal v Jogendra Nath*, AIR 1948 Pat 407; *Venkayya v Subbarao*, AIR 1957 Pat 619.
1786. *Tika Ram v Deoji Maharaj*, (1934) All LJ 674 : 152 IC 189 : AIR 1934 All 787; *Bhikaji Vishnu v Ramchandra Krishna*, AIR 1944 Bom 210; *Suruj Bhan v Hafiz Abdul*, (1944) 43 Punj LR 75 : 195 IC 291 : AIR 1944 Lah 1; *Mohammad Yusuf v Hafiz Abdul*, AIR 1944 Lah 9.
1787. *Nickells M Atherstone*, (1847) 10 KB 944; *Wallis v Hands*, (1893) 2 Ch 75; and see *Noratmal v Mohanlal*, (1966) ILR 16 Raj 57 : AIR 1966 Raj 89.
1788. *Manavadan v Parry & Co*, (1925) ILR 48 Mad 815 : 90 IC 729 : AIR 1925 Mad 1277.
1789. *Manmatha Krishna Mitra v Dena Bank*, AIR 1992 Cal 362, p 365; *Mahindra & Mahindra Ltd v Kohinoor Debi*, AIR 1989 Cal 200 (NOC)—holding that the paramount question for consideration would be whether the parties intended only to introduce some alteration in the old lease or to create a new one.
1790. *Goppulal v Dwarkadhieeshji*, [1969] 3 SCR 989 : AIR 1969 SC 1291 : [1969] 2 SCJ 810 : (1969) 2 SCC 792; *Crowly v Vitty*, (1852) 7 Exch 319; *Deo d Monck v Gee Kie*, (1844) 5 QB 841; *Jamini Mohan v Debendra*, 71 IC 976 : AIR 1924 Cal 355; *Sankar Lal Narayan Prasad v Satya Narayan Berlia*, AIR 1987 Cal 221, p 224.

relationship between the parties gets created. It is a question of fact to be determined.[1791] There is an implied surrender when the lessee accepts an offer inconsistent with the lease, eg by remaining in possession as a servant, for the possession of the servant is that of the master.[1792] It was held by the Delhi High Court that there is an implied surrender of a lease when the lessee takes a usufructuary mortgage of the demised premises.[1793] Surrender amounts to the yielding up of a term by the tenant of his landlord. There must be delivery of possession by the tenant to the landlord, and the acceptance of possession by the landlord. It is a mutual act between the landlord and the tenant. When the government takes possession under a requisition order, there is no such mutuality, because they take possession both from the landlord and the tenant.[1794]

Relinquishment of possession

Relinquishment of possession operates as an implied surrender, if there is—(1) an yielding up by the lessee; and (2) an acceptance of possession by the lessor. There must be a taking of possession, not necessarily a physical taking, but something amounting to a virtual taking of possession.[1795] Whether this has occurred, is a question of fact. Thus, if the lessor says he will give up his claim for rent if the lessee gives up possession in the middle of the quarter, and the lessee then gives the keys to the lessor who accepts them, the lease is terminated to surrender.[1796] So also, when after a dispute as to rent, the lessee returns the key to the lessor who accepts them;[1797] or when the lessee says that she will quit immediately and the lessor replies that she may go when she likes, and the lessee quits and the lessor re-enters.[1798] But leaving the keys with the lessor is not sufficient, unless the lessor accepts them as a symbol of possession. Thus, there was no surrender when the lessee left the keys with the clerk of the Official Assignee on the lessor's bankruptcy, and the Official Assignee continued to demand rent;[1799] or if the lessee leaves the keys at the office of the lessor who is unable to return them as he cannot find the lessee.[1800] But if after the keys are left, the lessor at first refuses to accept but afterwards puts up a to-let board on the premises, gives the keys to an agent and paints out the name of the tenant from the front of the house, his conduct shows that he has exercised his option to accept the surrender.[1801] But the fact that the lessor attempts to re-let the house does not necessarily imply acceptance of possession. In a case where the lessee went to America and left the keys with an agent who, not finding a sub-tenant, gave them to the lessor, who attempted to re-let, the lessor had acted for the benefit of both parties, and there was no acceptance.[1802] Nor will acceptance be implied merely from the fact that the lessor entered for repairs after the lessee had quit;[1803] unless the lessor remains in possession for a considerable time, and embarks on works of reconstruction.[1804]

1791. *Savita Dey v N Majumdar,* AIR 1996 SC 272.
1792. *Peter v Kendall,* (1827) 6 B & C 703, p 710; *Vilia Raja v T Vareed,* AIR 1961 Ker 293.
1793. *Lala Devi Singh v Bhagwan Das,* AIR 1972 Del 175.
1794. *Tarabai Jivanlal v Padamchanna,* (1949) 51 Bom LR 797 : AIR 1950 Bom 89.
1795. *Oastler v Henderson,* (1877) 2 QBD 575, p 578 (CA).
1796. *Whitehead v Clifford,* (1814) 5 Taunt 518; *Furnivall v Grove,* (1860) 8 CB (NS) 496.
1797. *Dodd v Acklon,* (1843) 6 Madd & G 672; *Imambandi Begum v Kamleswari Pershad,* (1894) ILR 14 Cal 109, p 119 : 13 IA 160.
1798. *Grimman v Legge,* (1828) 8 B & C 324.
1799. *Cannan v Hartley,* (1850) 9 CB 634; Re *Panther Lead Co,* (1896) 1 Ch 978 (lessor's company liquidator accepts keys without prejudice to his rights under the lease).
1800. *Smith v Blackmore,* (1885) 1 TLR 267.
1801. *Phene v Popplewell,* (1862) 12 CB (NS) 334; *Chengalwaraya v Nataraja,* (1965) ILR 2 Mad 219 : AIR 1966 Mad 19.
1802. *Oastler v Henderson,* (1877) 2 QBD 575.
1803. *Bessell v Landsberg,* (1845) 7 QB 638; *Smith v Blackmore,* (1885) 1 TLR 267.
1804. *Smith v Roberts,* (1892) 9 TLR 77 (CA).

Mere abandonment of possession by the lessee does not amount to surrender. The abandonment must be accompanied by acceptance of surrender on the part of the landlord, though even subsequent acceptance will suffice.[1805] It matters not that the lessor accepts, under a mistaken impression that the lessee is entitled to quit.[1806] If the lessor re-enters in exercise of a right of forfeiture, the lessee's assent to such re-entry does not constitute a surrender.[1807] When tenancy is surrendered and substituted by a fresh agreement, not handing over the physical possession would not be of much consequence.[1808]

Not an assignment

A surrender of a term puts an end to the lessee's rights, and lets in the lessor. It does not operate as an assignment, and so a judgment against the lessee is not *res judicata* against the lessor after the surrender.[1809]

(11) Clause (g)—Amendments

The following amendments have been made in this sub-section by the amending Act 20 of 1929:

After the word "re-enter", the words "or the lease shall become void" have been omitted. These words were misleading, because, even if the condition professed to determine the lease, the lessor could not re-enter in the absence of an express provision to that effect.

The words "or (3) the lessee, is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event" have been inserted to provide for forfeiture in the event of the lessee's insolvency.

The words "any of these cases" are substituted for the words "either case".

A statutory technicality, such as a notice in writing prescribed under section 111(g) is not a rule of justice, equity and good conscience and, as regards cases before the extension of the section to a particular area, the mere institution of a legal proceeding for eviction fulfills the requirement of law. "The conscience of the court needs nothing more and nothing else".[1810]

Lessor can resume possession, only in a manner known to, or recognised by law. A lessor, with the best of title, has no right to resume possession extra-judicially by the use of force from the lessee even after the expiry of earlier termination of the lease by the forfeiture or otherwise. The use of the expression "re-entry" in the lease deed does not authorise extra-judicial methods to resume possession.

On the expiry of the period of lease, the erstwhile lessee continues in possession because of the law of the land, namely that the original landlord cannot physically throw out such an erstwhile tenant by force. He must get his claim for possession adjudicated by a competent court.[1811]

Under the law, the possession of a lessee, even after the expiry or its earlier termination, is judicial possession, forcible dispossession of which is prohibited. A lessee cannot be dispossessed otherwise than in due course of law. The fact that the lessor is the state, does not

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1805. *V P Naidu v Sethu Udayan,* AIR 1974 Ker 132.
1806. *Gray v Owen,* (1910) 1 KB 622.
1807. *Cook & Co v C L Philips,* (1931) 34 Cal WN 785 : 130 IC 222 : AIR 1931 Cal 133.
1808. *Kamlabai v Nagilal Mantri,* AIR 1988 SC 375 : (1987) Mah LJ 1102; *Rasiklal v Govind Pandurang,* AIR 1993 Bom 34, p 39.
1809. *Rajah of Ramnad v Ramanathswami,* (1921) ILR 44 Mad 514 : 63 IC 205 : AIR 1921 Mad 306.
1810. *Rattan Lal v Vardesh Chander,* AIR 1976 SC 588 : (1976) 2 SCC 103 : [1976] 2 SCR 906. (Case relating to Delhi before the TP Act became applicable to Delhi on 1 December 1962.)
1811. *Raptakos Brett & Co Ltd v Ganesh Property,* AIR 1998 SC 3085.

place it in any higher or better position. Therefore, the government cannot appropriate to itself an extra-judicial right of re-entry. Possession can be resumed by the government, only in a manner known to, or recognised by law. It cannot resume possession otherwise than in accordance with law.[1812]

Forfeiture

The right of forfeiture is founded upon the existence of a lease, and the jural relationship of lessor and the lessee as contemplated under section 105. It is implicit that if the lease is in operation, the lessor had been given the right to determine such a lease for committing breach of a covenant or for disclaimer by the lessee or for the insolvency of the lessee, and the happening of any of the three specified events, *ipso facto* does not put an end to the lease, but it only exposes the lessee to the risk of forfeiting his lease, and gives a right to the lessor, if he so elects, to determine the lease.[1813] A lease of an immovable property would stand determined by forfeiture if any of the three conditions enumerated in clause (g) thereof is fulfilled and the lessor gives notice in writing to the lessee of his intention to determine the lease.[1814] Thus, according to this clause, as worded, two things, namely, the happening of any of the specified events, and the giving of the notice by the lessor amount to a forfeiture.[1815]

The forfeiture of a lease requires the operation of two factors—

(1) A breach by the lessee of an express condition of the lease which provides for re-entry on such breach; and

(2) A notice by the lessor expressing his intention to determine the lease.[1816]

Even if the lease is determined by a forfeiture under the TP Act, the tenant under the rent law continues to be a tenant, ie, there is no forfeiture in the eyes of law. The tenant becomes liable to be evicted and forfeiture comes into play only if he has incurred the liability to be evicted under the state rent Act and not otherwise. Once the requirements of rent Act are satisfied, the tenant cannot claim the double protection of invoking the provisions of the TP Act or the terms of the contract.[1817]

The law as to tenancy being determined by forfeiture by denial of the lessor's title or disclaimer of the tenancy has been adopted in India from the law of England, where it originated as a principle in consonance with justice, equity and good conscience. On enactment of the TP Act, the same was incorporated in clause (g) of section 111. The rule is applicable even in areas where TP Act does not apply. However, the principle is not applicable where rent control legislation intervenes, and such legislation while extending protection to tenants from eviction does not recognise such denial or disclaimer as a ground for termination of tenancy and eviction of tenant.[1818] It is settled that even where the leasehold provides for forfeiture, in case of assignment by the lessee, there cannot be any

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1812. *State of Uttar Pradesh v Maharaja Dharmander Prasad Singh,* AIR 1989 SC 997; see also *Orissa Fisheries Development Corpn Ltd v Sudhanshu Sekhar Sahu,* AIR 1994 Ori 158.

1813. *Guru Amarjit Singh v Rattan Chand,* (1993) 4 SCC 349, p 354; *Raghuram Rao v Eric P Mathews,* AIR 2002 SC 797 : (2002) 2 SCC 624; *Amar Promoters, Bangalore v JSA Gajendra,* AIR 2005 (NOC) 423 (Kant).

1814. *Saraf Agencies Pvt Ltd v Kanoria Jute & Industries Ltd,* (2010) 4 CHN 882 (Cal) : (2011) 2 ICC 22; *Haneef Sait v Syed Asif,* (2011) 1 Kant LJ 258 : ILR 2011 Kant 739 : 2011 (1) RCR (Rent) 203.

1815. *Govinda Swamy v Palaniappa,* (1925) 48 Mad LJ 397 : 87 IC 10 : AIR 1925 Mad 833; *Bijoy Chandra v Howard Amla Railway,* AIR 1923 Cal 524 : 72 IC 93 : 38 Cal LJ 177.

1816. *Rattan Lal v Vardesh Chander,* AIR 1976 SC 588 : (1976) 2 SCC 103 : [1976] 2 SCR 906.

1817. *Pradesh Kumar Bajpai v Binod Behari Sarkar,* (1980) 3 SCC 348, p 352; see also *K K Krishnan v M K Vijay Ragavan,* (1980) 4 SCC 88 (where it was held that where rent Acts provide for grounds for eviction, same cannot be resisted on basis of rights conferred under TP Act).

1818. *Sheela v Firm Prahlad Pai Prem Prakashi,* (2002) 3 SCC 375 : AIR 2002 SC 1264.

forfeiture and automatic resumption by the lessor without notice to the lessee to determine the lease. The breach of condition of the lease only makes the lease voidable. Therefore, forfeiture is not complete unless and until the lessor gives a notice to the lessee that he wishes to exercise his option to determine the lease.[1819] Where the lease was for 30 years, and did not stipulate a forfeiture clause in the lease, the Supreme Court held that the contractual tenancy would subsist under the provisions of the TP Act, and eviction cannot be claimed against a contractual tenant during the subsistence of the lease.[1820]

Under the terms of the lease given by the Delhi Improvement Trust, the building erected on the land was to be used for residential purpose only and if it was used for any other purpose without approval of the lessor, the lease would become void. The landlord in violation of the terms of the lease, let out the building for commercial purpose. The Delhi Development Authority being the successor of the original lessor gave notice to the landlord that since the building was not permitted to be used for commercial purposes, the lease was liable to be terminated. It was held by the Supreme Court that the policy of the legislature, which enjoined that no person shall convert a residential building into a non-residential building except with the permission of the Rent Controller,[1821] was put to end unauthorised use of the leased lands, rather than merely to enable the authorities to get back possession of the leased lands. The lease is not forfeited in such cases merely because the building put upon the leased land is put to unauthorised use.[1822]

Termination by lessee

There is no provision in the TP Act, empowering the lessee to terminate the lease for a breach of covenant by the lessor.[1823] A written agreement is necessary and in absence of any written agreement between the landlord and the tenant, lease cannot be determined by way of forfeiture, but as a necessary corollary, the tenant would not be entitled to the protection of section 114 as against forfeiture.[1824]

Condition

The word "condition" is not used in this section in the same sense as in English law, and overlaps what is called a "covenant" in English law. A condition puts a bridle or restraint on the estate granted. Thus, in a lease which stipulated and conditioned that the lessee would not assign except to his wife and children,[1825] these words indicated that the lease could be determined for breach of the conditions. But a covenant only imports an agreement. Thus, in a lease where the lessee "hereby agrees that he will not underlet the premises without the consent in writing of the landlord", these words are a covenant, the breach of which gives the lessor only the right to recover damages or obtain an injunction.[1826]

Section 111(g) does not make any distinction between a condition, and a covenant.[1827] Irrespective of whether the provision was a condition or a covenant, the lease enures despite the breach, unless the lessor determines it. This he does by enforcing a right of re-entry. The

1819. *Meenakshi Jain v State,* AIR 1998 MP 78.
1820. *Modern Hotel v K Radhakrnaiah,* AIR 1989 SC 1510, p 1513.
1821. East Punjab Urban Rent Restriction Act, 1949, sections 11, 14.
1822. *Faquir Chand v Sri Ram Rattan Bhanot,* AIR 1973 SC 921, p 924; See also *Rai Chand Jain v Chandra Kanta Khosla,* AIR 1991 SC 744, p 752.
1823. *Hans Raj v Hardev Singh,* AIR 1984 P& H 229, dissenting from *Rattal Lal v Chanbasappa,* AIR 1978 Bom 216.
1824. *Anil Kumar Keshav Dev v Kishan Lal Shyam Lal,* AIR 2012 All 156 : LNIND 2012 ALL 55 : 2012 (6) ADJ 316 : 2012 (92) ALR 815.
1825. *Deo d Henniker v Watt,* (1828) 8 B & C 308.
1826. *Shaw v Coffin,* (1863) 14 CB (NS) 372.
1827. *Peter Alan Basil v East India Pharmaceutical Works Ltd,* AIR 1976 Cal 182.

words which have been omitted from the section, ie, "or the lease shall become void" referred to a condition in the strict sense in which it is understood in English law. Nevertheless, it was held that "void" must be construed as voidable,[1828] and that the breach of a condition did not involve forfeiture, unless the lease expressly so provided.[1829] In a Calcutta case,[1830] there was an express condition against alienation, but its breach was held not to work a forfeiture in the absence of a provision giving a right of re-entry. Conditions making the lease void on their breach are also construed in English,[1831] as well as Indian[1832] cases as making the lease voidable at the option of the lessor. However, the condition or covenant must be an express condition. This has been said to mean so expressed that the court can be certain that it was part of the stipulation between the parties.[1833] If the covenant to pay rent is express and a proviso for re-entry is annexed, non-payment of rent will support a forfeiture.[1834] But in the absence of such a proviso, forfeiture will not be incurred by the breach of an express covenant either to pay rent, or not to assign or sub-let.[1835] Where one of the two partners on the dissolution of the partnership assigns to the other partner his interest in partnership in the premises, it does not amount to a breach of the covenant prohibiting the assignment of the lease.[1836]

A lease may determine in several ways. The parties may provide that it will determine on a particular day. This is provided in clause (a). In clause (b), on the other hand, the lease does not come to an end on the doing of an act, or the happening of an event. It applies where the time is limited conditionally on the happening of some event, and that event happens. In clause (g), the lease is brought to an end by a defeasance clause. That is different from the two clauses (a) and (b). A lease for a term of 99 years granted to a company contained a clause to the effect that in case the company went into liquidation voluntarily or otherwise, the lease shall cease to be operative and the company shall make over the possession of the property to the proprietors. The company went into liquidation. It was held that clause (b) did not apply, as time was fixed. But as there was a condition that on the happening of a particular event, the lease would terminate, there was forfeiture.[1837]

ILLUSTRATION

A leased land to *B* on the following condition:—"You will enjoy the profits from generation to generation by erecting houses upon the land and dwelling thereupon. If you fail to dwell

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1828. *Hiranandhan Ojha v Ramdhar Singh,* (1922) ILR 1 Pat 363 : 69 IC 886 : AIR 1922 Pat 528, following *Davenport v The Queen,* (1877) 3 App Cas 115.
1829. *Allah Ditta v Farz Bibi,* (1914) PR 33 : 23 IC 395.
1830. *Nil Madhab v Narattam,* (1890) I. [illegible] Cal 826; *Krishna Chandra v National Chemical & Salt Works,* AIR 1957 Ori 35.
1831. *Davenport v The Queen,* (1877) 3 App Cas 115; *Reid v Parsons,* (1817) 2 Chit 247 (the term shall cease); *Deo d Bryan v Banks,* (1821) 4 B & Ald 401 (shall be void for all intents and purposes); *Deo d Nash v Birch,* (1830) 1 M & W 402 (shall be null and void); *Quesnel Forks Gold Mining Co v Ward,* (1920) AC 222.
1832. *Hiranandhan Ojha v Ramdhan Singh,* (1922) ILR 1 Pat 363 : 69 IC 886 : AIR 1922 Pat 528.
1833. *Mussa Kutti v Rangachariar,* (1910) 8 Mad LT 238 : 8 IC 309.
1834. *Kristo Nath v Brown,* (1887) ILR 14 Cal 176, p 182; *Mussa Kutti v Rangachariar,* 8 IC 309; *Narayan v Handu,* (1905) 15 Mad LJ 210; *Cutenho v Souza,* (1864) 1 Mad HC 15.
1835. *Tamaya v Timapa,* (1883) ILR 7 Bom 262, p 265; *Narayan Dasappa v Ali Saiba,* (1894) ILR 18 Bom 603; *Madar Saheb v Sannabawa,* (1897) ILR 21 Bom 195; *Parameshri v Vittappa,* (1903) ILR 26 Mad 157; *Netrapal Singh v Kalyan Das,* (1906) ILR 28 All 400; *Miran Bakhash v Aziz Bakhsh,* (1908) PR 53; *Basrat Ali Khan v Manirulla,* (1909) ILR 36 Cal 745 : 2 IC 416; *Sital Prasad v Nawab Dildar,* (1906) I Pat LJ : 133 IC 408; *Mahananda Saratmnani v Saramani,* (1911) 14 Cal LJ 585 : 10 IC 374 : 61 IC 658; *Saraswati v Bharakhanand Textile Mfg Co Ltd,* (1965) ILR Guj 473 : 6 Guj LR 512 : AIR 1967 Guj 36.
1836. *Devarajulu Naidu v Ethirajavatha,* AIR 1950 Mad 25.
1837. *Re Srinath Zaindari,* AIR 1952 Cal 207; but see *Chauthmal v Sardarmal,* (1959) ILR 9 Raj 31 : AIR 1959 Raj 24.

upon the land, you shall have no interest in or connection with the land." *B* failed lo dwell upon the land. Held that as there was no proviso for re-entry, *A* could not forfeit the lease or evict *B*.[1838]

Proviso for re-entry

The proviso for re-entry gives the lessor the option whether he will exercise his right to determine the lease. But even if the condition makes the lease void on its breach, it is voidable, and not void,[1839] and only the lessor can avoid it, for the lessee cannot avail himself of his own wrongful act.[1840] Unless there is an express condition to pay rent at a specified time accompanied by a provision for re-entry in default of such payment, the non-payment of rent will not entail forfeiture.[1841]

The application of the proviso to a particular covenant is a matter of strict construction; and for this reason, a proviso for re-entry on the ground of the lessee's insolvency was held not to apply when the company for which the lessee was the *benamidar* went into liquidation.[1842] A covenant against subletting the premises is not broken by the letting of lodgings,[1843] nor by the subletting of a part of the premises.[1844] But where the entire interest has been transferred by a tenant by separate alienations, the condition against alienation is broken and would work as forfeiture.[1845] A covenant against assignment is not broken, by the sale of a part,[1846] nor by a mortgage,[1847] for a mortgage is an assignment only of an interest in the property, or by a sublease, even though the sublease be for the whole of the unexpired residue.[1848] A proviso for re-entry on breach "of all or any of the covenants hereinafter contained" was held not to apply to covenants contained in a lease before the proviso, even though there were no covenants after the proviso.[1849] Again, when an underlease contained a clause restrictive of sub-letting and also incorporated the covenant of the head lease which contained a proviso for re-entry, but no restriction on subletting, it was held that the proviso was not applicable to the clause restricting sub-letting contained in the sublease.[1850]

The proviso for re-entry may be applicable to negative as well as to positive covenants, ie, both to omission and to acts. The appropriate phrase for positive covenants is "non-performance" and for negative covenants "non-observance".[1851] But after many conflicting decisions, it has been held that failure to perform refers to negative as well as to positive

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1838. *Nubakumar Datta v Trailokya Nath Bose,* 24 IC 354.
1839. *Bowser v Colby,* (1841) 1 Hare 109.
1840. *Deo d Bryan v Bancks,* (1821) 4B & Ald 401, p 406.
1841. *KG Pandit v Narsingdas,* (1950) ILR Nag 870 : AIR 1951 Nag 207.
1842. *Raman Menon v Malabar Forest and Rubber Co Ltd,* (1935) ILR 58 Mad 378 : 68 Mad LJ 269 : 154 IC 445 : AIR 1935 Mad 163.
1843. *Deo d Pitt v Laming,* (1814) 4 Camp 73, p 77.
1844. *Wilson v Rosenthal,* (1906) 22 TLR 233; *Cook v Shoesmith,* (1951) 1 KB 752 (CA); *Indraloke Studio Ltd v Santi Debi,* AIR 1960 Cal 609 (there is forfeiture if the whole is sub-let, though only a part with the consent of the lessor).
1845. *P Veda Bhatt v Mahalaxmi Amma,* AIR 1947 Mad 441.
1846. *Dassorathy v Rama,* (1883) ILR 9 Cal 526; *Bansi Das v Jagdip Narain,* (1897) ILR 24 Cal 152; *Kundanlal v Kallu,* (1914) 12 All LJ 650 : 24 IC 79; *Venkataramana v Krishna,* (1925) 47 Mad LJ 307 : 81 IC 1006 : AIR 1925 Mad 57; *Grove v Portal,* (1902) 1 Ch 727; *Church v Brown,* (1808) 15 Ves 258; *Swarnamoyee Debee v Aoyajaddi,* (1932) ILR 60 Cal 47 : 36 Cal WN 819 : 139 IC 239 : AIR 1932 Cal 787.
1847. *Ansur Subba v Secretary of State,* (1917) Mad WN 794 : 41 IC 720.
1848. *Hunsraj v Bejoy Lal Seal,* (1930) ILR 57 Cal 1176 : 57 IA 10 : 122 IC 20 : AIR 1930 PC 59.
1849. *Deo d Spencer v Godwin,* (1815) 4 M & S 265.
1850. *Crawley v Price,* (1875) LR 10 QB 302.
1851. *Evans v Davis,* (1878) 10 Ch QB 302.

covenants.[1852] A proviso for re-entry on breach of any covenant would include both positive as well as negative covenants;[1853] but the court will reject a covenant that is insensible,[1854] or ambiguous.[1855] The lessor must show that there is a breach of the covenant to which the proviso is annexed.[1856] The covenant is construed according to the ordinary rules, and the court must see what the object of the covenant is, and put a fair construction upon it according to the intention of the parties.[1857] For though the law abhors a forfeiture,[1858] yet, as Lord Tennterden said, "Judges are bound to give all instruments their natural construction and attach to them their legal consequences whatever their own inclinations may be".[1859] Thus, where a lease contained a covenant for forfeiture in case of a transfer without the consent of the lessor, a mere unregistered contract by the lessee for sale subject to the sanction of the lessor and putting the intended vendee in possession as an agent and giving him the right to work the quarry and sell lime and stone, was held as not amounting to subletting, but was a transfer of an interest and as the contract was not registered, the transfer was not effective and so there was no breach of the covenant.[1860] Sub-letting, if not prohibited by the contract of tenancy, is not a valid ground for forfeiting the tenancy,[1861] but if it is specifically prohibited, a violation of the same would result in the forfeiture of lease. Thus where the tenant without the permission of the landlady sublets the premises to another person, who is not even his family member to run business in the shop in his independent name, the tenant would be liable to vacate the shop for such unauthorized sub-letting.[1862] Mistake or forgetfulness will not excuse a breach.[1863]

A notice terminating the lease erroneously making a mention of a wrong provision ie, of section 111(g) instead of section 111(h) would not exclude the jurisdiction of Rent Tribunal to entertain petition.[1864]

In absence of a forfeiture clause in the lease agreement, as regards non payment of rent, lessor cannot have a right to re-enter the premises but would be entitled to recovery of rent and its arrears with costs and interest.[1865] There has to be some cogent evidence that rent has not been paid. In absence of any admission as to arrears of rent in written statement nor any admission or any equivalent statement or any other pleadings, non payment of arrears of rent cannot be a ground for entailing for eviction. If there is an admission of existence of arrears of rent it is same as admission as to existence of relationship of lessor and lessee. Even if the lessee is a person who pays the rent with utmost promptitude, eviction can be sought just by delivering a notice under section 106 of TPA.[1866] If he gives a notice for non payment of rent, and the tenant also replied to it, the plea of the tenant that the petition is not maintainable

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1852. *Harman v Ainslie,* (1904) 1 KB 698.
1853. *Wadham v Post Master General,* (1871) LR 6 QB 644, p 648.
1854. *Deo d Wyndham v Carew,* 2 QB 317.
1855. *Chidambara v Manikka Chetti,* (1864) 1 Mad HC 63, p 64.
1856. *Deo d Chandless v Robson,* (1926) 2 C& P 245.
1857. *Goodtitle d Luxmore v Saville,* (1812) 16 East 87; *Croft v Lumley,* (1858) 6 HL Cas 672.
1858. *Deo d Muston v Gladwin,* (1845) 6 QB 953.
1859. *Deo d Davis v Elsam,* (1828) Mood & M 189.
1860. *Secretary of State v Kuchwar Lime & Stone Co,* 65 IA 45 : (1938) All LJ 72 : 40 Bom LR 292 : 42 Cal WN 593 : (1938) 1 Mad LJ 209 : 172 IC 443 : AIR 1938 PC 20.
1861. *Isha Valimohmed v Haji Gulam Mohomed,* AIR 1974 SC 2061 : (1974) 2 SCC 484.
1862. *Hiroo Bisht v District Judge, Almora,* AIR 2011 Utr 82.
1863. *Eastern Telegraph Co v Dent,* (1899) 1 QB 835.
1864. *National Textiles Corporation Ltd v Rent Control Appellate Tribunal, Jaipur,* AIR 2011 (NOC) 374 (Raj).
1865. *Bharati Shetty v B Hanumanthappa,* AIR 2013 Karn 165.
1866. *Taste Hotels Pvt Ltd v Medisetty Jayasri,* AIR 2012 AP 4 : LNIND 2011 AP 485 : 2011 (5) Andh LD 508 : 2011 (2) Rent LR 652.

in absence of a valid notice would not be entertained and the order for release of the premises would be proper.[1867] The complete destruction of the subject of the lease ie, the building/ superstructure and the destruction of the underlying land in a lease deed will affect leasehold rights.[1868] In *Ramiya v Government of Tamil Nadu,*[1869] the landlord sought eviction on ground of construction of permanent structure by the tenant without his consent and for recovery of arrears of compensation towards damages. As per the report of the commissioner, extensive damage was caused to the premises that were given on lease. He estimated, calculated and awarded Rs 50,000 to the landlord. The same however was reduced by the appellate court on an appeal by the tenant without following any evidence to Rs 25000. On an appeal to the Madras High court, it was held that this reduction was not proper.

In *Ferrazzini's Bakery v Amitava Mitter,*[1870] there were concurrent findings regarding damage of suit property, making of new constructions and creation of sub-tenancy, and it was held that the termination of lease would be proper and the tenants would be liable for eviction. Where the tenant claimed that the partnership business was run in shop with consent of the landlord, the burden of proving the consent on part of the landlord would be on the tenant and not on the landlady.[1871]

Disclaimer or denial of landlord's title

Disclaimer or denial of the landlord's title is a ground for forfeiture. The section adopts the definition of disclaimer by CJ Tindal, in *Deo d Williams and Jeffery v Cooper*[1872]—"A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself." The Supreme Court has held that to constitute a denial of title of the landlord, a tenant should renounce his character as tenant and set up title or right inconsistent with the relationship of landlord and tenant, either in himself, or in a third person. In the case of derivative title of the landlord, in the absence of a notice of transfer of title in favour of the landlord or attornment of tenancy, a tenant's assertion that the landlord is a co-owner does not amount to denial of his title, unless the tenant has also renounced his relationship as a tenant.[1873]

This is only a particular application of the general principle of law that a man cannot approbate and reprobate, or, as it is more familiarly expressed, he cannot blow hot and cold.[1874] It had, therefore, been acted upon before the TP Act was enacted.[1875] It has been held[1876] in cases where the section was not applicable, that there would be no forfeiture unless the disclaimer was in a judicial proceeding or other public document; this decision is no longer good law as the Supreme Court has held in *Mohammed Amir v Municipal Board,*[1877] "the implication is a repudiation of it. An omission to acknowledge the landlord as such, by requesting further information, will not be enough." Refusal to pay rent is not in itself a

1867. *Dharampal v Prabha Rani Gupta,* AIR 2014 (NOC)122 (Utr).
1868. *Shaha Ratansi Khimji & Sons v Kumbhar Sons Hotel Pvt Ltd,* (2014) 14 SCC 1.
1869. *Ramiya v Government of Tamil Nadu,* AIR 2013 (NOC)42 (Mad).
1870. *Ferrazzini's Bakery v Amitava Mitter,* AIR 2013 Cal 104 : LNIND 2013 CAL 70 : 2013 (3) Cal HN 116 : 2013 (2) ICC 460.
1871. *Hiroo Bisht v District Judge, Almora,* AIR 2011 Utr 82.
1872. *Deo d Williams and Jeffery v Cooper,* (1840) 1 Man & G 135.
1873. *C Chandramohan v Sengottaiyan,* (2000) 1 SCC 451 : AIR 2000 SC 568.
1874. *Gurdevi v Sham Lal,* AIR 1946 Lah 330, following *Maharaja of Jeypore v Rukmini,* (1919) ILR 42 Mad 589 : 46 IA 409 : AIR 1919 PC 1 : 50 IC 631.
1875. AIR 1965 SC 1923, [1966] 1 SCJ 484.
1876. *Md Hafiz Vila v United Provinces,* AIR 1945 All 285.
1877. *Mohammed Amir v Municipal Board,* (1836) 1 M & W 695, p 703.

disclaimer, but it may be evidence of a disclaimer.[1878] Accordingly there is no disclaimer if the lessee refuses to pay rent until he knows who is the right owner,[1879] or until he is satisfied as to the lessor's title to receive the whole rent.[1880] Nor will the denial of the title of an assignee of the original lessor work a forfeiture of the tenancy.[1881] It would appear that if a tenant denies title of the landlord mistakenly, the protection under the rent Act would continue. A mere statement of the tenant that he was not aware in the particular set of facts as to who was his landlord is not to say that he ever denied title of his landlord. Mere non-response of the notice to pay arrears of rent is not an expressed declaration of denial of title.[1882] By a mere denial of title of the landlord by the tenant of the premises and setting up title in himself, the tenancy does not automatically stand terminated under section 111(g). The landlord must choose this conduct of the tenant, and forfeit his tenancy right by giving a notice in writing to the lessee of his intention to determine the lease. Disclaimer of owner's title by a tenant protected by rent legislation will not result in termination of his tenancy.[1883] So long as the tenant accepts the relationship of landlord and tenant, the question of title, as such, is immaterial. A person may not be the owner, and may yet be the landlord. If there is no repudiation of the relationship of landlord and tenant, the question of forfeiture would not arise and a controversy as to the real ownership of the property is immaterial for the purpose of this clause.[1884] If a tenant after admitting tenancy questions the title of the landlord over property, the doctrine of estoppel applies.[1885] In an eviction suit, where there is a question as to the title of the landlord, the tenants must surrender possession of the property before challenging such title.[1886] Section 111 (g) will have an independent operation without being dependant on applicability of rule of estoppel under section 116 of the Indian Evidence Act, that is an enabling provision.[1887] If the denial of title that is not bonafide, is in the written statement or before the Rent Controller, or there is a failure of the tenant to obtain declaration against the landlady about her ownership after selling the premises to her himself, or is on the ground that the suit on the basis of which landlord was claiming title was never put in execution nor acted upon,[1888] determination of lease by forfeiture takes place.[1889] Where

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1878. *Deo d Williams and Jeffrey v Cooper,* (1840) 1 Man & G 135; *Prag Narain v Kadir Bakhsh,* (1913) ILR 35 All 145 : 18 IC 728.
1879. *Deo d Williams v Pasquali,* (1794) Packe 196; *Jones v Mills,* (1861) 10 CB (NS) 788; *Rama Aiyangar v Gurusami,* (1918) 35 Mad LJ 129, p 134 : 46 IC 62; *Venkatachariar v Rangasami,* (1919) 36 Mad LJ 532 : 51 IC 709; *Rukmini v Ravaji,* (1924) ILR 48 Bom 541 : 83 IC 45 : AIR 1924 Bom 454.
1880. *Mallika Dassi v Makham Lal,* (1905) 9 Cal WN 928.
1881. *Abdulla v Mahammad Muslim,* 96 IC 1056 : AIR 1926 Cal 1205; *Farman Bibi v Tasha Haddal,* (1907) 12 Cal WN 587; *Sugga Bai v Smt Hiralal,* AIR 1962 MP 32.
1882. *Munisumi Nuthu v C Runganathan,* (1991) 2 SCC 139, p 140.
1883. *Govindammu v Murugesh Mudaliar,* AIR 1991 Kant 290, p 295; See also *Mugati Subha Rao v P V K Krishnu Rao,* AIR 1989 SC 2187 : (1989) 4 SCC 732; *Hans Raj Bansal v Hardev Singh,* AIR 1984 P & H 229; *Kuldip Singh v Balwant Kaur,* AIR 1991 P & H 291, p 295.
1884. *Brij Kishore v Mushtari Khatoon,* AIR 1976 All 399.
1885. *Sri Gangai Vinaynagar Temple v Meenakshi Ammal,* (2015) 3 SCC 624 : LNIND 2014 SC 892 : 2014 (11) SCALE 654 : 2015 (5) SCJ 558.
1886. *State of AP v D Raghukul Pershad,* (2012) 8 SCC 584 : LNINDORD 2012 SC 431 : JT 2012 (8) SC 375, 2012 (7) SCALE 313.
1887. *Lahu Ingale v Kailash Matasaran Gupta,* AIR 2014 Bom 143 : LNIND 2014 BOM 1307 : 2014 (4) AIR Bom R 705 : 2014 (5) Mah LJ 659.
1888. *Musaraf Hussain v Hazara Bibi,* AIR 2012 (NOC) 42 (Ori); *Firojuddin v Babu Singh,* (2012) 3 SCC 319 : LNIND 2012 SC 81 : AIR 2012 SC (Supp) 103 : JT 2012 (6) SC 48; *Phatu Rochiram Mulchandani v Karnataka Industrial Areas Development Board,* (2015) 5 SCC 244 : AIR 2014 SC 2700 : JT 2014 (4) SC 243.
1889. *Keshar Bai v Chunnulal,* (2014) 11 SCC 438; *Lahu Ingale v Kailash Matasaran Gupta,* AIR 2014 Bom 143 : LNIND 2014 BOM 1307 : 2014 (4) AIR Bom R 705 : 2014 (5) Mah LJ 659; *Lahu Ingale v Kailash Matasaran Gupta,* AIR 2014 Bom 143 : LNIND 2014 BOM 1307 : 2014 (4) AIR Bom R 705 : 2014 (5) Mah LJ 659.

the tenant after the death of the owner of the property had accepted his wife and his son as his landlord and had paid both of them the rent at certain occasions, the suit at the behest of one of the co-owners would be maintainable and the tenant's plea of conflict of interest of the co-owners would not be sustained.[1890]

ILLUSTRATION

A is a tenant of *B*, but *C* claims to be the landlord. *B* sues *A* for rent and *A* in his written statement states—"I have never paid rent to *B*. *C* now claims rent. I am ready to pay whosoever is the rightful owner". This is not a disclaimer which will entitle *B* to evict *A* in a subsequent suit.[1891]

On the other hand, a direct repudiation of his landlord is sufficient,[1892] especially if the tenant executes a *kabuliyet* in favour of another landlord.[1893] In an Orissa case, the lessee sold the leased house to a third person, describing himself as the "owner", thus renouncing his character as a lessee. The lessor gave notice to quit, whose validity with reference to section 106 was questioned. It was held that the lessee's disclaimer which was a ground for forfeiture under section 111(g)(2) coupled with the notice to quit (even assuming that it was not valid under section 106) brought the case within section 111(g)(2), and the suit for eviction was maintainable.[1894] Where a tenant disclaims the title of the lessor, there is forfeiture of the tenancy. Thereafter, if he remains in possession and pays, what he calls, rent or is prepared to pay it, the rent can only be understood, in these circumstances, as money paid towards damages for use and occupation.[1895] The section indicates that although the tenant does not deny that he is a tenant, yet it is a disclaimer if he claims to be a tenant of another landlord.[1896] So a refusal to pay rent accompanied with the words "you are not my landlord",[1897] or "I have no rent for you, I have been ordered to pay no one",[1898] operates as a disclaimer, for this amounts to setting up a title in a third person. Where the trust was the landlord and the tenant denied the status of the trustee who represented the trust, the Madras High Court took the view that this amounted to denial of title in view of the definition of the word "landlord" in section 2(b) of Tamil Nadu Buildings (Lease & Rent Control) Act, 1960, and the tenant was liable to be evicted on that ground.[1899]

A plea set up by the lessee in the written statement in a suit for eviction, denying the relationship of landlord and tenant between the parties, would entail forfeiture under section 111, clause (g), and no notice terminating the tenancy under clause (h) is required.[1900] Where the tenant disputes the title of the landlord by setting up a plea of adverse possession, the lease is forfeited and any defect in the notice to quit given by the lessor to the lessee would not avail the lessee, since the lessor becomes entitled to the possession of the property by reason of forfeiture of the lease.[1901] In cases where eviction suit in a claim for adverse possession were filed under the Transfer of Property Act, equitable relief under O VII rule 7 could be granted. There is a difference in exercise of jurisdiction when the civil court deals with a lis relating to eviction brought before it under the provisions of Transfer of Property

1890. *Narayan Kedia v Prasanta Kumar Patnaik,* AIR 2014 (NOC)203 (Ori).
1891. *Ruhmm v Rayaji,* (1924) ILR 48 Bom 541 : 83 IC 45 : AIR 1924 Bom 454.
1892. *Deo d Gray v Stamon,* (1836) 1 M & W 695.
1893. *Anandamoyee v Lakhi Chandra,* (1906) ILR 33 Cal 339.
1894. *D B Putro v D D Patro,* AIR 1978 Ori 103.
1895. *Boologanathan v Govindarajan,* (1979) 2 Mad LJ 47.
1896. *Hatimullah v Mahomed Arju,* (1928) 32 Cal WN 391 : 113 IC : AIR 1928 Cal 312.
1897. *Deo d Bennett v Long,* (1841) 9 C & P 773.
1898. *Deo d Whitehead v Pittman,* (1833) 2 Nev & M (KB) 73.
1899. *Kumuthi Modalichamy v Thangarathina Nadar,* AIR 1991 Mad 229, p 233.
1900. *Shiv Parshad v Shila Rani,* AIR 1974 HP 2.
1901. *Rachavva v Kariyappa,* AIR 1981 Kant 76.

Act and under any special enactment pertaining to eviction on specified grounds. Needless to say, this court has cautiously added that if alternative relief is permissible within the ambit of the Act, the position would be different.[1902] If the question of title of the property is directly and substantially in issue between parties in an earlier eviction suit, it shall operate as res judicata.[1903] In a Madras case, the owner of land filed a suit for a permanent injunction restraining the lessees from cutting or damaging the trees on the land. The lessees, in the written statement, contended that their fathers and forefathers had planted the trees and reared them with their own labour and at their own expense, and for their own benefit, thereby denying the title of the owner to the trees. It was held that by doing so, they forfeited the right to claim as the lessees, and the lease would stand determined under clause (g) of this section.[1904] If the title of the heir of the landlord is denied, the denial acts as the forfeiture of the lease.[1905] When a proceeding was initiated for eviction of the defendants from the suit land as *adhiars* and they renounced their character as tenant or *adhiar* and claimed title for themselves, it was held that the doctrine of forfeiture under section 111 (g) of the TP Act was clearly applicable to the case.[1906] The repudiation must be clear and unequivocal, whether in pleadings or in any other document; the mere claiming of a higher right by the lessee does not involve forfeiture;[1907] it must be to the knowledge of the landlord.[1908] The denial, if clear and unequivocal, would undoubtedly affect the interests of the landlord adversely and substantially. The tenant merely denying the landlord's title bona fide with the object of seeking information of such title or with the object of having such title established before a court of law so as to protect himself, would not attract the charge of disclaimer.[1909] Denial of a mere derivative title does not amount to disclaimer of title.

An incidental statement in a sale deed referring to other property will not operate as a forfeiture.[1910] The bare statement that there is no relation of landlord and tenant with the lessor may operate as a surrender, but it is not a disclaimer as it does not amount to setting up title, either in a third person, or in the tenant himself.[1911] There is, therefore, no disclaimer

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1902. *Tribhuvanshankar v Amrutlal,* (2014) 2 SCC 788 : LNIND 2013 SC 984 : JT 2013 (14) SC 491 : 2013 (13) SCALE 627.
1903. *Mohd Nooman v Mohd Jabed Alam,* (2010) 9 SCC 560 : LNIND 2010 SC 905 : 2010 (10) SCALE 63 : JT 2010 (10) SC 354.
1904. *Govindaraja Vaniar v Thirusangu Vaniar,* (1991) 94 LW 667.
1905. *Ramrao v Shree Ram,* AIR 1953 All 797.
1906. *Fazal Sheikh v Abdur Rahman Mea,* AIR 1991 Gau 17, p 23.
1907. *Raja Mohammad Amir v Municipal Board,* AIR 1965 SC 1923 : [1966] 1 SCJ 484, in which the court held that *Warner v Sampson,* (1959) 1 QB 297 : [1959] 1 All ER 120, did not apply to India. See also the judgment of MR Lord Denning in that case. See also *Sre Vedapuriswaraswami v Sheik Farid,* AIR 1972 Mad 448; *Kundan Mal v Gurudutta,* (1989) 1 SCC 552, p 555; *Ishwar Singh v Sawarn Singh,* AIR 1986 HP 17, p 20.
1908. *Deo d Gray v Stanion,* (1836) 1 M & W 695, p 703; *Raman Nair v Mariyomma,* (1920) ILR 43 Mad 480 : 56 IC 13; *Sreedharan Valia v Kunhunni,* (1921) 41 Mad LJ 525; *Venkatachariar v Narasimha,* (1918) 35 Mad LJ 647 : 48 IC 301 : AIR 1919 Mad 886; *Rama Aiyangar v Gurusami,* (1918) 35 Mad LJ 129 : 46 IC 62 : AIR 1919 Mad 897; *Prag Narain v Kadir Baksh,* (1913) ILR 35 All 145 : 18 IC 728; *Narayan v Mangesh,* (1932) 34 Bom LR 1287 : 140 IC 567 : AIR 1932 Bom 599; *Hashmat Husain v Saghir Ahmad,* AIR 1958 All 847; *Ram Das v Lachman Janki,* (1961) All LJ 644; *Varalakshmamma v Veeraraghavamma,* AIR 1960 AP 166.
1909. *Nirviikar Gupta v Ram Kumar,* AIR 1992 MP 115, pp 119 : 120; *Khuman Singh v Nathuram,* (1991) MP LR 123; *Mirkhan Natchekhan v Kutub Ali,* (1979) MP LJ 155.
1910. *Kemalooti v Muhamad,* (1918) ILR 41 Mad 629 : 45 IC 743; *Guru Amarjit Singh v Rattan Chand,* (1993) 4 SCC 349, p 354.
1911. *Protap Narain v Biraj Dasi,* (1914) 19 Cal LJ 77 : 20 IC 823; *Annada v Mohim,* (1917) 26 Cal LJ 261 : 42 IC 673; *Hatimullah v Mahamad Arju,* (1928) 32 Cal WN 391 : 113 IC 13 : AIR 1928 Cal 312.

if the tenant mortgages the property, describing himself as the owner;[1912] or describes himself as the owner in proceedings under the Land Acquisition Act.[1913] In a Calcutta case, the tenant had said that he had no relation of landlord and tenant with the lessor and that he was the tenant of another to whom he paid rent, and the court held that this was no disclaimer.[1914] This, it is submitted, is bad law. In a suit for eviction, if the lessee claims to be the tenant, not of the plaintiff but of a third person, and had paid rent to the third person even prior to the suit, it amounts to denial of title of the lessor.[1915] Disclaimer by a lessee who has assigned his term will not affect the interest of the assignee.[1916]

Plea of disclaimer not raised in the plaint cannot be entertained,[1917] unless the parties have chosen to go on trial on an issue of disclaimer framed at the trial.[1918]

Verbal disclaimer

Although there is no case on the point it would seem that under TP Act, a verbal disclaimer is sufficient to support a forfeiture, whether the lease be periodic or for a term of years. But in a case not governed by the TP Act, the disclaimer must be by record.[1919]

Claim to permanent tenancy

There is no disclaimer if the lessee sets up a permanent tenancy, for although he repudiates the particular holding which the lessor attributes to him, he does not question the lessor's right to receive rent, nor does he renounce his character as lessee.[1920] An older Bombay case held that the assertion of a permanent tenancy did operate as a disclaimer.[1921] This was following the English case of *Vivian v Moat.*[1922] But the tenants assertion in *Vivian v Moatwdy,* of a right to hold at a customary rent, which involved a denial of the relationship of landlord and tenant. The Bombay case is, therefore, incorrect and, though not formally overruled, it has not been followed in subsequent decisions, and is no longer an authority. But in a subsequent Bombay case,[1923] J Ranade said:

> It is disclaimer for a yearly tenant, when he claims to be a *mirasi* or permanent tenant, and such a disclaimer need not necessarily be made to the landlord himself.

1912. *Muhammad Mahmad Khan v Laja Mal,* (1934) ILR 15 Lah 683 : 151 IC 289 : AIR 1934 Lah 289; *Prag Narain v Kadir Bakhsh,* 18 IC 728; *Guru Amarjit Singh v Rattan Chand,* (1993) 4 SCC 349, p 355.
1913. *Zia-ud-din v Fakhir-ud-din,* (1923) ILR 4 Lah 160 : 73 IC 791 : AIR 1923 Lah 454.
1914. *Mathewson v Jadu Mahton,* (1908) 12 Cal WN 525.
1915. *Ratanlal v Chanbassappa,* AIR 1978 Bom 216. See also *Hatimulla v Mohomad Arju,* AIR 1928 Cal 312.
1916. *Gopal Jayvant v Shriniwas,* (1918) ILR 42 Bom 734 : 47 IC 635.
1917. *Narendra Nath Govil v Naresh Chand Goyal,* AIR 1992 Raj 126, p 128.
1918. *M Subbarao v PVR Krishna Rao,* AIR 1989 SC 2187, p 2191.
1919. *Gurdevi v Sham Lal,* AIR 1946 Lah 330.
1920. *Mohammad Amir v Municipal Board,* AIR 1965 SC 1923 : [1966] 1 SCJ 484; *Kali Kishen v Golam Aly,* (1886) ILR 13 Cal 3; *Kali Krishna v Golam Aly,* (1886) ILR 13 Cal 248; *Vithu v Dhondi,* (1891) ILR 15 Bom 407; *Dodhu v Madhavrao,* (1894) ILR 18 Bom 110; *Unhamma v Vaikunta,* (1894) ILR 17 Mad 218; *Chinna v Harishchendana,* (1904) ILR 27 Mad 23; *Maharaja of Jeypore v Rukmini,* (1919) ILR 42 Mad 589 : 46 IA 109 : 50 IC 631 : AIR 1919 PC 1; *Ochhavlal v Gopal,* (1908) ILR 32 Bom 78; *Gol Daji v Dod Laxman,* (1920) 22 Bom LR 648 : 58 IC 226; *Rama Ranchhod v Sayad Abdul,* (1921) ILR 45 Bom 303 : 58 IC 226 : AIR 1921 Bom 395; *Amar Krishna v Nazir Hassan,* (1939) ILR 14 Luck 723 : 183 IC 821 : AIR 1939 Oudh 257.
1921. *Baba v Vishvanath,* (1883) ILR 8 Bom 228.
1922. *Vivian v Moat,* (1881) 16 Ch D 730.
1923. *Mahipal v Lakhman,* (1900) ILR 24 Bom 426, p 434.

On both points, it is submitted that this is an incorrect statement of the law.

The assertion of a permanent tenancy by a yearly or monthly lessee does not operate as a waiver of notice to quit, and the cases cited assume that the lessor cannot evict without such notice. This is because a notice to quit is only necessary when a tenancy is admitted on both sides, and it is only when the tenant denies any tenancy that there is no necessity to end that which, he says, has no existence.[1924]

Before suit

The disclaimer must be before the suit is filed to eject the lessee.[1925] This is on the principle that the action must be based on something accruing before the suit, and the rule is followed by all the courts in India, for it has been held that disclaimer in the written statement or after the suit is filed will not support a forfeiture, or dispense with the necessity for notice to quit in the case of a yearly tenancy.[1926] However, a disclaimer in a previous suit operates as a disclaimer so as to support the subsequent suit for ejectment.[1927]

The Supreme Court has, however, approved the observations of the Punjab & Haryana High Court in *Sada Ram*'s case,[1928] to the effect that a denial of title in the written statement cannot be taken advantage of in that suit, but can be taken advantage of only in a subsequent suit to be filed by the landlord, as it would only lead to unnecessary multiplicity of proceedings as the landlord would be obliged to file a second suit for ejectment of the tenant on the ground of forfeiture entailed by the tenant's denial of his character as a tenant in the written statement. The plaint should in that event be amended so as to incorporate the ground of denial of title for the relief on that ground.[1929]

The amendment of the section by the requisition for notice to the lessee makes it clear that the disclaimer must be before notice, and the notice before the suit. In the case of forfeiture, one written notice is required under the law, and not one under section 111 (g), and another under section 114A.[1930]

Agricultural tenancies

In the case of agricultural tenancies, the right of forfeiture for disclaimer depends upon the provisions of the Act governing the tenancy. It was not excluded by the Bombay Land

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1924. *Deo d Calvert v Frowd,* (1828) ILR 4 Beng 557.
1925. *Deo d Lewis v Cawdor,* (1834) 1 Cr M & R 398; *Deo d Bennett v Long,* (1841) 9 C & P 773; *Mela Ram v Sandhi Khan,* (1933) ILR 13 Lah 796 : 141 IC 825 : AIR 1933 Lah 221.
1926. *Maharaja of Jeypore v Rukmini,* (1919) ILR 42 Mad 589 : 46 IA 109 : 50 IC 631 : AIR 1919 PC; *Prannath Shaha v Madhu Khulu,* (1886) ILR 13 Cal 96; *Nizamuddin v Mamtazuddin,* (1901) ILR 28 Cal 135; *Srimati Mallika Dassi v Makham Lal,* (1904) 9 Cal WN 928: *Khater Mistri v Sadruddi Khan,* (1907) ILR 34 Cal 922; *Vithu v Dhondi,* (1891) ILR 15 Bom 407; *Subba v Nagappa,* (1889) ILR 12 Mad 353; *Madavan v Athi Nanjigar,* (1889) ILR 15 Mad 123; *Unhamma v Vaikunta,* (1894) ILR 17 Mad 218; *Ambabai v Bhau,* (1896) ILR 20 Bom 759; *Pratap Narain v Harihar Singh,* (1909) ILR 36 Cal 927 : 2 IC 656; *Haidri v Nathu,* (1895) ILR 17 All 45; *Peria v Subramanian,* (1908) ILR 31 Mad 261; *Chiragh Din v Mahomed Usman,* 70 IC 349 : (1924) All LJ 281; *Mukal Singh v Misra Paras Ram,* 79 IC 106 : AIR 1924 All 726; *Ramayan Prasad v Gulabo Kuer,* AIR 1967 Pat 35. But see *Sada Ram v Gajjan Shiama,* (1970) 72 Punj LR 223 : AIR 1970 P & H 511, a decision based on the principle of the section.
1927. *Debiruddi v Abdur Rahim,* (1890) ILR 17 Cal 196; *Nilmadhab Bose v Ananta Ram,* (1898) 2 Cal WN 755; *Fayj Dhali v Aftabuddin Sirdar,* (1902) 6 Cal WN 575; *Ramgati v Pran Hari,* (1905) 3 Cal LJ 201; *Khater Mistri v Sadruddi Khan,* (1907) ILR 34 Cal 922; *Sheik Maidhar v Rajani,* (1909) 14 Cal WN 339 : 5 IC 708; *Ramji Lal v Shib Charan Das,* (1930) 28 All LJ 908 : 130 IC 638 : AIR 1930 All 479.
1928. *Sada Ram v Gajjan Shiama,* AIR 1970 P & H 511.
1929. *Majati Subbarao v P V K Krishana Rao,* AIR 1989 SC 2187, 2190.
1930. *Prabhat Chandra v Bengal Central Bank,* (1938) ILR 2 Cal 434 : 42 Cal WN 761 : AIR 1938 Cal 589.

Revenue Code;[1931] nor by the Bengal Act 8 of 1869.[1932] But it is excluded by the Bengal Tenancy Act 8 of 1885.[1933] When the right of forfeiture has not been excluded by the local Act it has been applied on the principle of English law,[1934] and even in the case of a permanent tenancy.[1935] But when the relationship is not that of a landlord and tenant, but of a grantor and grantee, the rule of forfeiture has no application.[1936] If a perpetual lease is granted for a premium and then forfeited, the consideration is exhausted by the granting of the lease, and the forfeiture does not convert the original premium into a debt.[1937] A disclaimer by one co-tenant will not justify a suit to evict the other co-tenants, unless his act was the act of all.[1938] If the disclaimer is given effect to by the court, and the landlord's suit for rent is dismissed, the tenant cannot plead the tenancy in a subsequent suit to evict him as a trespasser.[1939]

Insolvency

A condition determining a lease in the event of the insolvency of the lessee is recognised in section 12 when the condition that is for the benefit of the lessor is a condition that reserves to the lessor a right of re-entry. In this connection, notes "Lease" under section 12 and under section 10 may be referred. Accordingly, if the condition against insolvency reserves a right of re-entry to the lessor, he has a right to determine the lease by forfeiture for that reason.

This ground of forfeiture was added by the amending Act of 1929. It was not covered by the section before the amendment, as a condition against assignment means a condition against voluntary assignment, and is not broken by an involuntary assignment, or an assignment by the operation of law, such as an execution sale;[1940] or an insolvency;[1941] though an express condition against involuntary assignment may be valid.[1942]

The repealed clause "or the lease shall become void" would suggest that the breach of a condition avoiding a lease would involve a forfeiture, although there was no proviso for re-entry. But this is not the law.

1931. *Venkaji Krishna v Lakshman Devji,* (1896) ILR 20 Bom 354; *Vidyavardhak Sangh Co v Ayyappa,* (1925) ILR 49 Bom 842 : 90 IC 614 : AIR 1925 Bom 524; *Tatya Saolya v Yeshwanta Kondiba,* (1951) ILR Bom 293 : 52 Bom LR 909 : AIR 1951 Bom 288; *Faqiria v Kalu Mal,* AIR 1952 Punj 52.
1932. *Nizamuddin v Mamtazuddin,* (1901) ILR 28 Cal 135; *Ananda Chandra v Abrahim,* (1899) 4 Cal WN 42.
1933. *Debiruddi v Abdur Rahim,* (1890) ILR 17 Cal 196; *Dhora Kairi v Ram Jewan,* (1893) ILR 20 Cal 101.
1934. *Nizamuddin v Mamtazuddin,* (1901) ILR 28 Cal 135.
1935. *Kally Das Ahiri v Manmohini Dassee,* (1897) ILR 24 Cal 440.
1936. *Tirtha Naik v Lal Sadananda Singh,* AIR 1952 Ori 99.
1937. *Kammaran Nambiar v Chindan Nambiar,* (1895) ILR 18 Mad 32.
1938. *Ishan Chunder v Shama Churn,* (1884) ILR 10 Cal 41; *Imbichi Kandan v Thamburath,* (1909) 19 Mad LJ 565 : 4 IC 875; *Birendra Kishore v Bhubaneswari,* (1912) ILR 39 Cal 903 : 15 IC 620; *Jharu Mondal v Mahatabuddin,* 113 IC 561 : AIR 1928 Cal 713.
1939. *Nil Madhub Bose v Ananta Ram,* (1898) 2 Cal WN 755; *Ramgati v Pran Hari,* (1903) 3 Cal LJ 201; *Fayj Dhali v Aftabuddin Sirdar,* (1902) 6 Cal WN 575; *Khater Misri v Sadruddi Khan,* (1907) ILR 34 Cal 922; *Sheikh Miadhar v Rajana,* (1909) 14 Cal WN 339 : 5 IC 708; *Ekabbar Sheikh v Hara Bewa,* (1911) 15 Cal WN 335 : 8 IC 660.
1940. *Deo d Mitchinsun v Carter,* (1798) 8 TR 57; *Tamaya v Timapa,* (1833) ILR 7 Bom 262; *Subbaraya v Krishna,* (1883) ILR 6 Mad 159, p 164; Re *West Hopetown Tea Co* (1890) ILR 12 All 192; *Golak Nath v Mathura Nath,* (1893) ILR 20 Cal 273.
1941. *Deo d Goodbehere v Bevan,* (1815) 3 M & S 353, p 369.
1942. *Dwarika Nath Roy v Mathura Nath,* (1916) 21 Cal WN 117 : 34 IC 833; *Vyankatraya v Shivrambhat,* (1883) ILR 7 Bom 256.

Lessor or his transferee

A proviso of re-entry runs with the land, and may, therefore, be enforced by the lessor's transferee.[1943] The transferee cannot enforce a forfeiture for a breach occurring before the assignment, unless the breach is a continuing one.[1944] But in a Bombay case,[1945] an assignee was allowed to forfeit a lease for breach before the assignment. Note "Rights of the assignee" under section 109 may be referred.

Notice in writing

As breach of a condition only makes the lease voidable, the forfeiture is not complete unless and until the lessor gives notice that he has exercised his option to determine the lease.[1946]

A simple tenancy can therefore be terminated by service of notice under section 106 of the Transfer of Property Act and once a valid notice is served, the tenant becomes a trespasser. A notice under the Act is valid if it calls upon the tenant to hand over vacant, peaceful and khas possession of the premises.[1947] A suit filed by the landlord without issuance of notice is not maintainable.[1948] Even where the lease deed provides for forfeiture in case of assignment by the lessee, there can be no automatic resumption by the lessor. He has to exercise his right to determine the lease before he can resume.[1949] Thus even if the lease contains a clause to the contrary, a notice in writing manifesting a clear intention is an essential condition of forfeiture taking effect in law.[1950] By a mere denial of title of the landlord by the tenant of the premises and setting up title in himself even in a case where the tenancy is governed by the TP Act only, the tenancy does not automatically stand terminated under section 111(g). The landlord must choose this conduct of the tenant, and forfeit his tenancy right by giving a notice in writing to the lessee of his intention to determine the lease.[1951] A notice under section 111(g) is essential even if the tenant has failed to pay rent, and the lessor cannot take possession of the leased premises by force.[1952] If the lessors were tenants in common, the notice would have to be by, or on behalf of all.[1953]

Before the amending Act of 1929, it was only necessary for the lessor to do "some act showing his intention to determine the lease". With reference to this phrase, it was held that the lessor did an act showing his intention to determine the lease when he took possession with his *durwans,*[1954] or when he sent the lessee a lawyer's notice,[1955] or orally

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1943. *Kristo Nath v Brown,* (1887) ILR 14 Cal 176.
1944. *Deo d Muston v Gladwin,* (1845) 6 QB 953 (covenant to insure).
1945. *Vishveshwar v Mahableshwar,* (1919) ILR 43 Bom 28 : 47 IC 198.
1946. *Tatya Saolya v Yeshwanta Kondiba,* (1951) ILR Bom 293 : 52 Bom LR 909 : AIR 1951 Bom 283; *Asghar v Uttar Pradesh Government,* (1954) All LJ 340 : AIR 1954 All 649; *UOI v Vithalbhai Pvt Ltd,* AIR 2002 Cal 144, para 55.
1947. *Hardoi Zila Sahkari Bank v Sarl,* 2010 SCC OnLine All 741: (2010) 80 ALR 799; *Madan Lal v Bheru Lal,* 2010 SCC OnLine Raj 4353; *Pallawi Resources Ltd v Protos Engg Company P Ltd,* (2010) 5 SCC 196 : LNIND 2010 SC 283 : AIR 2010 SC 1969 : 2010 (3) SCALE 356.
1948. *Shibani Basu v Sandip Ray,* (2010) 14 SCC 406 : LNIND 2010 SC 1147 : AIR SC (Civ) 2011 SC 72 : 2010 (12) SCALE 455; *Usha Mehta v Govt of AP,* (2012) 12 SCC 419.
1949. *Dattabrajee v Shripad,* AIR 1976 Bom 398.
1950. *Dev Raj v Lajwanti,* AIR 2010 HP 72; *Deenar Builders Pvt Ltd v Khodey Distelleries Ltd,* AIR 2000 Del 147 : (1999) 82 DLT 809.
1951. *Govindamma v Murugesh Mudaliar,* AIR 1991 Kant 290 : (1990) ILR Kant 2639.
1952. *Caltex (India) Ltd v Kejriwal & Sons,* AIR 1973 All 275.
1953. *Cf Gopal Ram v Dhakeswar Pershad,* (1908) ILR 35 Cal 807, but see *Syed Ahmad v Mathu Alagappa v Magnesite Syndicate,* (1916) ILR 39 Mad 1049 : 32 IC 512.
1954. *Cook & Co v C L Phillips,* (1930) 34 Cal WN 785 : 130 IC 222 : AIR 1931 Cal 133.
1955. *Sivarama Aiyar v Muthu Alagappa,* (1915) Mad WN 845 : 31 IC 211.

informed the lessee that the lease was forfeited,[1956] or when he filed a suit in ejectment, which he withdrew with liberty to file a fresh suit on the same cause of action.[1957] But there was a conflict of decisions as to whether the act showing an intention to determine the lease was a condition precedent to the rights of suit for ejectment. The Calcutta, Madras and Allahabad High Courts held that it was,[1958] and the Bombay High Court held that it was not.[1959] A subsequent Calcutta case, however, expresses a preference for the Bombay view,[1960] but a still later Calcutta case preferred to follow the earlier decisions of Calcutta.[1961] The Patna High Court has followed the Bombay view.[1962] It is now, however, clear that the lessor cannot file a suit in ejectment until after he has given notice for, until then the lease subsists.[1963] The giving of a notice in writing is, since the amendment, an essential condition of forfeiture taking effect in law,[1964] even if the lease contains a clause to the contrary.[1965] Where a notice under section 111(h) has been given, it is not necessary to also give a notice under section 111 (g) on the ground of forfeiture of lease.[1966] Where there is a simplicitor termination of tenancy under section 106 of the TP Act and not under section 111 (g) of the TP Act, these provisions of section 114 of the TP Act cannot be attracted.[1967] If the lessor does not serve the requisite notice under section 111(g) read with section 114A, the lease would be deemed to be subsisting, and the owner cannot sell the land with vacant possession and unencumbered with the lease.[1968] A notice served by registered post direct to the contact address will be presumed to be duly served if the acknowledgment receipt comes back signed by someone.[1969] In the case of forfeiture of a lease granted before 1929, a disclaimer followed by some act by the lessor indicating his intention to determine the lease is all that is necessary, and no written notice is required.[1970] The Supreme Court has held that the rule that a notice in writing is required is not a rule based on any principle of justice, equity and good conscience, and is not applicable to leases executed before April 1930 when the amending Act of 1929 came into force.[1971] The Patna High Court has expressed the view that the opening words of section 111(g) no doubt seem to imply that the lease comes to an end as soon as notice to quit is given, but the concluding words imply that something more, eg an actual entry or the institution of a suit for ejectment, is required to be done

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1956. *Satyanarayana v Venkataramamurthy,* 157 IC 804 : AIR 1935 Mad 454.
1957. *Ramnath v Siba Sundari,* (1917) 25 Cal LJ 332 : 40 IC 348; *Mazhoor Pudukudi v Perandatta,* (1911) 8 Mad LT 99 : 6 IC 264; *Raghupati Roy v Debu Karmakar,* (1956) 60 Cal WN 385 : AIR 1956 Cal 79.
1958. *Anandamoyee v Lakhi Chandra,* (1906) ILR 33 Cal 339; *Nawrang Singh v Janardan Kishor,* (1918) ILR 45 Cal 469 : 41 IC 952; *Motilal Pal v Chandra Kumar,* (1920) 24 Cal WN 1064 : 60 IC 312; *Venkatramana v Gundaraya,* (1908) ILR 31 Mad 403; *Prag Narain v Kadir Bakhsh,* (1913) ILR 35 All 145 : 18 IC 728; *Shib Charan v Kharka,* (1925) ILR 47 All 348 : 86 IC 174 : AIR 1925 All 346.
1959. *Isabali Tayabali v Mahadu Ekoba,* (1918) ILR 42 Bom 195 : 43 IC 851, followed in *Prakushchandra v Rajendranath,* (1931) ILR 58 Cal 1359 : 135 IC 296 : AIR 1932 Cal 221.
1960. *Prakashchandra v Rajendranath,* AIR 1932 Cal 221.
1961. *Creet v Gangaraj,* (1937) ILR 1 Cal 203 : AIR 1937 Cal 129 : 64 Cal LJ 280.
1962. *Sri Ram Chandra v Thahir Ajodliya,* (1935) ILR 15 Pat 8 overruled in *Maheshwari v Manrajo,* (1945) ILR 23 Pat 185, on the point of limitation.
1963. *Srinivasa Ayyar v Muthusami Pillai,* (1901) ILR 24 Mad 246, p 251.
1964. *Saheb Din v Gauri Shankar,* (1939) ILR 15 Luck 92 : 185 IC 25 : AIR 1940 Cal 92; *Tatya Saolya v Yeshwanta Kondiba,* (1951) ILR Bom 293 : 52 Bom LR 909 : AIR 1951 Bom 283.
1965. *Ramniranjan v Gajadhar,* AIR 1960 Pat 525; *Ranumal v Mun Council,* AIR 1972 Raj 55.
1966. *Mool Chand v Ishwar Lal,* AIR 1974 Raj 163.
1967. *Ram Bali Pandey v II Addl Judge, Kanpur,* AIR 1999 All 77.
1968. *Chadrawati Devi v Surendra Pal Singh,* AIR 1979 All 406.
1969. *Bhusan Chandra v Bengal Coal Co Ltd,* AIR 1966 Cal 63. See also commentary under section 106.
1970. *Krishna Prasad v Adyanath Ghatak,* AIR 1944 Pat 77.
1971. *Namdeo Lokman v Narmadabai,* [1953] SCR 1009 : AIR 1953 SC 228; *Narasimham v Atchiyya,* (1955) ILR Mad 227 : (1954) 2 Mad LJ 83 : AIR 1954 Mad 739; *Sakunthalammal v Chandrasekar,* (1968) ILR 3 Mad 201 : AIR 1968 Mad 195.

by the lessor to end it.[1972] There does not seem to be any cogent reason to support this view. Lease is determined by forfeiture which is complete when notice is given. Note under section 112 "Waiver of forfeiture" may be referred.

The rule of English law (before the enactment of Law of Property Act, 1925, section 146) would appear to be that a suit in ejectment is equivalent to a re-entry;[1973] and this has been followed in some agricultural tenancies to which the TP Act does not apply,[1974] and in the case of tenancies created before the TP Act.[1975]

(12) Clause (h)—Notice to quit

Periodic tenancies are terminated by notice to quit under section 106. Until a periodic tenancy is determined, the lessor cannot treat the lessee as a trespasser.[1976] No notice is necessary to determine a tenancy for a fixed term,[1977] or when it determines by efflux of time,[1978] or before evicting a tenant on sufferance.[1979] Where under the terms of a lease for 21 years from 25 December 1934, either party could determine the tenancy at the end of seven years on giving six months' notice, and the landlord gave to the tenants' solicitors a notice as from 21 June 1941, which purported to terminate the lease on 21 December 1941, it has been held that the notice, although the mistake as to the date was obviously due to a slip, was invalid, and the acceptance of service by the solicitors did not cure the defect.[1980] A tenancy at will is determinable at the will of either party, by the tenant giving up possession, or by a demand for possession by the landlord,[1981] or by the death of either party.[1982]

The twin requirements of a notice under section 106 of the Transfer of Property Act are that a minimum period of 15 days time for the tenant to vacate the premises; and that this time should expire with the end of the tenancy month.[1983] Both the provisions are to be read conjointly in order to come to the requirements of a valid notice.[1984] Notice must be with respect to the property leased. Where a quit notice was issued specifying the door number of suit premises, even though the boundaries was not properly specified, the tenant could have understood that the landlord has sought eviction from the suit premises, the notice is not bad for want of proper description and would be valid. Where the tenanted property was situated in two mohallas and the boundaries of property under tenancy had been correctly

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1972. *Chotu Mia v Sundri,* AIR 1945 Pat 260.
1973. *Moore v Ullcoats Mining Co,* (1908) 1 Ch 575; *Serjeant v Nash Field & Co,* (1903) 2 KB 304 : [1900-03] All ER Rep 525; *Evas v Davis,* (1878) 10 Ch D 747: *Baylis v LeGrus,* (1858) 4 CB (NS) 537 (reletting a sufficient entry).
1974. *Padmanabhaya v Ranga,* (1911) ILR 34 Mad 161 : 6 IC 447; *Korapalu v Narayana,* (1915) ILR 38 Mad 445 : 20 IC 930; *Thirthaswamiar v Rangappayya,* (1913) 25 Mad LJ 486 : 21 IC 405; *Dwarika Nath Roy v Mathura Nath,* (1916) 21 Cal WN 117 : 34 IC 833.
1975. *Venkatachariar v Rangasami,* (1919) 36 Mad LJ 532 : 51 IC 709; *Thirthaswamiar v Rangappayya,* 21 IC 405.
1976. *Aminullah v Emperor,* (198) 26 All LJ 328 : 107 IC 690 : AIR 1928 All 95.
1977. *Bishen Sarup v Abdul Samad,* (1931) 29 All LJ 666 : 136 IC 273 : AIR 1931 All 649.
1978. *Dattopant v Vithalrao,* AIR 1975 SC 1111 : (1975) 2 SCC 246; *Janardhanan Chandran v Govindan Shanmughan,* AIR 1990 Ker 46 (NOC).
1979. *Gokul Chand v Shib Charan,* (1912) 9 All LJ 574 : 13 IC 59.
1980. *Hankey v Clavering,* (1942) 2 KB 326 : [1942] 2 All ER 311.
1981. *Deo Nandan v Meghu Mahton,* (1907) ILR 34 Cal 57; *Ram Krishun v Bibi Sohila,* 145 IC 567 : AIR 1933 Pat 561; *Deo d Price v Price,* (1832) 9 Bing 356.
1982. *Chemminian v Udayavarma,* (1900) 10 Mad LJ 201; *James v Dean,* (1805) 11 Ves 383, p 391. See note "Tenancy at will" under section 105.
1983. *Pal Synthetic Pvt Ltd v Bank of Maharashtra,* (2010) 116 DRJ 150 (Delhi).
1984. *Hoare Miller v Bank of India.* AIR 2011 AP 185 : LNIND 2011 AP 493 : 2011 (4) All MR 1 JS : 2010 (94) All Ind Cas 288; *National Textiles Corporation Ltd v Rent Control Appellate Tribunal, Jaipur,* AIR 2011 (NOC) 374 (Raj); *Babu Tandon Lal v Addl District Judge,* 2010 SCC OnLine All 1675 : (2010) 82 ALR 719 : (2010) 6 All LJ 587.

disclosed at the foot of notice, in such cases, defect in notice qua reference to one Mohalla would not vitiate notice and the quit notice would be valid.[1985] Notice must be given to the lessee. If notice is given to terminate the tenancy to one of the co-tenants who succeeded to the tenancy after the death of the tenant, it is valid with respect to all the tenants and impleading of all tenants would not be required.[1986]

An invalid notice may not determine tenancy. A proper service of notice to quit is the backbone of the suit of ejectment filed under the Transfer of Property Act, 1882 and where the deemed service of notice is not proved, ejectment decree passed banking on said deemed service of notice is not proper. Similarly, merely because a notice sent through registered post came back with an endorsement not present would not be sufficient and landlord has to prove cogent evidence that it was in fact refused by the tenant more so when the notice did not carry any date showing termination of tenancy, and in such a case the tenancy cannot be said to have been terminated by notice. Under section 106, the notice to quit must expire with the end of the month of the tenancy, or in other words, it must terminate the tenancy with effect from the expiration of the month of the tenancy. If it terminates the tenancy with effect from an earlier date, it would be clearly invalid.[1987] Where the suit was filed by the landlord for eviction of the tenant on the ground of non payment of rent, and it was shown that the tenant had replied to the notice for vacation, his plea that the petition is not maintainable in absence of a valid notice would not be entertained and the order for release of the premises would be proper. In an eviction suit where the quit notice given is short of six months period but the suit for eviction is filed after more than six months, the notice would be valid.[1988]

In case of inconsistency between the Tamil Nadu Buildings (Lease and Rent Control) Act (Act 18 of 1960 and the Transfer of Property Act, 1882, the Tamil Nadu Rent Control Act shall prevail over the Transfer of Property Act and shall have overriding effect.[1989]

In the case of an agricultural lease, section 105 to section 116 apply to the extent to which they are founded upon principles of reason and equity. In a Madras case, the plaintiff had leased out the land to cut coconuts from the coconut trees by means of a document which was renewed every year, but after 17 August 1967, there was no document in writing. It was held that when a tenant was in possession on the basis of a lease for an indefinite period; and he was entitled to assume that so long as he paid the rent and complied with the conditions of the lease, he would be allowed to continue and if the landlord wanted to terminate the lease, it was just and necessary that the landlord should intimate and terminate the tenancy so that the tenant could be put on notice that the tenancy is going to come to an end. In this case, in the absence of a notice to terminate the agricultural lease, the suit for permanent injunction in the alternative was dismissed.[1990]

The single most important factor to be considered in an eviction suit is the correct service of the notice under section 106. Notice must be served either in person or even through post. If the notice is sent to the correct address; both the residential address as

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1985. *Shanmugam v Hema,* AIR 2011 Mad 177 : LNIND 2011 MAD 243 : 2011 1 LW 927; *Syed Zaved Ali Sabzposh v Avadh Kishore Lal,* AIR 2010 (NOC) 830 (All) : 2010 (3) ALJ 639.
1986. *Narayan Kedia v Prasanta Kumar Patnaik,* AIR 2014 (NOC)203 (Ori).
1987. *Kanak Pramanik v Indrajit Bandopadhyay,* AIR 2013 Cal 60 : LNIND 2012 CAL 446 : 2012 (117) All Ind Cas 723; *Rama Nand v Mulakh Raj,* AIR 2010 (NOC) 921 (P&H); *Capt Praveen Davar v Harvansh Kumari,* (2010) 119 DRJ 560 (Delhi).
1988. *Shree Ram Urban Infrastructure Ltd v Court Receiver, High Court of Bombay,* (2015) 5 SCC 539 : AIR 2014 SC 2286 : 2014 (6) SCALE 613.
1989. *Indian Bank v Nippon Enterprises South, Chennai,* AIR 2011 Mad 238 : LNIND 2011 MAD 1180 : AIR 2011 Madras 238 : 2011 2 CTC 474.
1990. *Renga Iyengar v Sivaswami Pandaram,* AIR 1977 Mad 364.

also the office address through registered post or through messenger of telegraph department but is either refused or returned as "not claimed" and the tenant does not dispute the correctness of address and is unable to establish that he is not residing in the premises, it would be treated as due service. If the notice is not received or taken by the tenant, it can be affixed to a conspicuous place of the suit property and an affidavit was filed in its support, the notice to terminate tenancy is proper and the burden of proof shifted to the tenants to discharge proof adduced by the landlord regarding service they had wholly failed in discharging the burden and service of notice would be proved. But where the notice is returned with an endorsement by the peon of postal services as refused but the endorsement is not by tenant and he denies service of notice, the presumption of deemed service is negated and the burden would be on the landlord to prove service by producing the peon on dock to discharge the burden of proving service of notice.[1991] In a joint tenancy notice sent and received by all three brothers would be valid service of notice. For the purposes of calculating mesne profits, a valid notice under section 106 should have been served.[1992] A notice terminating lease is at the discretion of the lessor but after the amendment of 2002, it has to be in accordance with the amended provision. The twin requirements to be fulfilled are that the notice must give a clear 15 days period to the tenant to vacate the property coupled with the second requirement that it must terminate on the last date of the calendar month. Where notice was short of the period specified in section 106 but the suit was filed after the expiry of the said period, notice would not be deemed to be invalid in view of section 106(3). A notice terminating the tenancy asking the tenant to vacate the premises immediately is valid, even if the suit for recovery of possession is filed after six months of date of issue. If through the termination notice, only 10 days' time was granted to the tenant to vacate the premises but the suit was filed long after lapse of the statutory period of 15 days, the notice even if was a defective one, it would be deemed to be cured by virtue of the suit itself having been filed after 15 days. A notice to quit given in June and the suit for eviction filed in September, or where no date or time period was mentioned in the notice, it would not be invalid more so where the suit for eviction was presented after the expiry of 30 days from the date of the service of the notice as provided in the Act.[1993] A tenancy created through an unregistered lease agreement that was neither renewed nor registered, can be terminated by giving a thirty days notice and three months prior notice is not necessary and tenancy. In case of termination of agricultural tenancy, a notice of three months given by him would be illegal if the landlord is required to give a

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1991. *K Sajjan Raj v Punjab Gopy Setty Chandra Mouli,* AIR 2011 (NOC) 411 (AP); *Paritosh Bhowmick v Nandulal Kar,* AIR 2012 (NOC) 192 (Cal); *Shanker Lal Didwaniya v Akhilesh Narain Singh,* AIR 2010 (NOC) 459 (All); 2010 (1) ALJ 69; *Alok Kumar Sharma v T Hemalatha,* AIR 2013 AP 7 : LNIND 2012 AP 435 : 2012 (5) Andh LD 797; *Radha Kishen. v Radha Devi,* AIR 2014 (NOC) 587 (Raj); *Vandana Gulati v Gurmeet Singh,* AIR 2013 All 69 : LNIND 2013 ALL 13 : 2013 (96) ALR 896 : 2013 (1) All Rent Cas 819; *Dasa v Ajay Kumar Singh,* AIR 2014 (NOC) 151 (Cal); *Ajay Kumar Singh v Dasa,* AIR 2013 Cal 125 : LNIND 2013 CAL 145 : 2013 (4) ICC 502 : 2013 (2) Rent LR 380; *Kanak Pramanik v Indrajit Bandopadhyay,* AIR 2013 Cal 60 : LNIND 2012 CAL 446 : 2012 (117) All Ind Cas 723; *Shree Ram Goyal v Jitendra Kumar Gupta,* AIR 2010 (NOC) 743 (All) : 2010 (2) ALJ 557.

1992. *Saraf Agencies Pvt Ltd v Kanoria Jute & Industries Ltd,* (2010) 4 CHN 882 (Cal) : (2011) 2 ICC 22.

1993. *Tanusree Mukherjee v Mitali Chinara,* AIR 2013 (NOC) 218 (Ori; *Baljit Singh v Thakaria,* ILR, (2011) 1 Del 563 : 2011 IAD (Delhi) 363; *Bank of Madurai v Isherdas Sahni,* (2011) 176 DLT 270(Delhi); *Fulchand v Anil,* (2010) 5 Mah LJ 975; *Shree Ram Urban Infrastructure Ltd v Court Receiver, High Court of Bombay,* (2015) 5 SCC 539 : AIR 2014 SC 2286 : 2014 (6) SCALE 613; *Aravindharaj Adhithan v R Perumal,* 2011 (3) CTC 31, 2011-2-LW50; *Dasa v Ajay Kumar Singh* AIR 2014 (NOC) 151 (Cal); *Renu Gupta v Kanti Devi,* AIR 2013 All 26 : LNIND 2012 ALL 76 : 2013 (1) ALJ 495 : 2012 (95) ALR 683; *Ajay Kumar Singh v Dasa,* AIR 2013 Cal 125 : LNIND 2013 CAL 145 : 2013 (4) ICC 502 : 2013 (2) Rent LR 380.

notice of six months.[1994] A notice cannot be invalidated simply on account of shortfall in the notice period specified in notice, and the landlord cannot be estopped from claiming relief of possession.[1995] The service of notice is a condition precedent for terminating the tenancy. The denial of service became a triable issue as the presumption of service of notice under section 27 of the General Clauses Act is a rebuttable presumption.[1996] The validity of a notice may be assailed on the ground that it is not in accordance with law and the tenancy has never been terminated. Such objections can be raised only by a tenant and the Power of attorney holder of the tenant does not have any locus standi to file appeal after termination of tenancy.[1997] Section 4 of the Tamil Nadu Public Premises (Eviction of unauthorised Occupants) Act envisages only a notice to quit giving a time of not less than ten days for vacating but the tenants were given thirty days time, a suit filed by the tenants to prempt the authorities from taking proceedings against them for being in occupation of unauthorised public premises is clearly barred and a second appeal filed by them would be dismissed.[1998]

112. Waiver of forfeiture.—A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

Synopsis

(1) Waiver of Forfeiture 1026
(2) Distress 1028
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(1) Waiver of Forfeiture

On breach of an express condition to which a proviso for re-entry is annexed, or any of the other events stated in section 111 (g), the lease is voidable at the option of the lessor. If the lessor has knowledge of the breach, he may adopt one of three courses— (i) elect to avoid the lease; or (ii) elect not to avoid the lease; or (iii) make no election. These three alternatives were put by Baron Bramwell in *Croft v Lumley.*[1999] In case (i) he must be required by section 111(g) to give a notice in writing to the lessee of his intention to determine the lease, and it

1994. *Lakshmi Narayan Gupta v Secretary, Khadi Gramodyog Vikas Mandal, Buddhanpur,* AIR 2014 Utr 14 : 2014 (3) UC 1717; *Manvendra Kumar Chatterjee v Shailendra Kumar Jain,* (2011) (3) UC 2220 : 2011 (1) UD 557; *Savarga Bhaktibhai Dullabhai Sthapit Bhakta Patidar v Prabhubhai Dahyabhai Bhakta,* AIR 2011 (NOC) 186 (Guj).
1995. *Bhargavimmal v Peria Mariamman and Chinna Mariamman Devasthanam,* AIR 2014 (NOC) 454 (Mad)
1996. *Hill Elliott & Co Ltd v Bhupinder Singh,* (2011) 121 DRJ 438 (DB) : 2011 AIR CC 1368 (Delhi).
1997. *Devender Kumar Yadav v Ravinder Kumar Sanghi,* (2010) 2 RCR (Rent) 392 : (2010) 4 RCR (Civil) 665; *Board of trustees of the Port of Kolkata v Kalipada Bhakat,* (2014) 10 SCC 573 : LNIND 2014 SC 874 : 2014 (9) SCJ 235 : 2014 (11) SCALE 647.
1998. *Vinod M Patel, Proprietor, Sri Meenakshi Stores, SIDCO Industrial Estate v The Branch Manager, SIDCO* 2011-1. L.W. 92.
1999. *Croft v Lumley,* (1858) 6 HLC 672, p 705.

is only then that there is a forfeiture and the lease is terminated. Thus, under section 111(g), two things, namely the happening of any of the three specified events, and the giving of the notice by the lessor, together amount to a forfeiture. Under that section, there can be no forfeiture unless and until the lessor gives the notice. Therefore, there can be no forfeiture as contemplated by that section, without the lessor being aware that the event which gives him the right to put an end to the lease has happened, for, without such knowledge, he cannot give the notice and without such notice, there is no forfeiture as defined in that section. In this view of the matter, the language of section 112 does not appear to be very optimistic. If "a forfeiture under section 111, clause (g)" means the happening of any of the three specified events followed by a notice from the lessor, the first proviso to section 112 becomes meaningless, for there cannot be a forfeiture under section 111(g) without knowledge of the lessor. This proviso, therefore, makes it clear that the word "forfeiture" as used in section 112 does not mean the same thing as "forfeiture" as defined under section 111(g). Therefore, the opening words "A forfeiture under section 111, clause (g)", and the marginal note "Waiver of forfeiture" are not quite appropriate.

Section 112 deals with the second of the three alternative cases mentioned above; namely, the lessor electing not to avoid the lease despite the breach, or a disclaimer by or the insolvency of, the lessee. It would be more accurate, therefore, to say that in case (ii) there is a waiver of the breach, or the disclaimer or the insolvency, as the case may be, than that there is waiver of a forfeiture. Indeed, in *Croft v Luniky,* Baron Bramwell said that the expression "waiver of forfeiture" is not strictly accurate. The waiver in case (ii) is either express, or implied from one or other of the acts referred to in this section. In case (iii), the lessor takes no action and this is the case of lying by. However, the election is not between different rights, but whether to retain the right created or to give it up.[2000]

Acceptance of rent due on a date after the forfeiture is incurred, is a waiver of forfeiture.[2001] but, mere acceptance of rent after the expiry of lease would not amount to consent of the landlord for continuance of lease.[2002] If the landlord accepts rent without protest or making a grievance after the lease is forfeited or after the lessee has defaulted in his statutory obligation, or subsequent to suit,[2003] such conduct would amount to waiver,[2004] but not when he does it by mistake,[2005] or when the landlord is actively prosecuting the suit for eviction filed by him against the tenant.[2006] This is because acceptance of the rent is an affirmance that the lease was subsisting at the time when the rent became due.[2007] For the same reason, receipt of rent due before the breach does not

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2000. *Thirthaswamiar v Rungappayya*, (1913) 25 Mad LJ 486 : 21 IC 405.

2001. *Pennant's case*, (1596) 3 Co Rep 64, p 64; *Goodright d Walter v Davids*, (1778) 2 Cowp 803; *Arnsby v Woodward*, (1827) 6 B & C 519; *Deo d Griffith v Pritchard*, (1883) 5 B & Ad 765; *Deo d Gatchouse v Rees*, (1838) 4 Bing (NC) 384; *Davenport v The Queen*, (1877) 3 App Cas 115; *Dulli Chand v Meher Chand*, (1867) 8 WR 138; *Vishvanath v Yakub*, (1833) PJ 104; *Sarafali v Subraya*, (1896) ILR 20 Bom 439, p 446; *Farman Bibi v Tasha Haddal*, (1908) 12 Cal WN 587; *Basanta Kumar v Secretary of State*, 59 IC 273; *Chattar Singh v Nand Kishore*, (1914) 12 All LJ 1139 : 26 IC 107; *Chotu Mia v Sundri*, AIR 1945 Pat 260; *Mohan lal v Governor General*, AIR 1945 Nag 255.

2002. *Shanti Prasad Devi v Shanker Mahto*, AIR 2005 SC 2905 : (2005) 5 SCC 543.

2003. *Amar Pramoters, Bangalore v J S A Gajendra*, AIR 2005 (NOC) 423 (Kant).

2004. *Sen & Co v Manimala Sadhu*, AIR 1980 Cal 155; See however *Sugam Chand Agrawal v Jivt Shah*, AIR 1984 Pat 814, p 186 – holding that once a default occur, mere acceptance by itself will not amount to waiver and that there was no conflict between the Full Bench decisions in *Rajkumar Prasad v Uchit Narain Singh*, AIR 1980 242 and *Bibi Amna Khatun v Zahir Hussain*, AIR 1981 Pat l.

2005. *Amar Transport v Muthu Ganapathy*, AIR 2005 (NOC) 529 (Kant).

2006. *UOI v S L Talwar*, AIR 2002 All 212 : (2002) 3 AWC 1881.

2007. *Arnsby v Woodward*, (1827) 6 B & C 519; *Raj Mohan v Mati Lal*, (1915) 22 Cal LJ 546 : 33 IC 331. See also *Shanmugam Pillai v Atma Lakshmi*, (1949) FCR 537 : AIR 1950 FC 38.

operate as a waiver.[2008] But the giving of a notice to quit at a future day amounts to a waiver, because the giving of the notice recognises the continuance of the tenancy upto that day.[2009] A contrary view has, however, been taken in *Lowenthal v Vanhoute.*[2010] It is explained there, that when a forfeiture of a lease is incurred, the lease is voidable, and not void and in those circumstances, the giving of a notice to quit may recognise the subsistence of the lease and may amount to a waiver of forfeiture, but when the tenancy is determined by a notice to quit, the position is entirely different. When a valid notice to quit is given, the lease is determined and a new tenancy can be created by an agreement, express or implied, and no such agreement can be inferred from the fact of service of a second notice. But see the second illustration to section 112. In *Price v Worwood,*[2011] Martin, *B,* said: The mere receipt of the money, the rent having become due previously, is of no consequence, and for the very plain reason that the entry of a condition broken does not at all affect the right to receive payment of a pre-existing debt. But such waiver operates in respect of a particular breach.[2012]

ILLUSTRATION

A leased a house to *H* with an express condition that if a default was made in the punctual payment for three successive months, the lease would be forfeited and *A* would have a right to re-enter. Rents payable in April, May, June and July were not paid. On 19 July. *B* paid the rent of April and May. The rent payable in August was not paid. A was entitled to forfeit the lease for the three successive defaults of June, July and August.[2013]

But if the rent is accepted for any period subsequent to the breach, it makes no difference that it is accepted "under protest" or without prejudice to the forfeiture, eg as compensation for use and occupation;[2014] or that is credited to a suspense account;[2015] or that there is a proviso in the lease requiring waiver to be in writing.[2016] The protest is inoperative as the lessor has no right to take the money except on the terms on which it is paid, and because it is the law which decides that the acceptance of rent constitutes a waiver, and the lessor cannot by qualifying his acceptance alter the legal consequence of his act.[2017] Nor does it matter that the rent is accepted from an underlessee, or other person in possession.[2018]

When money is tendered and accepted, whether it is accepted as rent is a question of fact; but once that is decided, whether it amounts to a waiver, is a question of law.[2019]

(2) Distress

Under the English common law, the landlord has an incident to his reversion, the right to seize whatever movables he finds on the premises without legal process as a pledge to compel

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2008. *Green's* case, (1582) Cro Eliz 3; *Price v Worwood,* (1856) 4 II & N 512; *Purna Chandra v Ali Mahammad,* (1923) 37 Cal LJ 548 : 70 IC 999 : AIR 1924 Cal 520; *Habib Ahmed v Keoli Koer,* (1946) All LJ 121 : 222 IC 593 : AIR 1946 All 328.
2009. *Shiv Prasad v Mandira Kumari,* 186 IC 686 : AIR 1940 Pat 478.
2010. *Lowenthal v Vanhoute,* (1947) KB 342 : [1947] 1 All ER 116.
2011. *Price v Worwood,* (1859) 4 H & N 512.
2012. *Muhammad Hasan v Baidya Nath,* 184 IC 605 : AIR 1940 Pat 140.
2013. *Raj Mohan v Mat Lal,* (1915) 22 Cal LJ 546 : 33 IC 331.
2014. *Crofi v Lumley,* (1858) 6 HLC 672; *Davenport v The Queen,* (1877) 3 App Cas 115; *Strong v Stringer,* (1889) 61 LT 470; *Amar Krishna v Nazir Hasan,* (1939) ILR 14 Luck 723 : 183 IC 821 : AIR 1936 Oudh 257.
2015. *Kali Krishna v Fazle Ali,* (1883) ILR 9 Cal 843.
2016. *R v Paulson,* (1921) 1 AC 271.
2017. *Matthews v Smallwood,* (1910) I Ch 777, p 786 (1908-10) All LR Rep 536; *Oak Property Co Ltd v Chapman,* (1947) KB 886, p 898 : [1947] 2 All ER; *ICA Segal Securities Ltd v Thoseby,* (1963) 1 QB 887, pp 897–898 : (1963) 1All ER 5000.
2018. *Deo d Griffith v Pritchard,* (1938) 5 B & Ad 765.
2019. *Windmill Investments (London) Ltd v Milano Restaurant,* [1962] 2 All ER 680.

payment of arrears of rent. This right is not recognised in India, except in Presidency towns where it may be exercised through the small causes court; and is also recognised subject to statutory restrictions in some agricultural tenancies. In English law, there is no right to levy distress, unless the relationship of landlord and tenant still subsists when the distress is levied. Accordingly in English law, the levy of distress operates as a waiver, even if it is levied for rent for a period before the breach;[2020] and in *Price v Worwood*,[2021] Chief Baron Pollock said that an actual distress is so clear an affirmance of the tenancy existing at the time, that it does away with all previous forfeitures. This section does not make this distinction and the words "distress for such rent" limit the operation of the waiver to rent becoming due since the forfeiture was incurred. This may be because the Presidency Small Cause Courts Act does not expressly require that the relationship of landlord and tenant should exist at the time of the application for a distress warrant. In this connection, section 53 of that Act may be referred.

(3) Any Other Act

The election not to avoid the lease may be manifested in other ways, besides acceptance of rent or levy of distress. The test is whether the act constitute an unequivocal recognition of the continued existence and effective operation of the lease.[2022] Instances of such acts showing an intention to treat the lease as subsisting are a demand for rent accruing due since the breach,[2023] even a demand made "without prejudice",[2024] a suit for such rent,[2025] or acceptance of a sum paid into court as damages for breach of covenant to repair alleged to have been committed during the term.[2026] The pleadings in a suit for ejectment may even operate as a waiver of forfeiture, eg where the lessor describes the breaches as occurring during the existence of the term,[2027] or makes an alternative prayer inconsistent with the determination of the lease.[2028]

In an English case,[2029] the lessor, after the forfeiture, described the lessee as a "termor", and this was treated as a waiver, although the statement was made in a receipt for rent due before the forfeiture. But in a Calcutta case already cited,[2030] a similar description was held to refer to the period antecedent to the forfeiture and, therefore, not to operate as a waiver. However, an act of waiver would not amount to a waiver, unless it is communicated to the tenant.[2031]

(4) First Proviso—Knowledge of the Breach

The principle underlying the first proviso is that there can be no election without knowledge. It must, therefore, be shown that the lessor had notice or knowledge of the

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2020. *Ward v Day*, (1864) 4 B & S 359; *Kirkland v Briancourt*, (1890) 6 TLR 441; *Raj Mohan v Mati Lal*, (1912) 22 Cal LJ 546 : 33 IC 331.
2021. *Price v Worwood*, (1859)4 H & N 512.
2022. *London & County Ltd v Wilfred Sportsman Ltd*, (1969) 1 WLR 1215 : [1969] 3 All ER 621.
2023. *Deo d Nash v Birch*, (1836) 1 M & W 402; *Kristo Nath v Brown*, (1887) 14 Cal 176, p 184.
2024. *Segal Securities Ltd v Thoseby*, (1963) 1 QB 887 : [1963] 1 All ER 500.
2025. *Dendy v Nicholl*, (1858) 4 CB (NS) 376; *Jogeshuri v Mahomed Ebrahim*, (1886) ILR 14 Cal 33; *Sitanath v Basudeb*, (1900) 2 Cal LJ 540; *Kalanand v Gunput*, (1911) 16 Cal WN 104 : 11 IC 974; *Abdul Rashid v Safar Ali*, 42 IC 614; *Midnapore Zamindari Co v Joyram Santal*, (1916) 1 Pat LJ 185 : 34 IC 918.
2026. *Pellatt v Boosey*, (1862) 31 LJ (CP) 281.
2027. Ibid.
2028. *Evans v Davis*, (1878) 10 Ch D 747; *Sarafali v Subraya*, (1896) ILR 20 Bom 439, p 448; *Rukmini v Rayaji*, (1924) ILR 48 Bom 541 : 83 IC 45 : AIR 1924 Bom 454; *Abdul Rashid v Safar Ali*, 42 IC 614.
2029. *Green's* case, (1582) Cro Eliz 3.
2030. *Raj Mohan v Mati Lal*, (1915) 22 Cal LJ 546 : 33 IC 331.
2031. *London & County Ltd v Wilfred Sportsman Ltd*, [1970] 3 All ER 600 (CA).

breach which incurs a forfeiture at the time of the supposed waiver.[2032] Knowledge of an agent is not sufficient, unless the agent has authority to grant a new lease.[2033] Waiver is an intentional relinquishment of a known right. The foundation of a waiver is the knowledge of a person who is said to waive his right and there cannot be a waiver in ignorance. This principle is recognised in section 112.[2034]

(5) Second Proviso—Election Irrevocable

The second proviso results from the principle that an election once made is irrevocable. The lessor, when he has knowledge of the breach, may take time to make his election; but once he has made the election either by express words or unequivocal act, the election is irrevocable.[2035] Therefore, if the lessor has given notice and filed a suit on the ground of forfeiture, he has determined the lease, and no subsequent act of his will amount to waiver. A distress levied after such a suit would be merely a trespass, and not an affirmance of the tenancy.[2036] Acceptance of rent after such a suit is not a waiver.[2037] A prayer for rent or mesne profits in a suit for ejectment on the ground of forfeiture will not necessarily operate as a waiver.[2038] But the suit must be an unequivocal demand for possession, and if there are alternative prayers to enforce the covenants in the lease,[2039] the plaint itself would not be unequivocal.

(6) Subsequent Breaches

Waiver of past breaches does not preclude the lessor from enforcing a forfeiture when the same or another condition is subsequently broken.[2040] When the breach is of a continuing nature, the same rule applies, and the continuance of the breach after the waiver will justify a forfeiture.[2041] But where the breach of one covenant necessarily involves the breach of another, the waiver of one operates as a waiver of the other.[2042] But if the breach involves the creation of a subordinate interest, eg in the case of a covenant not to sublet, the waiver operates during the continuance of that interest,[2043] but not afterwards.[2044]

2032. *Arnsby v Woodward*, (1827) 6 B & C 519; *Matthews v Smallwood*, (1910) 1 Ch 777 : [1908-10] All ER Rep 536; *Atkin v Rose*, (1923) 1 Ch 522; *Fullers Theatres v Rofe*, AIR 1923 Cal 435; *Mritunjay v Gopal*, (1869) 10 WR 466; *Nagardas v Ganu*, (1891) PJ 107; *Swarnamayee Debee v Aoyajaddi*, (1932) ILR 60 Cal 47 : 36 Cal WN 819 : 139 IC 239 : AIR 1932 Cal 787.
2033. *Deo d Nash v Birch*, (1836) 1 M & W 402.
2034. *Talbot & Co v Haricharan*, AIR 1952 Cal 47; *Fatelal v Dayalal*, (1949) ILR Nag 167.
2035. *Jones v Carter*, (1846) 15 M & W 718; *Grimwood v Moss*, (1872) LR 7 CP 360; *Serjeant v Nosh Field & Co*, (1903) 2 KB 304 : [1900-03] All ER Rep 525; *Chengiah v Rajah of Kalahasti*, (1912) 24 Mad LJ 263 : 15 IC 45.
2036. *Grimwood v Moss*, (1872) LR 7 CP 360.
2037. *Deo d Morecraft v Meux*, (1824) 1 C & P 346; *Timmarsa v Badiya*, (1867) 2 Bom HC 66.
2038. *Padmanabhaya v Ranga*, (1910) ILR 34 Mad 161 : 6 IC 447; *Koragalva v Jakri Beary*, (1927) 52 Mad LJ 8 : 99 IC 700 : AIR 1927 Mad 261; *Tollman v Portbury*, (1872) LR 7 QB 344; *Penton v Barnett*, (1898) 1 QB 276; *Mazhoor Pudukudi v Perandatta*, (1911) 8 Mad LT 99 : 6 IC 264; *Upendra Nath v Dhubeswar*, 132 IC 875 : AIR 1931 Pat 240; *State of Bihar v S S Devi*, AIR 1972 Pat 200.
2039. *Evans v Davis*, (1878) 10 Ch D 747; *Moore v Ullcoats Mining Co*, (1908) 1 Ch 575.
2040. *Dulli Chand v Meher Chand*, (1667) 8 WR 138; *Raj Mohan v Mati Lal*, (1915) 22 Cal LJ 546 : 33 IC 331.
2041. *Deo d Baker v Jones*, (1850) 5 Exch 498 and *Penton v Barnett*, (1898) 1 QB 276 (both cases of covenants to repair); *Deo d Muston v Gladwin*, (1845) 6 QB 953 and *Price v Worwood*, (1859) 4 H & N 512 (both cases of covenants to keep Insured); *Deo d Amber v Woodbridge*, (1829) 9 B & C 376 (not to use in a particular way); *Segal Securities Ltd v Thoseby*, (1963) 1 QB 887 : [1963] 1 All ER 500.
2042. *Downie v Turner*, (1951) 2 KB 112 : [1951] 1 All ER 416.
2043. *Walrond v Hawkins*, (1875) LR 10 CP 342; *Griffin v Tomkins*, (1880) 42 LT 359.
2044. *Deo d Boseawan v Bliss*, (1813) 4 Taunt 735.

(7) Lying by

This is the third case put by the Baron Bramwell in *Crift v Lumley*,[2045] where the lessor, having knowledge of the breach, makes no election. Such lying by and witnessing the breach is no waiver, for some positive act must be done,[2046] either to give notice under section 111(g), or to waive under this section. It does not matter that the lessee spends money on the premises, while the lessor is lying by.[2047]

The mere fact that the lessor does not take action for getting an unauthorised construction made by the lessee removed, does not stop the lessor from suing for ejectment.[2048] But long continued acquiescence in repeated breach is evidence from which a waiver may be inferred.[2049]

This principle of this section applies to Punjab and Delhi.[2050]

113. Waiver of notice to quit.—A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

ILLUSTRATIONS

(a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders and accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) *A*, the lessor, gives *B*, the lessee; notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice waived.

Synopsis

(1) Waiver of Notice to Quit.....1031
(2) Effect of Waiver 1032
(3) Effect of Institution of Eviction Proceedings.....1035
(4) Agricultural Leases 1036

(1) Waiver of Notice to Quit

Waiver of notice to quit does not, like waiver of forfeiture, depend upon the election of one party, but upon the consent of both. Justice Maule in *Blyth v Dennett*[2051] said:

> There is this difference between a determination of a tenancy by a notice to quit and a forfeiture; in the former case, the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot waive without the assent of both; but in the case of a forfeiture, the lease is voidable only at the election of the lessor; in the one case the estate continues, though voidable; in the other, the tenancy is at an end.

2045. *Crift v Lumley*, (1858) 6 HLC 672; *Mahadeo Prasad v Sulekha Sarkar Sm*, AIR 1954 Cal 404.
2046. *Deo a Sheppard v Allen*, (1810) 3 Taunt 78; *West Country Cleaners v Saly*, (1966) 1 WLR 1485 : (1966) 3 All ER 210 (CA).
2047. *Perry v Davis*, (1858) 3 CD (NS) 769.
2048. *Jagat Ram Sethi v Raj Bahadur*, AIR 1972 SC 1727 : (1972) 2 SCC 613 : [1973] 2 SCJ 599.
2049. *Kelsey v Dodd*, (1881) 52 LJ Ch 34.
2050. *Gindori v Shamlal*, AIR 1946 Lah 330 : 226 IC 533.
2051. *Blyth v Dennett*, (1853) 13 CB 178, p 180.

This distinction is manifested in the section by the words "with the express or implied consent of the person to whom the notice is given." Both the illustrations are of notices given by the lessor; and the consent of the lessee is implied in the illustration (a) by his tender of rent, and in illustration (b) from his remaining in possession. The effect of giving a second notice to quit had been considered in several cases.[2052] In *Tayabali v Ahsan & Co*,[2053] the Supreme Court has held that such a notice would amount to a waiver of the first notice to quit, provided that there has been express or implied consent of the lessee to such waiver; such consent can be implied from the payment of rent in respect of a period after the lease would have expired under the first notice.

A waiver is an intentional relinquishment of a known right. There can be no waiver, unless the person against whom the waiver is claimed had full knowledge of his rights, and facts enabling him to take effectual action for the enforcement of such rights.[2054] To constitute waiver under section 113, mere tender and acceptance of rent are not sufficient. These two actions should show an intention on the part of the landlord to treat the lease as subsisting. Whenever there is acceptance by the landlord of any sum tendered by the tenant as rent, the court is obliged to look to such acceptance in the light of the last of such requirement of section 113 as to where this expectance has shown an intention on the part of the landlord to treat the lease as subsisting.[2055] The Allahabad High Court has held that to constitute a waiver under section 113, not only the landlord should have the knowledge of the fact that his conduct of accepting the rent amounts to waiver, but also that he should have the intention to treat the lease as subsisting.[2056]

Waiver of notice is not a pure question of law as waiver is a question of fact and must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and factual foundation for it is laid in the pleadings and in the absence of appropriate pleading, there can be no distinct issue.[2057] Where the tenant, even after the first notice to quit, tendered rent for the post notice period by money order to the landlord and continued in possession and thereafter, second notice was served on him by the landlord, it was held that there was waiver of the first notice by both the parties who treated the tenancy as continuing after the first notice.[2058]

Illustration (a) to the section shows that in order that acceptance of rent may amount to a waiver, the rent accepted must be for a period after the notice.[2059]

(2) Effect of Waiver

Waiver of a notice to quit operates in English law as an agreement to create a new tenancy to take effect at the expiry of the old tenancy.[2060] This section seems to regard waiver as an agreement to restore the old tenancy. But the Supreme Court has held that in principle, the

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2052. *Shiv Prasad v Mandia Kumari*, 184 IC 686 : AIR 1940 Pat 478; *Lowenthal v Vanhoute*, (1947) KB 342 : [1947] 1 All ER 116; *Mohanlal v Vijai Narain*, (1960) ILR 10 Raj 1392 : AIR 1961 Raj 136.
2053. *Tayabali v Ahsan & Co*, [1970] 2 SCR 554 : AIR 1971 SC 102 : [1970] 2 SCJ 310 : (1970) 1 SCC 46.
2054. *Associated Hotels of India Ltd v S B Sardar Ranjit Singh*, AIR 1968 SC 933 : [1968] 2 SCR 548.
2055. *New India Assurance Co Ltd v Ghanshyam Das*, AIR 1997 All 383.
2056. *Anish Ahmad Special/Additional District Judge, Saharanpur*, (1997) 2 All Rent Case 32 : 1997 All LJ 1691; see also *AS Raj v District Judge, Lucknow*, (1982) 2 All Rent Cas 515; *UOI v Sudarshan Lal Talwar*, AIR 2002 All 212, para 18; *Food Corpn of India v Kuljinder Pal Singh Dhillon*, AIR 2002 Del 209 (NOC).
2057. *Haneef Sait v Syed Asif*, (2011) 1 Kant LJ 258 : ILR 2011 Kant 739 : 2011 (1) RCR (Rent) 203.
2058. *Malina Mondal v Puspa Rani Dasi*, AIR 1991 Cal 291, p 293.
2059. *Chotey Lal v Sheo Shankar*, AIR 1951 All 478.
2060. *Tayleur v Wildin*, (1868) LR 3 Exch 303.

consent of the lessee to treat the old tenancy as subsisting constitutes a new agreement.[2061] But under this section the result would be the same, for the surety's liability which has been determined by the notice to quit could not be extended without his consent. Under the section there can be a waiver of a notice to quit with an express or implied consent of the tenant, by any act on the part of the landlord showing an intention to treat the lease as subsisting.[2062] But that act must be an act on the part of the landlord or somebody acting on his behalf.[2063] So, in the case of a lease by joint lessors, an act of one cannot operate as a waiver as against the other.[2064]

There is a fundamental difference between a waiver of a forfeiture which is a matter which can be done at the election of the landlord alone and the waiver of a notice to quit which proceeds on the basis of a new agreement between the landlord and the tenant. The observations in *Lowenthal v Vanhoute*[2065] may be referred. It is not in every case that the payment and acceptance of rent by the landlord after the notice to quit of necessity, waives the notice. The question under section 113 is whether the act of the landlord (whether it is a receipt of the amount sent as rent or is the receipt of the amount sent without any statement at all) is one from which one can impute to the landlord the intention of creating a renewal of the tenancy, or treating the tenancy as still subsisting, is a question of fact.[2066] A mere production of rent receipt after the notice to quit was given, is not sufficient to show waiver.[2067]

In some cases, it has been held that payment and acceptance of rent after the expiry of a notice to quit operates as a waiver of the notice and the lease subsists;[2068] but acceptance of rent for the period before the expiry of the notice does not operate as waiver.[2069] In an Allahabad case,[2070] the landlord had been throughout insisting that there were past arrears of rent. After the issue by the landlord of a notice to quit, the landlord accepted the rent remitted by the tenant alleging it to be for a period which included a certain period after the issue of the notice. The acceptance of rent in these circumstances, it was held, could not amount to a waiver of the notice. From the mere fact that under the Indian Contract Act, 1872,[2071] some amount would be adjusted towards a period subsequent to the notice to quit, an inference about intent to waive the notice could not be drawn. The acceptance of rent by mistake is not waiver of the notice.[2072] Nor is there waiver if the payment is for compensation

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2061. *Calcutta Credit Corp v Happy Homes,* [1968] 2 SCR 20 : AIR 1968 SC 471; and see *Tayabali v Ahsan & Co,* AIR 1971 SC 102, where this question was kept open.
2062. *Muralidhar Kulthia v Tara Dye,* AIR 1953 Cal 349.
2063. *Hindusingh v Rao Nihalkaranji,* AIR 1954 MB 37.
2064. *Motilal v Basant Lal,* AIR 1956 All 175.
2065. *Lowenthal v Vanhoute,* (1947) KB 342 : [1947] 1 All ER 116.
2066. *Navnit Lal v Baburao,* AIR 1945 Bom 132; *Sailabala Dassee v H A Tappassier,* AIR 1952 Cal 455; *Harbhajan Singh v Munshi Ram,* (1957) ILR Punj 86 : 58 Punj LR 328 : AIR 1956 Punj 86; *Bhagat Patnaik v Madhusudhan Panda,* (1964) ILR Cut 374 : AIR 1965 Ori 11; *Saleh Bros v K Rajendran,* (1969) 1 Mad LJ 247 : AIR 1970 Mad 165.
2067. *Ranjit Chandra v Mohitosh,* [1970] 1 SCR 16 : AIR 1969 SC 1187 : [1969] 2 SCJ 661 : (1969) 1 SCC 699; *Manindra Nath De v Man Singh,* AIR 1951 Cal 342; *Sharda v Gulab Devi,* AIR 1972 All 435.
2068. *Bengal Nagpur Rly v Bal Mukunda,* 80 IC 200 : AIR 1923 Cal 663; *Keith Prowse & Co v National Telephone Co,* (1894) 2 Ch 147 (only one day's rent); *Kapur Chand v Kanji,* AIR 1958 Pat 868 : AIR 1959 AP 346.
2069. *Price v Worwood,* (1859) 4 H & N 52; *Mansar Ali v Abdul Karim,* (1908) 10 Cal LJ 187 : 1 IC 753; *Ved Prakash v Din Dayal,* (1961) All LJ 637.
2070. *Bimla Devi v Vedpal Singh,* (1978) All LJ 575.
2071. Indian Contract Act, 1872, section 59.
2072. *Maconochie v Brand,* [1946] 2 All ER 778; *Hazaribagh Mun v Fulchand,* AIR 1966 Pat 434.

for use and occupation;[2073] or, where the rent Acts are in force, the acceptance of the "rent" may be attributable to the statutory tenancies created thereby.[2074]

Where the rent control Act applies, the lessee is allowed to continue in possession notwithstanding the termination of the contractual tenancy by notice under section 111(h). Any subsequent acceptance of "rent" by the lessor does not constitute a waiver of the notice.[2075] The waiver of the notice is a bilateral act, exhibiting an *ad idem* to continue the old contractual tenancy despite the notice. Where the tenant becomes a statutory tenant on the expiry of a lease, the notice, according to the Rajasthan High Court, would not be waived by a mere acceptance of the rent by the landlord. The tenant offers rent to fulfill his obligation under the rent control Act. Similarly, the landlord accepts the rent, not because he shows thereby an intention to create a new tenancy or to treat the old tenancy as subsisting, but because he is entitled to accept the rent so long as the tenant remains in possession under the rent control Act.[2076]

Where, after issue by the lessor of a notice to quit, the lessee sends the rent by money order and the lessor accepts the amount under protest as compensation and not as rent, the conduct of the lessor shows that he did not intend to waive the notice, and no fresh tenancy is created in such circumstances.[2077] The giving of a second notice to quit may operate as a waiver, as it shows that the lessee may rightfully remain in possession after the expiry of the first notice.[2078] However, the terms of the second notice may show that this was not the intention of the lessor, eg if the notice is merely a demand for possession,[2079] and therefore the fact that the landlord gives a second notice, does not necessarily imply waiver on his part of the first notice. In a proper case, it might be possible that despite the second notice, there was no intention to waive the notice to quit.[2080] After determination of the tenancy by all the co-owners, it is not open to one of the co-owners either to waive the notice, or to revive the tenancy, or to create a fresh tenancy in favour of the tenant.[2081]

Illustration (b) to section 113 clearly shows that if a tenant continues in possession after expiry of the period of notice given by the lessor, and the landlord serves upon him a second notice (thus indicating his intention to treat the lease as subsisting), the lessor has impliedly waived the first notice.[2082]

Mere acceptance of rent in absence of any written request for extension of lease after expiry of lease as per agreed terms would not amount to implied renewal,[2083] if the lease deed contained a renewal clause, but the same was not exercised by the tenant and the lessor in the notice had not

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2073. *Deo d Cheny v Batten,* (1775) 1 Cowp 243.
2074. *Panchanan Ghose v Haridas,* (1954) 58 Cal WN 438 : AIR 1954 Cal 460; *Mahadeo Prasad v Sulekha,* AIR 1954 Cal 404; *Pulin Behary v Lila Dey,* AIR 1957 Cal 627; *Narayana Iyengar v Subba Rao,* (1958) ILR Mys 104 : AIR 1958 Mys 113; *Jagannath v Sayed Abdul,* AIR 1962 Assam 148; *Janki Nath v Jialal,* AIR 1962 J&K 2; *Bhagwatsinghji v Keshulal,* AIR 1963 Raj 113; *Bhagat Ram v Keshab Deo,* AIR 1965 Assam 55. And see *Ganga Dutt Murarka v Kartik Chandra Das,* [1961] 3 SCR 813 : AIR 1961 SC 1067.
2075. *Ram Singh v Sagar Chand,* (1976) ILR HP 519 : AIR 1976 HP 21.
2076. *Roshanlal v Kailash Prasad,* AIR 1973 Raj 141.
2077. *Pohumal T Mardani v Tushar Kanti Paul Chaudhary,* AIR 1977 Gau 17.
2078. *Deo d Brierly v Palmer,* (1812) 16 East 53, p 56; *Padam Chand v Atar Singh,* AIR 1972 All 217. But see *Lowenthal v Vanhoute,* (1947) KB 342, (1947) 1 All ER 116.
2079. *Deo d Godsell v Inglish,* (1810) 3 Taunt 54; *Deo d Digby v Steel,* (1811) 3 Camp 115; *Ram Sarup v Gayatri Devi,* (1952) All LJ 373 : AIR 1952 All 863; *Joy Kumar v S K Chaudhuri,* (1952) ILR 2 Cal 138 : 55 Cal WN 471 : AIR 1952 Cal 130.
2080. *B R M Shrivastava v Poori Bai,* AIR 1981 Del 344.
2081. *Garware Paints Ltd v Prem Chand Gupta,* AIR 1984 All 364; *Chhangur Ram v Ganesh,* (1978) All LJ 486.
2082. *Sudhir Kumar v Indo Prova Ghose,* AIR 1976 Cal 276.
2083. *Panch Raghou Taank Ramniwas Sarda v Hindustan Petroleum Corporation Ltd,* AIR 2014 Chh 178.

expressed any intention to renew the lease.[2084] Payment of enhanced rent after determination of tenancy, in absence of a separate agreement to that effect would not result in creation of tenancy and the tenant would be a tenant holding over from month to month.[2085] The terms of the lease agreement have paramount importance in renewal and extension of lease, and the entire lease document should be considered in totality to decipher the terms and conditions of lease.[2086]

(3) Effect of Institution of Eviction Proceedings

The question is where a landlord files a suit for ejectment after determining the tenancy by serving a notice on the tenant, whether the acceptance of rent by him thereafter, constitute a waiver. Decisions on the subject are conflicting, and sometimes one and the same High Court has expressed conflicting views. Thus, according to an earlier Allahabad judgment, if the landlord in such a case claims damages for the use and occupation and the defendant makes payment to the landlord without insisting on him to withdraw the suit, the landlord cannot be said to have waived his right asserted by him to eject the tenant.[2087] Similarly merely because after the institution of the suit the rent for the period subsequent to the date of termination of the tenancy deposited by the tenant is withdrawn by the landlord, it cannot be said that there was an intention to waive the notice.[2088] Further, if the landlord is actively prosecuting the eviction suit, mere acceptance of rent cannot be treated as waiver.[2089] According to a few subsequent Allahabad rulings also, such acceptance cannot amount to waiver.[2090] Departing from this trend, an Allahabad judgment of 1966 regards such acceptance as amounting to waiver.[2091]

The Andhra Pradesh High Court has, in 1976, held that having regard to the language of section 113, even the acceptance of rent subsequent to the notice does not amount to a waiver, unless it shows an intention to treat the lease as subsisting. Where a person has instituted a suit seeking eviction, it is difficult to accept the contention that he still intended to treat the lease as subsisting, even if he accepts rent after such institution. Illustration (a) to section 113, it held, must be understood and applied in consonance with the principle underlying the section, and with due reference to the intention of the lessor. There is no warrant for the view that the mere receipt of rent, irrespective of the intention of the lessor, should, of its own force and divorced from the circumstances of the case, be regarded as amounting to waiver.[2092] According to the Bombay High Court, acceptance of rent during the continuance of a suit for eviction cannot amount to waiver. A termination of tenancy which has been made a cause of action for filing a suit cannot be done away with on the grounds of alleged waiver by the acceptance of a certain amount.[2093] Where a tenant is in arrears of rent on the date of an application for eviction filed under the rent control Act, any payment made of rent, and any acceptance of rent after the filing of the eviction proceedings, does not come in the way of the landlord. Further, the tenant is not entitled to the benefit of relief against forfeiture under section 114, the relationship being governed by the special statute, namely, the rent control Act.[2094] If the landlord actually continues the prosecution of

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2084. *R S Iron Industries Pvt Ltd v Calcutta Pinkjrapole Society,* AIR 2013 Cal 94 : LNIND 2012 CAL 573 : 2012 (120) All Ind Cas 715 : AIR 2013 Cal 97.
2085. *Ferrazzini's Bakery v Amitava Mitter,* AIR 2013 Cal 104 : LNIND 2013 CAL 70 : 2013 (3) Cal HN 116 : 2013 (2) ICC 460.
2086. *Govind Impex Pvt Ltd v Appropriate Authority, Income Tax Dept,* (2011) 1 SCC 529 : LNIND 2010 SC 1189 : AIR 2011 SC (Supp) 359 : 2010 (13) SCALE 124.
2087. *Khumani v Sakley Lal,* (1951) All LJ 331 : AIR 1952 All 579.
2088. *Jhaman Das v Ram Krishna,* (1986) 1 All Rent Cas 427.
2089. *Khumani v Sakeey Lal,* AIR 1962 All 579.
2090. See cases referred to in *Sharda Sharma v Gulab Devi,* AIR 1972 All 435.
2091. *Ram Dayal v Jawala Prasad,* AIR 1966 All 623; *Sharda Sharma v Gulab Devi,* AIR 1972 All 435.
2092. *Purohit Lakshmanchandji v V V Sree Ramachandra Murty,* AIR 1976 AP 428.
2093. *Hashmetrai H Sindhi v Tarachand L Mohota,* AIR 1979 Bom 95.
2094. *Ram Chandra v Ram Niwas,* AIR 1983 Bom 417, paras 6 and 7.

the case or appeal with regard to the ejectment of the tenant, acceptance of the rent by him cannot be treated as a waiver, according to the High Courts of Nagpur, and Jammu and Kashmir.[2095] The Oudh Chief Court held that in such a case the mere acceptance of a sum for use and occupation, would not amount to waiver of a notice to quit.[2096] According to the Calcutta view, however, since there is no proviso to section 113 corresponding to the second proviso to section 112, the payment and acceptance, after the filing of a suit for rent subsequent to the expiry of notice would operate as a waiver.[2097] In any case, the inclusion in the suit of a claim of rent subsequent to the expiry of notice does not have the effect of waiver, for a demand does not show consent.[2098]

The fact of the lessee holding over without an agreement for a new tenancy does not operate as a waiver;[2099] nor the fact that the lessor, as a matter of indulgence, allows the lessee to continue in occupation after the expiry of the notice.[2100]

A plea of waiver based on facts must be pleaded in the written statement.[2101]

After the determination of the tenancy by all the co-owners, it is not open to one of them to waive the notice, or to revive the tenancy. This can be done only by all the co-owners acting together.[2102]

(4) Agricultural Leases

The principle of the section applies to agricultural leases.[2103]

114. Relief against forfeiture for the non-payment of rent.—Where a lease of immovable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrears, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

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2095. *Ilahibux v Munir Khan,* (1954) ILR Nag 147 : AIR 1953 Nag 219; *Ram Lal v Sardari Lal,* AIR 1968 J & K 22.
2096. *Kamlapat Sahai v Mando Bibi,* AIR 1948 Oudh 127.
2097. *Manicklal v Kadambini,* (1926) 43 Cal LJ 272 : 64 IC 156 : AIR 1926 Cal 763.
2098. *Shah Wali v Hussaini Begum,* 42 IC 655; *Zaffar Hussain v Mahavir Parsad,* (1956) ILR 35 Pat 894 : AIR 1957 Pat 206.
2099. *Gray v Bompas,* (1862) 11 CB (NS) 520.
2100. *Whiteacre d Boult v Symonds,* (1808) 10 East 13.
2101. *Hashmetrai v Tarachand,* AIR 1979 Bom 95.
2102. *Chhongur Ram v Ganesh,* (1978) All LJ 468.
2103. *Hindu Singh v Rao Nihalkaranji,* AIR 1954 MB 37.

(1) Relief Against Forfeiture for Non-payment of Rent

The rule of equity enshrined in section 114 postulates that where a lease of immovable property has determined by forfeiture for non-payment of rent and the lessor files a suit for ejectment of the lessee, the court exercises a discretionary jurisdiction of passing an order relieving the lessee against the consequences of forfeiture if at the hearing of the suit the lessee pays or tenders to the lessor the rent in arrears with interest and costs or furnishes such security as the court thinks sufficient.[2104] Having appointed a time for payment, the court still retains jurisdiction to extend the time.[2105] The legislature never intended to place a tenant, in a situation, worse than what it would have been under the principles as may be derived from section 114 of the TP Act.[2106]

In terms, section 114 makes payment of rent at the hearing of the suit in ejectment, a condition of the exercise of the court's jurisdiction, but an appeal being a rehearing of the suit, in appropriate cases it is open to the appellate court at the hearing of the appeal to relieve the tenant in default against forfeiture. Passing of a decree in ejectment against the tenant by the court of first instance does not take away the jurisdiction of the appellate court to grant equitable relief. Failure of the tenants to avail themselves of the opportunity does not operate as a bar to the jurisdiction of the appellate court. The appellate court may having regard to the conduct of the tenant decline to exercise its jurisdiction to grant him relief against forfeiture. The question is not one of jurisdiction, but of discretion.[2107] Though the TP Act does not apply to the state of Punjab, the principles underlying or contained in the provisions of the TP Act as are essentially the principles of justice, equity and good conscience, have been held to be applicable. Section 114 embodies one such principle.[2108]

In England, equity from very early times regarded a forfeiture clause for non-payment of rent as security for the rent, and granted relief whenever compensation could be given; and even the Courts of Common Law restrained actions for ejectment for non-payment of rent on the lessee bringing the rent into court. Relief was given upon the principle that, as the right of entry was intended merely as security for the rent, the lessor thereby recovered full compensation, and was put in the same situation as if rent had been paid to him when it was originally due.[2109] This section refers to non-payment of rent only,[2110] while other cases of forfeiture are dealt with in the new section 114A. It therefore does not apply in cases of a simple suit for evicting a monthly tenant after service of notice to quit.[2111]

2104. *Trilok Chand Kawad v Javeri Lal Marlech,* 2010 SCC OnLine Raj 2895. *Rajan v Rakesh Kumar,* (2010) 1 RCR (Rent) 386 (DB)
2105. *Rakesh Wadhawan v Jagdamba Industrial Corpn,* (2002) 5 SCC 440 : AIR 2002 SC 2004.
2106. *Rajan v Rakesh Kumar,* (2010) 1 RCR (Rent) 386 (DB); *Karam Kapahi v Lal Chand Public Charitable Trust,* AIR 2010 SC 2077 : (2010) 4 SCC 753.
2107. *R S Lala Praduman Kumar v Virendra Goyal,* AIR 1969 SC 1349 : (1969) 1 SCC 714; *Rakesh Wadhawan v Jagdamba Industrial Corporation,* (2002) 5 SCC 440 : AIR 2002 SC 2004; see also *Chilukuri Tripura Sundaramma v Chilukuri Venketeswarlu,* AIR 1949 Mad 841; *Janab Vallathi v K Kederval Thayammal,* AIR 1958 Mad 232; *Shrikishanlal v Ramnath Jankiprasad Ahir,* (1944) ILR Nag 877 : AIR 1944 Nag 229; *Budhi Ballab v Jai Kishan Kanpal,* 1963 All LJ 132; *Bhagwan Rambhan Khese v Ramchandra Kesho Pathak,* AIR 1953 Bom 129; *Bhiku Hari More v Vishvanath Shridhar Mogare,* AIR 2003 Bom 235.
2108. *Rakesh Wadhawan v Jagdamba Industrial Corporation,* (2002) 5 SCC 440 : AIR 2002 SC 2004.
2109. *Dhurrumtola Properties Ltd v Dhunbai,* (1931) ILR 58 Cal 311 : 132 IC 87 : AIR 1931 Cal 457; *Peachy v Duke of Somerset,* (1724) 1 Str 447 : 2 Wh & Tud 979.
2110. *Tippayya v Rama,* AIR 1961 Mys 131.
2111. *Phool Badan Verma v Ram Badhaee,* AIR 2010 (NOC) 741 (All) : 2010 (2) ALJ 551.

Relief against forfeiture for non-payment of rent was given in India before the TP Act.[2112] It is given in leases to which the TP Act is not applicable,[2113] and is recognised in various Acts referring to agricultural holdings.[2114]

Justice Shah (as he then was) has explained the object of section 114 thus in *Pradyuman Kumar v Virendra Goyal:*[2115]

> The covenant of forfeiture for non-payment of rent is regarded by the Courts as merely a clause for securing payment of rent, and unless the tenant has by his conduct disentitled himself to equitable relief the Courts grant relief against forfeiture of tenancy on the tenant paying the rent due, interest thereon and costs of the suit.

There is no distinction between a clause of nullity, and a condition of forfeiture. A lease under the old section 111(g) provided that on failure to pay three installments of rent, the lease should be null and void. This was treated as a case of forfeiture for non-payment of rent, and relief was given under this section.[2116] The section has no application to a tenancy from month to month.[2117] It has been held by the Calcutta High Court that when the West Bengal Premises Tenancy Act, 1956 applies, section 114 of the TP Act in so far as forfeiture against default is concerned, cannot be applied.[2118]

The principle of the section has been applied in Punjab;[2119] and also to agricultural leases.[2120]

Section 114 of the TP Act cannot be applied to a case where the suit for eviction of a tenant has been instituted not on the basis of forfeiture of lease under the TP Act, but on the basis of statutory provision dealing specifically with the rights and obligations of the landlords and tenants such as section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Where a tenant renders himself liable to be evicted on the ground of being a defaulter in payment of rent as contemplated by section 12(2) section and section 12(3)(a) of the Bombay Rent Act, bar from the way of the landlord in instituting the suit for ejectment of a tenant is removed, and he gets a right to have a decree of eviction. Such removal of bar is not in any sense forfeiture of any of the rights under the lease which the tenant held. Section 114 applies to a case where a lease of immovable property has determined by forfeiture for non-payment of rent. Under clause (g) of section 111, lease of immovable property determines by forfeiture, inter alia, in case the lessee breaks an express condition which provides that on breach thereof, the lessor may re-enter. Therefore, in a case where forfeiture of lease is claimed on the ground of non-payment of rent, it would have to be established that one of the express conditions of the lease provided that on breach of that condition, namely non payment of rent, the lessor was

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2112. *Timmarsa v Badiya,* (1865) 2 Bom HC 66; *Kottal Uppi v Edavalath,* (1871) 6 Mad HC 258; *Alum Chunder v Moran,* (1864) WR 31; *Ablakh Rai v Salim Ahmad,* (1879) ILR 2 All 437.
2113. *Subbaraya v Krishna,* (1883) ILR 6 Mad 159, p 164; *Narayana v Narayana,* (1883) ILR 6 Mad 327; *Jamsedji v Lakshmiram,* (1889) ILR 13 Bom 323; *Vaguran v Rangayyangar,* (1892) ILR 15 Mad 125.
2114. *Duli Chand v Meher Chand,* (1874) 12 Beng LR 439 (PC); *Mothoora Mohun v Ram Lall,* (1879) 4 Cal LR 469; *Mahomed Ameer v Peryag Singh,* (1881) ILR 7 Cal 566.
2115. *Pradyuman Kumar v Virendra Goyal,* [1969] 3 SCR 950 : AIR 1969 SC 1349 : [1969] 2 SCJ 689 : [1969] 2 SCA 242 : (1969) 1 SCC 714.
2116. *Hiranandan Ojha v Ramdhar Singh,* (1922) ILR 1 Pat 363 : 69 IC 886 : AIR 1972 Pat 528.
2117. *K G Pandit v Narsingdas,* (1950) ILR Nag 870 : AIR 1951 Nag 207.
2118. *Sadhu Saran Prasad v Rabindra Nath Saha,* AIR 1985 Cal 1.
2119. *Kallan v Jawahar Singh,* (1924) 5 Lah LJ 99 : 71 IC 837 : AIR 1924 Lah 49; *Guru Nanak Soc v State,* AIR 1972 Punj & H 83.
2120. *Ramkrishna v Fernandez,* 93 IC 851 : AIR 1927 Mad 239; *Shri Krishanlal v Ramnath,* AIR 1944 Nag 229.

entitled to re-enter, and that the lessee committed breach thereof followed by a notice in writing from the lessor showing his intention to determine the lease.[2121]

The claim of the tenant must be bonafide. If he comes up with a false claim of payment of rent of three months without receipts and of having oral agreement with landlord for execution of fresh lease deed the tenant is not allowed to discretionary relief as did not approach the court with clean hands.[2122] Similarly, if the tenant neither gives any reply to a valid notice nor deposits the amount in court, he is not entitled to any benefit under section 114.[2123] Mere acceptance of the cheque where the rent is accepted after the institution of the suit for ejection on grounds of forfeiture would not extend any benefit to the lessee. Where the enhanced rent as per the agreement was to be paid by the lessee within six months from the date of its accrual but he paid it after the lapse of six months a termination of tenancy on grounds of non payment of rent would not be illegal.[2124] Where the lessor issued notice and claimed enhanced rent for renovation of property, it being dilapidated, but the lessee without paying the enhanced rent continued to be in the occupation of the property and damages were caused to the property, the lessor would be entitled to mense profits.[2125]

(2) Distinction between Termination by Forfeiture and by Notice

Where a tenancy is legally forfeited, it comes to an end even before the expiry of the period of tenancy originally agreed. No question of notice of termination under section 106 arises in such a case. On the other hand, where the lease is not for a particular period, but only a yearly or monthly lease, and the agreement of tenancy provides for termination by notice under section 106, no question for forfeiture arises, and the benefit of section 114 cannot be claimed.[2126]

Where there is a simplicitor termination of tenancy under section 106 of the TP Act and not under section 111 (g) of the TP Act, these provisions of section 114 of the TP Act cannot be attracted.[2127]

2121. *Arun Khiamal Makhijani v Jamnadas Chetandas,* (1989) 4 SCC 612, p 624.
2122. *Paritosh Bhowmick v Nandulal Kar,* AIR 2012 (NOC) 192 (Cal).
2123. *N Periyasamy v K A L K R A L V Yakappa Chittiar,* (2010) 3 MWN (Civil) 698A. See also *Uttam Chand Gupta v New India Assurance Company Ltd,* AIR 2014 (NOC)115 (All); *Sanjiv v Mahabir Digambar Jain Mandir, Chhaparauli,* AIR 2012 All 157 : LNIND 2012 ALL 56 : 2012 (93) ALR 180 : 2012 (1) All Rent Cas 585; *Bhagat Ram v Ma* If the tenant commits a default in the payment of rent an additional protection has been given to him by the Legislature under section 14(1)(a) of the Delhi Rent Control Act, 1958. *Sarla Goel v Kishan Chand,* 2009 9 SCALE 392 : LNIND 2009 SC 2367 : JT 2009 (9) SC 21 : AIR 2009 SC (Supp) 2721; *The State of Maharashtra v Super Max International Pvt Ltd,* AIR 2010 SC 722 : LNIND 2009 SC 1735 : JT 2009 (11) SC 344 : 2009 (11) SCALE 794; *Prithipal Singh v Satpal Singh,* (2010) 2 SCC 15 : LNIND 2009 SC 2132 : AIR 2010 SC (Supp) 249 : 2009 (14) SCALE 672; *G Sekar v Geetha,* (2009) 6 SCC 99 : LNIND 2009 SC 860 : AIR 2009 SC 2649 : 2009 (5) SCALE 559; *Anil Kumar Keshav Dev v Kishan Lal Shyam Lal,* AIR 2012 All 156 : LNIND 2012 ALL 55 : 2012 (1) All Rent Cas 552 : 2012 (6) ADJ 316; *Taste Hotels Pvt Ltd v Medisetty Jayasri,* AIR 2012 AP 4 : LNIND 2011 AP 485 : 2011 (5) Andh LD 508 : 2011 (2) Rent LR 652; *Hoare Miller v Bank of India,* AIR 2011 AP 185 : LNIND 2011 AP 493 : 2011 (4) All MR 1 JS : 2010 (94) All Ind Cas 288; *K Sajjan Raj v Gopi Shetty Chandra Mouli,* AIR 2011 (NOC) 411 (AP); *Mina Sharma v Satyanaran Mandir Samittee,* AIR 2014 (NOC) 417 (Chh) *hant Prabhu Das* (2010) 81 ALR 608 (Utt).
2124. *Bata India Ltd v Sharvan Kumar Jain,* AIR 2017 Utr 186.
2125. *General Manager, Bharat Sanchar Nigam Limited (BSNL) v Radhika Chettri,* AIR 2018 (NOC) 285 (Sikkim).
2126. *Geetabhai v BD Manjrekar,* AIR 1984 Bom 400.
2127. *Ram Bali Pandey v Additional Judge, Kanpur,* AIR 1999 All 77.

(3) Relief not Available in Cases of Permissive Possession Short of a Lease

Where the possession of a person was not under a valid lease but was permissive, the same would be rendered akin to a trespasser after the revocation of permission under quit notice and no remedy would be available to him against the owner who would be entitled to seek possession.[2128]

(4) At the Hearing

Under the English statutes, the lessee may apply for relief not only at the hearing, but within six months of the execution of the decree in ejectment;[2129] but under this section, the lessee must apply at the hearing of the suit. As an appeal is a continuation of the suit, the lessee may pay or tender even in appeal.[2130]

Jurisdiction to grant relief against forfeiture can be exercised by the appellate court also.[2131] The words "at the hearing of the suit", also include the hearing of the appeal.[2132]

Where the tenancy stood determined by efflux of time, it would be an empty formality to relieve the tenant against earlier determination of tenancy by forfeiture for non-payment of rent, as equity always looks at the substance, and not to the form. The grant of equitable relief under section 114 was, therefore, declined in appeal.[2133]

The discretionary power under section 114, when exercised by the court, cannot be reversed in revision, unless its exercise is shown to be contrary to some principle of law.[2134] The section does not refer to tender of rent before a suit is filed; but such tender would be a ground for relief, and if the lessor nevertheless files a suit in ejectment, he does so at his own risk as to costs.[2135]

Section 114 contemplates tender or payment at the hearing of the suit, namely, in the trial court before the suit is commenced. The deposit of the decretal amount and payment made in pursuance of stay order of the court cannot be taken into account for the purpose of section 114, nor can tender or payment at the appellate stage be availed of for a relief under section 114. Where the tenant made no payment at any stage of the suit, but took only a false plea of payments having been made, relief, under section 114, cannot be granted at the stage of second appeal for the first time.[2136]

Deposit of standard rent with the Rent Controller under the Calcutta Rent Act, 1920 has been held to entitle a tenant to relief against forfeiture.[2137]

(5) Conditions of Relief

The lessee is put on terms to make full compensation to the lessor, ie, he must pay all rent in arrears with interest and full costs of the lessor's suit;[2138] or if he does not pay, he must give

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2128. *Andhra Graphite (P) Ltd v Jobing Syndicate, a registered partnership firm,* AIR 2011 (NOC) 2456 (AP).
2129. Common Law Procedure Act, 1852, section 210.
2130. *Ramakrishna v Baburaya,* (1912) 23 Mad LJ 715 : 24 IC 139; *Thirthaswamiar v Rangappayya,* (1913) 25 Mad LJ 486 : 21 IC 405; *Shri Kishanlal v Ramnath,* AIR 1944 Nag 229; *Bhagwant v Rambhau Keshav,* (1953) ILR Bom 98 : 54 Bom LR 833 : AIR 1953 Bom 129; *Chilakuri Tripura v Chilukuri Venkateshwarlu,* AIR 1949 Mad 841; *Janab Vellathi v Kadervel Thayammal,* AIR 1958 Mad 232.
2131. *Gobinda Lal v Tarak Nath,* AIR 1977 Cal 178.
2132. *Dayabhai v Bansilal,* 55 Bom LR 300.
2133. *Shyamial Agarwal v Nanda Rani Dassi,* AIR 1988 Cal 133.
2134. *Om Shanti Swarup v Prasanna Kumar,* AIR 1975 All 227.
2135. *Krishnaswami v Natal Emigration Board,* (1894) ILR 17 Mad 216.
2136. *Ram Prasad Rai v Raghunath Prasad,* AIR 1974 All 72.
2137. *Ahindra Nath v Twiss,* (1922) ILR 49 Cal 150 : 70 IC 75 : AIR 1922 Cal 394.

security for payment within 15 days. The Madras High Court has held that he must pay arrears of rent even though they are time-barred.[2139] Rent in arrear means rent in arrear upto the date when relief from forfeiture is allowed.[2140] There must be actual payment. Mere readiness to pay,[2141] or a conditional offer[2142] will not be sufficient.

The relief is discretionary, and in some cases it has been refused on the ground that the lessee made no tender in the lower court, and set up a false plea of discharge.[2143] But in a case before the TP Act, the Privy Council gave relief inspite of a false defence.[2144] In *Namdeo Lokman v Narmadabai,*[2145] in which the Supreme Court cited with approval the decision of the House of Lords in *Hyman v Rose,*[2146] pointed out that the entire conduct of the lessee was relevant, for he was seeking an equitable relief. It was held that in exercising the discretion under section 114, each case must be judged by itself, the delay, the conduct of the parties and the difficulties to which the landlord has been put should be weighed against the tenant. It is a maxim of equity that a person who comes in equity, must do equity and must come with clean hands. If the conduct of the tenant is such that it disentitles him to relief in equity, then the courts hands are not tied to exercise it in his favour. Even though no third parties were affected, the court upheld a refusal to grant relief in the case of a tenancy who was recalcitrant, and a habitual defaulter. Where the landlord approaches the court with unclean hands by having committed a default in handing over the possession immediately after the execution of the lease agreement or within a reasonble time thereafter, it was held that the tenant is entitled to the protection under section 114[2147] which is a rule of equity, justice and good conscience.[2148]

Relief has been refused where the lessee has been a persistent defaulter,[2149] or has raised frivolous or vexatious defences,[2150] or has withheld rent for a year and a half without justification.[2151] Where the tenant has been a chronic defaulter, there is no scope for exercising any equitable powers for relieving him from eviction on the ground of non-payment of rent.[2152] If there is sufficient cause, the court can relieve the lessee against forfeiture on the ground of

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2138. *Kundanlal v Kallu,* (1914) 12 All LJ 650 : 24 IC 79; *Shyam Bhagwan Dubey v Shaikh Nizam,* AIR 1994 MP 52, p 54.
2139. *Vasudeva v Krishna,* (1921) ILR 44 Mad 629 : 62 IC 593 : AIR 1921 Mad 418; *Vaman Pai v Venkata Naika,* AIR 1936 Mad 116 : (1936) Mad WN 83 : 160 IC 530; *Janab Vellathi v Kadervel Thayammal,* AIR 1958 Mad 232.
2140. *Dhurrumtolla Properties Ltd v Dhunbai,* (1931) ILR 58 Cal 311 : 132 IC 87 : AIR 1931 Cal 457; *Howard v Fanshawe,* (1895) 2 Ch 581 : [1895-99] All ER Rep 855.
2141. *Habib Ahmed v Keoti Kuer,* AIR 1946 LJ 121 : 222 IC 593 : AIR 1946 All 328; *Bhusan Chandra v Bengal Coal Co Ltd,* AIR 1966 Cal 63.
2142. *Luxmi Spinning Weaving Mills v Md Ibrahim,* (1958) Cal LJ 110 : 62 Cal WN 753 : AIR 1958 Cal 428.
2143. *Narayan v Handu,* (1905) 15 Mad LJ 210; *Mahalakshmi v Lakshmi,* (1911) 21 Mad LJ 960 : 12 IC 456. But see *Ramakrishna v Baburaya,* (1912) 23 Mad LJ 715 : 24 IC 139.
2144. *Dulli Chand v Meher Chand,* (1874) 12 Beng LR 239 (PC); *Ladharam v Chuniram,* (1946) 48 Bom LR 613 : 230 IC 67 : AIR 1947 Bom 86.
2145. *Lokman v Narmadabai* [1953] SCR 1009 : AIR 1953 SC 228; approving *Appayya Shetty v Mahammad Beari,* (1916) ILR 39 Mad 834 : 30 IC 596; and explaining *Debendra Lal v Cohen,* (1927) ILR 54 Cal 485 : 106 IC 477 : AIR 1927 Cal 908; *Dwarka Prasad v Om Prakash,* AIR 1967 Cal 612.
2146. *Hyman v Rose,* (1912) AC 623 : (1911-13) All ER Rep 238.
2147. *R Baskar Bhat v Hindustan Petroleum Corpn Ltd,* AIR 2002 Mad 330, para 14.6 : (2002) 2 Mad LJ 214.
2148. *Vellathi v K K Thayammal,* AIR 1958 Mad 232; *Palaniswamy v Kandappa Gounder,* AIR 1968 Mad 96; *Guru Nanak Society v State of Haryana,* AIR 1972 P&H 83; *Rameswar Bora v Dakshinpat Satra,* AIR 1990 Gau 81.
2149. *Namdeo Lokman v Narmadabai,* AIR 1953 SC 228; *Thackers Press & Directories Ltd v Gopinath,* (1962) 60 Cal WN 449 : AIR 1962 Cal 591.
2150. *Narsingh Das v Permeshwari Das,* AIR 1962 All 65.
2151. *Kishanlal v Hari,* AIR 1956 Ass 113.
2152. *Meenakshisundaram v Paul Asari,* (1977) 1 Mad LJ 537.

non-payment of rent. But where the tenant does not show that he was not able to pay the rent, and makes no attempt to pay the arrears of rent even when the suit is instituted and makes the tender only after the application is moved by the landlord for striking off the defence under O 15, rule 5 of the Code of Civil Procedure, the court will be justified in refusing to grant relief against forfeiture.[2153] Relief against forfeiture was granted to tenants who were not chronic defaulters, though on some occasions they had not paid rents on the due dates.[2154] The order being discretionary, the Supreme Court will not ordinarily interfere with the exercise of the discretion.[2155] Where the lease for a fixed period had already expired during the pendency of the appeal, the lease would stand determined by efflux of time, even if forfeiture is relieved against. The grant of equitable relief under section 114 in such an event is held to be entirely out of place.[2156]

(6) Consent Decree

If the terms of the lease are embodied in a consent decree, the court executing the decree has power under this section to grant relief from forfeiture;[2157] but such relief cannot be granted in connection with decrees other than consent decrees.[2158]

(7) No Double Protection

The Supreme Court has held that the executing court cannot grant relief against forfeiture on the strength of section 114 of the TP Act notwithstanding section 12(3) of the Bombay Rent Act, 1947, of which clause (2) was a special provision incorporating the equity provision contained in section 114 of the TP Act. If a tenant fails to abide by the requirements of the special provision of section 12(3) of the Rent Act, he must take the consequences thereof, and there is no question of granting him double protection by resorting to section 114 of the TP Act.[2159]

(8) Period of Grace

When the lease allows a period of grace after the due date for the payment of rent, the Madras High Court at one time held that the provision for forfeiture was not penal, and that the lessee was not entitled to relief.[2160] The Bombay High Court refuses to treat that as an inflexible rule.[2161] It is obvious that such a rule might be a means of defeating the equity of relief, and the Madras High Court has repudiated it.[2162]

Even though claiming unpaid rent for a period of three years beyond three years is barred by the law of limitation, but recovery of due rent is barred but remedy of eviction on grounds of non payment of rent beyond three period is not barred.[2163]

2153. *Om Shanti Swarup v Prasanna Kumar,* AIR 1975 All 227.
2154. *Rameshwar Bora v Dakshinpat Satra,* AIR 1990 Gau 81, p 85.
2155. *Pradyuman Kumar v Virendra Goyal,* [1969] 3 SCR 950 : AIR 1969 SC 1349 : [1969] 2 SCJ 689 : [1969] 2 SCA 242 : (1969) 1 SCC 714.
2156. *Shyamlal Agarwala v Nanda Rani Dassi,* AIR 1988 Cal 133, p 135.
2157. *Nagappa v Venkat Rao,* (1904) ILR 24 Mad 265; *Krishnabai v Hari Govind,* (1907) ILR 31 Bom 15; overruling *Shirekuli v Mahablya,* (1886) ILR 10 Bom 435; *Balambhat v Vinayak,* (1911) ILR 35 Bom 239 : 10 IC 746, *Amiya De v D N Mandal,* AIR 1971 Cal 263.
2158. *Girdharadoss & Co v Appadurai,* (1928) ILR 51 Mad 157 : 107 IC 792 : AIR 1928 Mad 193.
2159. *Prithvichand Ramchand Sablok v SY Shinde,* AIR 1993 SC 1929, pp 1936–1937 : (1993) 3 SCC 271, pp 281-282. See also *Pradesh Kumar Bajpai v Binod Behari Sarkar,* AIR 1980 SC 1214 : [1980] SCR 93.
2160. *Naraina v Vasudeva,* (1905) ILR 28 Mad 389; *Adhiragi Chetty v Billa Tyampu,* (1910) 20 Mad LJ 944 : 6 IC 438; *Mahalakshmi v Lakshmi,* (1911) 21 Mad LJ 960 : 121 C 456; *Narayan v Handu,* (1905) 15 Mad LJ 210.
2161. *Krishnaji v Sitaram,* (1921) ILR 45 Bom 300 : AIR 1921 Bom 403.
2162. *Appayya Shetty v Mahammad Beari,* (1916) ILR 39 Mad 834 : 301 IC 596; *Ramabrahmam v Rami Reddi,* 108 IC 273 : AIR 1928 Mad 250.
2163. *Ram Narayan Prasad v Benu Kumar Mukhia,* AIR 2018 Sikkim 5 : 2017 (2) RCR (Rent) 68.

(9) Extension of Time by Court

In England, it has been held that where an order for relief against forfeiture of a lease is granted to a tenant on terms to be performed within a specified time, the court has jurisdiction to extend that time if circumstances which would make it just and equitable that extension should be granted are brought to its notice.[2164] Following the said decision, the Supreme Court has held that even the time appointed by a consent decree can be extended.[2165]

Sub-lessee

The assignee has the same right to relief under this section as the lessee. In England, the right to relief is given to the "tenant" and his assigns.[2166] It, therefore, extends to a mortgagee,[2167] or underlessee.[2168] The Allahabad High Court has given a sub-lessee the benefit of this section.[2169] Where the lease itself gives a right to the lessee to sublet the premises, the sub-lessee has the right to avoid forfeiture by payment of rent under section 114 unless based on the facts, he is disentitled from claiming exercise of the discretion in his favour.[2170]

[2171][**114A. Relief against forfeiture in certain other cases.**—Where a lease of immovable property was determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach, and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.]

Synopsis

(1) Relief Against Forfeiture .....1044 (2) Eviction Under Statute 1045

2164. *Chandless-Chandless v Nicholson,* (1942) 2 KB 321 : [1942] 2 All ER 315.
2165. *Rakesh Wadhawan v Jagdamba Industrial Corpn,* (2002) 5 SCC 440 : AIR 2002 SC 2004.
2166. Common Law Procedure Act, 1852, section 212; see also Law of Property Act, 1925, section 146 (4).
2167. *Grand Junction Co Ltd v Bates,* (1954) 2 QB 160 : [1954] 2 All ER 385; *Church Commrs v Ve-ri Best Co,* (1957) 1 QB 238 : (1956) ILR 3 All 777.
2168. *Hare v Elms,* (1893) 1 QB 604; *Moore v Smee & Cornish,* (1907) 2 KB 8; *Vaman Pai v Venkata Naika,* (1936) Mad WN 83 : 60 IC 530 : AIR 1936 Mad 116; *Factor (Sundries) Ltd v Miller,* [1952] 2 All ER 630; *Grangeside Properties Ltd v Collingwoods Securities Ltd,* [1964] 1 All ER 143 : (1964) 1 WLR 139; *Belgravia Ins Co Ltd v Meah,* (1964) 1 QB 436 : [1963] All ER 828 (CA).
2169. *Ahmad Husain v Riaz Ahmad,* (1914) 12 All LJ 1085 : 25 IC 186.
2170. *Gobinda Lal v Tarak Nath,* AIR 1977 Cal 178.
2171. Ins. by Act 20 of 1929, sec. 58.

(1) Relief Against Forfeiture

This section was inserted by the amending Act 20 of 1929. It provides for relief against forfeiture in certain other cases besides non-payment of rent, eg for breach of covenant to repair, or for breach of covenant to insure. Before the enactment of the section, relief was not granted in the case of a breach of a covenant to repair.[2172]

The section does not apply to leases executed before the section was enacted,[2173] or brought into force.[2174] It also does not apply to a breach of the covenant to pay rent, for that is the subject of section 114.

This section would apply only when there is express condition governing the lease, which provides that on breach thereof, a lessor may re-enter. It cannot apply to a case governed by a rent law, which, while conferring on the tenants protection against eviction, also confers rights on the landlords to evict the tenants, if any of the grounds provided in the statute like default to pay rent is satisfied. A statutory provision like the one in section 4 of the Gangtok Rent Control and Eviction Act, 1956, providing the grounds on which only a tenant can be evicted, does not convert a periodic tenancy into one of fixed or indefinite duration, nor insert therein a clause of re-entry on the ground of non-payment of rent, and, therefore, the provisions of section 114A providing relief against forfeiture, cannot apply to premises-tenancies governed by such statutes.[2175] The section does not apply to forfeiture for disclaimer. There is no power to grant relief against forfeiture for disclaimer.[2176] But in the case last cited, it was said that the court would have such power if the disclaimer were occasioned by fraud, accident or mistake. This was obiter, and there is another obiter dictum in a Bombay case[2177] to the effect that in very special cases, a court might grant relief against forfeiture for disclaimer, even when the disclaimer was not occasioned by fraud, accident or mistake of the landlord. The section does not apply to forfeiture for breaches of covenants which have the effect of creating a subordinate interest such as assigning, under letting, parting with possession, or disposing of the property leased.

It has been held in England in the case of a user for immoral purposes,[2178] that certain breaches are by their nature irremediable. In *Glass v Kencakes Ltd*,[2179] however, those cases have been distinguished. The court held that a breach of such nature may be irremediable if committed by the lessee, or if committed by the sub-lessee, if the lessee is aware of it and takes no steps to evict the sub-lessee, but it is not necessarily so. Whether such user causes so great a damage to the property as to render the breach irremediable, is a question of fact.

The principle of this section and its requirements have been applied to agricultural leases by the Bombay High Court.[2180] The Madras High Court has refused to do so in some cases,[2181] but has done so in others.[2182] The effect of the section is that the lessee, by

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2172. *Debendra Lal v Cohen*, (1927) ILR 54 Cal 485 : 106 IC 477 : AIR 1927 Cal 908.
2173. *Sakunthalammal v Chandrasekar*, (1968) ILR 3 Mad 201 : AIR 1968 Mad 195.
2174. *Sazro Govind v Malba Madeva*, AIR 1969 Goa 42.
2175. *P S Nirash v Mintok Dolma Kazini*, AIR 1984 Sikkim 1, p 6; *Mangilal v Suganchand*, AIR 1965 SC 101, p 106.
2176. *Kemalooti v Muhamed*, (1918) ILR 41 Mad 629 : 45 IC 743.
2177. *Rachotappa v Konher*, (1934) ILR 59 Bom 194 : 36 Bom LR : 155 IC 516 : AIR 1935 Bom 41.
2178. *Rugby School (Governors) v Tannahill*, (1935) 1 KB 87 : [1934] All ER Rep 187; *Egerton v Esplanade Hotels London Ltd*, [1947] 2 All ER 88; *Hoffman v Fineberg*, (1949) Ch 245 : [1948] 1 All ER 592; *Borthwick-Norton v Romney Warwick Estates Ltd*, [1950] 1 All ER 798.
2179. *Glass v Kencakes Ltd*, (1966) 1 QB 611 : [1964] 3 All ER 807.
2180. *Mallappa v Janardan*, (1926) ILR 50 Bom 450 : 94 IC 1054 : AIR 1926 Bom 304.
2181. *Krishna Shetty v Gilbert Pinto*, (1919) ILR 42 Mad 654 : 50 IC 899; *Sakunthalammal v Chandrasekar*, (1968) ILR 3 Mad 201 : AIR 1968 Mad 195.

remedying the breach, prevents the enforcement of the forfeiture, and he is not liable for the lessor's costs,[2183] as he is under section 114. If the court were satisfied that the lessee had complied with the terms of the section, the lessor's suit for eviction would be dismissed with costs. In the case of forfeiture, one written notice is required under the law, and not one under section 111(g), and another under section 114A.[2184] A notice calling upon the lessee to remedy the breach "if it is capable of remedy" is good notice.[2185] It is settled that even where the lease provides for forfeiture, in case of assignment by the lessee, there cannot be any forfeiture and automatic resumption by the lessor without notice to the lease determining lessee. The breach of condition of the lease only makes the lease voidable. Therefore, forfeiture is not complete, unless and until the lessor gives a notice to the lessee that he wishes to exercise his option to determine the lease.[2186]

When the leased premises were themselves tenanted and the misuse was by the tenant, the time taken by the lessee in stopping the misuse by the tenant had to be considered to be reasonable time while interpreting a lease deed which specified that re-entry and forfeiture would not be ordered if the misuse was remedied within reasonable time. If the misuse was remedied within reasonable time, an order of re-entry would not be sustained.[2187]

The provisions of section 108(p) amount to an implied term, while section 114A provides for relief against forfeiture in respect of express terms or conditions. Section 114A cannot be invoked for breach of an implied condition.[2188]

Section 114A merely bars a suit for ejectment of the lessee. Where the land was acquired under the Land Acquisition Act for the purpose of the lessee company, it was held that the question of filing a suit for ejectment did not arise at all.[2189]

(2) Eviction Under Statute

The High Court of Sikkim has held that section 114A can apply only where the question is of applying an express condition in the lease which provides for re-entry by the lessor on its breach. It cannot apply where the case is governed by an Act relating to rent control and eviction of tenants, which, while conferring protection on tenants, also confers a certain right on the landlords to seek eviction on specified grounds. When such a ground is made out, it is not a case of forfeiture of the "lease" within section 111(g), but of forfeiture of the protection conferred on the tenant by the statute against eviction. The rent control Act does not insert a clause of re-entry on the ground of non-payment of rent.[2190]

115. Effect of surrender and forfeiture on under-leases.—The surrender, express or implied, of a lease of immovable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the

2182. *Bright Souza Bai v Louis Bai,* AIR 1947 Mad 119; *Westmorland Wood v Spain,* (1953) ILR Mad 615 : (1952) 2 Mad LJ 758 : AIR 1953 Mad 313.
2183. *Nind v Nineteenth Century Building Society,* (1894) 2 QB 226 (CA); but see now Law of Property Act, 1925, section 146(3).
2184. *Prabhat Chandra v Bengal Central Bank,* (1938) ILR 2 Cal 434 : 42 Cal WN 761 : AIR 1938 Cal 589. But see *Godabari Debi v Nand Kishore,* (1969) 74 Cal WN 531.
2185. *Glass v Kencakes Ltd,* [1964] 3 All ER 807.
2186. *Meenakshi Jain v State,* AIR 1998 MP 78.
2187. *Amrit Lal Bassi v UOI,* AIR 1987 Del 340.
2188. *Bhagaban Biswas v Bejoy Singh Nahar,* AIR 1980 Cal 70.
2189. *Basant Lal v State of Uttar Pradesh,* (1980) 4 SCC 430, p 433.
2190. *P S Nirash v Mintok Domma Kazini,* AIR 1984 Sikkim 1.

amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under lessees, or relief against the forfeiture is granted underSection 114.

Synopsis

(1) Effect of Surrender on Under Leases..1046 (2) Effect of Forfeiture on Underlease..... 1047

(1) Effect of Surrender on Under Leases

Section 115 provides that the surrender of a lease does not prejudice an under-lease of the property or in part thereof previously granted by the lessee. The lessee, having parted with a part of the interest of the property in favour of the sub-lessee, cannot surrender that part of the property which is in the possession of the sub-lessee, for he cannot restore possession of the same to the lessor apart from the fact that he can terminate the contract of lease only as a whole, and not in respect of a part of it.[2191]

Surrender being a voluntary act, the principle applies that the lessee cannot derogate from his own grant, and by surrender to the lessor, destroy the rights that he has created in the sub-lessee.[2192] The surrender, therefore, operates as a grant, subject to the rights of the sub-lessee. This section protects the rights of a sub-lessee in case of surrender and fraudulent forfeiture of the lease. It aims to protect a sub-lessee but only when he holds such a title. A person who under an agreement is responsible for management and maintenance of the tenancy is not a sub-lessee and cannot claim any remedy under this provision.[2193]

It had been held in England in *Walter v Yalden,*[2194] that a surrender operates as an assignment, and the lessee can only give a title to his lessor by surrender, to the same extent as he could to a stranger by an assignment. The question arose whether the lessor to whom the lessee had surrendered the lease, could claim immediate possession against a squatter who had acquired a title by adverse possession against the lessee. It was held that he could not until the lease determined in the ordinary course, for the lessee could not, by a surrender, give to the lessor what he had not got himself. In view of the express language of section 115, it is clear that a surrender cannot, in India, operate to defeat an under lessee. Regarding a person other than a sub-lessee, it is submitted that the view taken in *Walter v Yalden* is correct.

To effectuate a valid surrender, possession need not be handed over.[2195] Similarly, an execution of the lessee cannot attach the sub-lessee's interest, for all that he can proceed against is the interest of his judgment-debtor.[2196] The position is the same when on the bankruptcy of the lessee, his trustee in bankruptcy disclaims the lease, and such disclaimer

2191. *TIrath Ram Gupta v Gurubacan Singh,* (1987) 1 SCC 712 : AIR 1987 SC 770; *Krishna Kheerasa Habib v Shah Parasmal Pittaji Jain,* AIR 2000 Kant 129.
2192. *Suleman Haji v Darab Shaw,* (1939) ILR Bom 144 : 41 Bom LR 125 : 180 IC 945 : AIR 1939 Bom 98; *Premier National Bank v Bhairodin Sethia,* (1950) ILR 1 Cal 226; *Mahammad Ibrahim v Beni Madhav,* (1952) ILR 2 Cal 175 : AIR 1951 Cal 126.
2193. *Urban Amenities Pvt Ltd v Mrityunjoy Seal,* AIR 2011 Cal 123 : (2011) 1 CHN 645.
2194. *Walter v Yalden,* (1902) 2 KB 304.
2195. *Bhagbati Builder v Karim Bux,* AIR 1971 Cal 319 : (1972) ILR (1) Cal 146.
2196. *Vishnu Atmaram v Anant Vishnu,* (1890) ILR 14 Bom 384.

does not affect the sub-lessee's rights.[2197] When the lessee surrenders to the lessor, the sub-lessee, therefore, becomes a lessee of the lessor on the terms of the sub-lease. But if the surrender is made for the purpose of obtaining a new lease, the sub-lessee continues to hold under the lessee.[2198] However, where the grant of primary lease was subject to the sanction granted by the government, the renewal of the sub lease would not take effect in absence of sanction granted by government in favour of such sub-lessee.[2199]

The same rule has been enforced in India before the TP Act,[2200] and in the case of agricultural tenancies.[2201] Relinquishment by a *patnidar* of his interest does not affect subordinate interests.[2202] On the same principle, if an occupancy tenant mortgages his tenancy and then surrenders it to the *zamindar*, the surrender will not prejudice the rights of the mortgagee.[2203]

(2) Effect of Forfeiture on Underlease

If the lease is terminated by forfeiture *in invitum*, the principle that the lessee cannot derogate from his grant does not apply. In *Great Western Railway Co v Smith,*[2204] LJ Mellish, said: It is a rule of law that if there is a lessee, and he has created an under-lease, or any other legal interest, if the lease is forfeited, then the under lessee, or the person who claims under the lessee, loses his estate as well as the lessee himself; but if the lessee surrenders, he cannot by his own voluntary act in surrendering, prejudice the estate of the under lessee, or the person who claims under him. In a case of forfeiture, the sublease falls within the lease from which it is derived. Thus, forfeiture of a lease also destroys the rights of the sub-lessee,[2205] and in a suit for the eviction of the lessee, there is no need to implead or even to inform the sub-lessee;[2206] and the decree in ejectment of the lessee can be executed against the sub-lessee, although he was not a party.[2207] This is true of all derivative interests such as leases and mortgages created by the lessee;[2208] but if by terms of the lease, the lessee is authorised to mortgage his interest, the lease should not be extinguished without giving the mortgagee an opportunity to prevent the extinction.[2209] On the same principle, it has been held that the decree for ejectment against a lessee in a suit in which the sub-lessee was a party, extinguishes the sub-lessee.[2210]

2197. Re *Finley* (1883) 21 QBD 475; *Thompson and Cottrell's Contract,* (1943) 1 Ch 97.
2198. *Deo d Palk v Marchetti,* (1831) 1 B & Ad 715, p 721; *Suleman Haji v Darab Shaw,* AIR 1939 Bom 98.
2199. *Saroj Screens Pvt Ltd v Ghanshyam,* AIR 2012 SC 1649 : (2012) 3 Bom CR 565 : (2012) 4 SCALE 25.
2200. *Heeramonee v Gunganarain,* (1868) 10 WR 384; *Nehaloonissa v Dhunno Lal,* (1870) 13 WR 281.
2201. *Badri Prasad v Sheodhian,* (1896) ILR 18 All 354; *Mohsenuddin v Bhagaban Chandra,* (1921) ILR 48 Cal 605 : 25 Cal WN 29 : 61 IC 443 : AIR 1921 Cal 444.
2202. *Judoonath v Schoene Kilburn & Co,* (1884) ILR 9 Cal 671.
2203. *Rannu Rai v Rafi-ud-din,* (1905) ILR 27 All 82; *Brij Kumar v Sheo Kumar,* (1915) ILR 37 All 444 : 29 IC 215; *Chhiddu v Sheo Mangal Singh,* (1917) ILR 39 All 186 : 39 IC 585; *Kenchadi Lal v Jabarsha,* AIR 1936 Nag 171.
2204. *Great Western Railway Co v Smith,* (1876) 2 Ch D 235, p 253.
2205. *Great Western Rly Co v Smith,* (1876) 2 Ch D 235, p 253; *Timmappa v Rama Venkanna,* (1897) ILR 21 Bom 311; *Ramkissendas v Binjraj,* (1923) ILR 50 Cal 419 : 77 IC 910 : AIR 1923 Cal 691. See also *Madhusudan v Midnapore Zamindari Co,* (1918) ILR 45 Cal 940 : 46 IC 129.
2206. *Ramkissendas v Binjraj,* AIR 1923 Cal 691; *Egerton v Jones,* (1939) 2 KB 702 : [1939] 3 All ER 889; *Church Commrs v Ve-ri-best Co,* (1957) 1 QB 238 : [1956] 3 All ER 777; *Kshiroda Sundari v Bhupendra Mohan,* AIR 1961 Assam 70.
2207. *Sheikh Yusuf v Jyotish Chandra,* (1932) ILR 59 Cal 739 : 35 Cal WN 1132 : 137 IC 139 : AIR 1932 Cal 241; dissenting from *Ezra v Gubbay,* (1920) ILR 47 Cal 907 : 60 IC 969.
2208. *Khiali Ram v Nathu Lal,* (1893) ILR 15 All 219, p 230 (FB).
2209. *Bahadur v Raja Moti Chand,* (1925) ILR 47 All 589 : 88 IC 224 : AIR 1975 All 580.
2210. *Shankarrao v Kishanlal,* AIR 1950 MB 19.

If the forfeiture is a collusive proceeding between the lessor and the lessee, this fraudulent practice will not affect the sub-lessee. Moreover, if the forfeiture is relieved against, the sub-lessee also gets the benefit of the continuance of the lease. The Allahabad High Court has held that the sub-lessee can himself claim relief against forfeiture. In this connection, note "Sub-lessee" under section 114 may be referred.

116. Effect of holding over.—If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

ILLUSTRATIONS

(a) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of ₹ 100. The five years expire, but *C* continues in possession of the house and pays the rent to *A*. *C*'s lease is renewed from month to month.

(b) *A* lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A*'s assent. *B*'s lease is renewed from year to year.

Synopsis

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(1) Scope and Applicability

Section 108 (q) mandates that on determination of the lease, the lessee is bound to put the lessor into possession of the property. However, section 116 provides for the situations under which, despite determination of lease, if the lessee continues in possession a new lease may come into existence.[2211] A reference to section 116 shows that for application of this section, two things are necessary: (1) the lessee should be in possession after the termination of the lease; (b) the lessor or his representative should accept rent or otherwise assent to his continuing in possession.[2212] The use of the word "otherwise" suggests that acceptance of rent by the landlord has been treated as a form of his giving assent to the tenant's continuance of possession. There can be no question of the lessee "continuing in possession" until the lease has expired.[2213]

The whole basis of section 116 is that, in case of normal tenancy, a landlord is entitled, where he does not accept the rent after the notice to quit, to file a suit of ejectment and obtain a decree for possession, and so his acceptance of rent is an unequivocal act referable

2211. *Kaikhushru v Bai Jarbai*, AIR 1949 FC 124 : 1949 FCR 262, p 270.
2212. *M R Sahni v Doris Randhawa*, AIR 2008 Del 110 : (2008) 149 DLT 635 : (2008) 104 DRJ 246; *Ram Prasad Kurmi v Suraj Nath*, AIR 2005 (NOC) 573 (Gau); *Bank of India v V Swaroop Reddy*, AIR 2001 AP 260 : (2001) 2 ALD 280 : (2001) 2 ALT 388.
2213. *Karnani Industrial Bank v Province of Bengal*, AIR 1951 SC 285, p 287.

only to his desire to assent to the tenant continuing in possession. That is not so where Rent Act exists, and if the tenant says that landlord accepted the rent not as statutory tenant but only as legal rent, indicating his assent to the tenant's continuing in possession, it is for the tenant to establish it.[2214] The principles of holding over under section 116 come into play only after determination of the lease. The lease must be determined first and then the principles of holding over apply. They cannot apply before or where the occupation of tenancy continues under the registered lease after exercise of the option.[2215] The doctrine of holding over does not apply to a person who has never been in occupation as a tenant.[2216]

The effect of the second notice to quit under section 113 or a waiver of forfeiture under section 112, is that the determination of the lease under clauses (a) and (b) of section 116 does not take effect, because it is waived and the previous tenancy continues as before. The previous tenancy does not run as a fresh tenancy, but is the same as the old tenancy.[2217]

This section has to be read along with section 111(a) which deals with the termination of a tenancy by efflux of time. This section does not affect the rights of the landlord and tenant as contained in sections 112 and 113.[2218] In the case of *Gangadutt Murarka v Kartik Chandra Das*[2219] it was held that where a contractual tenancy, to which rent control legislation applied, had expired by efflux of time or by determination of notice to quit and the tenant continued in possession of the premises, acceptance of rent from the tenant by the landlord after the expiration or determination of the contractual tenancy will not afford ground for holding that the landlord had assented to a new contractual tenancy. It was further held that acceptance by the landlord from the tenant, after the contractual tenancy had expired, of amounts equivalent to rent, or amounts which were fixed as standard rent, did not amount to acceptance of rent from a lessee within the meaning of section 116.

(2) Holding Over[2220]

The expression "holding over" is used in the sense of retaining possession.[2221] The act of holding over after the expiration of the term does not create a tenancy of any kind.[2222] If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance.[2223] A distinction should be drawn between a tenant continuing in possession after the determination of the lease without the consent of the landlord, and a tenant doing so with the landlord's consent. The former is called a "tenant by sufferance" in the language of the English law, and the latter class of tenants is called a "tenant holding over" or "a tenant at will". In view of the concluding words of the section, a lessee holding over is in a better position than a tenant at will. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by

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2214. *Bhawanji Lakhamshi v Himathlal Jamnadas Dani*, AIR 1972 SC 819 : (1972) 1 SCC 388.
2215. *Ranjit Kumar Dutta v Tapan Kumar Shaw*, AIR 1997 Cal 278.
2216. *Syed Nawab Ali v Mohammad Ramzan*, AIR 1944 Nag 141.
2217. *Shotey Lal v Sheo Shankar*, AIR 1951 All 478 : (1950) All LJ 455; *Kamaksha v Parwatibai*, AIR 1960 MP 192.
2218. *Novnital v Baburao*, AIR 1945 Bom 132 : (1945) ILR Bom 68.
2219. *Gangadutt Murarka v Kartik Chandra Das*, AIR 1961 SC 1067 : [1961] 3 SCR 813; see *Kuppuswami v Mahadeva*, AIR 1950 Mad 746 : (1950) ILR Mad 844; *Ghulam v Raja Rao*, AIR 1947 Mad 436; *Kariya Belchappada v Vishnu*, (1971) KLT 340.
2220. See also notes "Tenant at sufferance" and "Tenant at will" under section 105.
2221. *R V Bhupal Prasad v State of Andhra Pradesh*, AIR 1996 SC 140 : (1995) 5 SCC 698.
2222 *Gopal Chandra v Khater Karikar*, AIR 1930 Cal 262 : (1930) 33 Cal WN 1207 : 125 IC 654; *Baban v Champabai*, AIR 1949 Nag 336 : (1949) ILR Nag 432; *Mohammad Hanif Mia v Haladhar Lahkar*, AIR 1957 Bom 236; and see *Lalit Mohan v Satalbasini*, AIR 1965 Cal 55 : (1964) 68 Cal WN 1036.
2223. *Kundan Lal v Deepchand*, AIR 1933 All 756 : 146 IC 762 : (1933) All LJ 682; *Prasad v Hansraj*, AIR 1946 Oudh 144 : 222 IC 602.

the lessee or sub-lessee remaining in possession of the property after his term was over, and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise.[2224] Section 116 does let a statutory recognition to the concept of holding over.[2225]

To bring a new tenancy into existence within the meaning of section 116, there should be an agreement as the section contemplates that on one side, there should be an offer of taking a fresh demise evidenced by the lessee's continuing occupation of the property after the expiry of the lease and on the other side, there must be a definite assent to this continuance of possession by the lessor/landlord,[2226] and that such an assent of the landlord cannot be assumed in cases of tenancies to which the rent restriction Acts apply on account of the immunity from eviction which a tenant enjoys even after the expiry of lease. In such cases, the landlord cannot eject him except on specified grounds mentioned in the rent restriction Acts and thus the acceptance of rent by the landlord from a statutory tenant, whose lease has already expired, would not be taken as evidence of a new agreement of tenancy and it would not be open to such a tenant to urge that by acceptance of rent, a fresh tenancy was created.[2227] Mere continuance in possession after determination of lease does not create a tenancy by holding over and the lessee must also prove that the lessor accepted rent or otherwise assented to the lessee's continuance in possession.[2228] The relationship of landlord and tenant may be created before payment of rent. Thus, a person in possession of a building without the consent of the landlord is a tenant on sufferance and not one at will, and is no better than a trespasser.[2229] So also, where a tenant remained in possession after the expiry of the date on which he was required to deliver possession by the Rent Controller, he cannot take advantage of the section even if he had paid rent for such period.[2230]

ILLUSTRATION

> *A* leased a godown to *B* for a term expiring on 20 October 1923. *B* wrote that he would vacate the godown on 30 October 1923. *A* replied that in that case he would require a proper notice to quit. *B* gave no notice but vacated the godown on 26 October 1923, and claimed to be liable for six days rent as compensation for use and occupation. But *A*'s demand for a notice was an assent to *B*'s continuing in possession and after 20 October, *B* was a monthly tenant. *B* was therefore liable for two months' rent, one month from 20 October plus one month in default on notice, one month being the period of notice required by usage.[2231]

The tenancy on sufferance is converted into a tenancy at will by the assent of the landlord, but the relationship of landlord and tenant is not established until the rent is paid and accepted. The assent of the landlord to the continuance of the tenancy after the

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2224. *Bhawanji Lakhamshi v Himatlal Jamnadas Dani,* AIR 1972 SC 819 : (1972) 1 SCC 388; *RV Bhupalprasad v State of Andhra Pradesh,* AIR 1996 SC 140 : (1995) 5 SCC 698; *Punjab National Bank v Choudhary,* AIR 1943 Oudh 392 : 210 IC 626; *Badrilal v Indore Municipality,* AIR 1973 SC 508; *Kaikhushru v Bai Jarbai,* AIR 1949 FC 124.
2225. *Kewal Chand Mimani v S K Sen,* AIR 2001 SC 2569 : (2001) 6 SCC 512.
2226. *K Anjanakumari v Bhavani,* AIR 2007 (NOC) 138 (Mad); *Bhuneshwar Prasad v United Commercial Bank,* AIR 2000 SC 2796 : (2000) 7 SCC 232.
2227. *Bhuneshwar Prasad v United Commercial Bank,* (2000) 7 SCC 232, para 7.
2228. *Mohamed Ahmed Amohi v Nirmal Chandra Roy,* AIR 1978 Cal 312; *Shanti Prasad Devi v Sahnker Mahto,* AIR 2005 SC 2905; *Maheshwar Singh v Radha Madhob Jew Thakur,* AIR 2007 Ori 190 : (2007) Supp (2) OLR 329.
2229. *Hasanalli v Dara Shah,* AIR 1949 Nag 289 : (1948) ILR Nag 922.
2230. *Gulam Ghaus v Chaudhari,* AIR 1947 Mad 436.
2231. *Meghji v Dayaiji,* AIR 1924 Bom 322 : 80 IC 507 : (1924) ILR 48 Bom 341.

determination of the tenancy would create a new tenancy. The courts in England have taken a different view, according to which no fresh tenancy is created.[2232]

Tenancy of holding over is a creature of a bilateral, consensual act, and does not come into existence by a mere unilateral intendment or declaration of one of the parties.[2233] This is really no tenancy at all in the strict sense and requires no notice to determine it, the expression being merely a fiction to avoid the continuance of possession operating as trespass. It is different from the concept of a tenancy at will, which arises by implication of law in certain cases of permissive possession.[2234] However, a tenant holding over as a tenant from month to month is entitled to notice to quit of 15 days.[2235]

Where a suit for ejectment and mesne profits was filed without giving a notice to quit required by section 106 of the TP Act, against a tenant in occupation of the rented property after expiry of lease, the suit would not be maintainable. Such a person is a tenant holding over and notice to quit is necessary. On expiry of the specified term under the unregistered lease deed executed before the filing of the suit, he does not become tenant at sufferance under section 111(a).

Where the lease was determined by efflux of time and a valid notice was admittedly served upon the tenant and rent deposited by the tenant was accepted by the landlord not as rent, but as damages for occupation of premises, it was held that the tenant is not a tenant holding over.[2236] Under the Indian law, the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy, his possession is juridical,[2237] and the occupation does not become unauthorised or wrongful until a decree for eviction is made.[2238]

A suit filed by the landlord for arrears of rent and also decree of ejectment of the tenant holding over month to month and therefore a tresspasser from the demised premises by giving 15 days notice under section 106, is legally justified.[2239] On the other hand, a tenant holding over with the implied consent of the landlord as he paid rent and the same was accepted by the landlord, can be evicted only by observing due procedure of law, and a suit filed by the tenant restraining the landlord from evicting him and restoration of his electrical supply would be proper.[2240] In *Ramratan Pannalal Jaiswal v Rohit Raghunathdas Udasi*,[2241] The issue was whether a compromise recorded in the Court created new tenancy in favour of the sub-tenant? The court held that, section 116 does not necessarily amount to creation of a fresh tenancy agreement. The whole basis of section 116 is that a landlord is entitled to file a suit for ejectment and obtain a decree for possession and, therefore, his acceptance of rent after expiry of lease is an unequivocal act referable to his desire to assent to the tenant continuing possession. Therefore, no new contract can be said to have taken place between the subtenant and the landlord by virtue of compromise between the tenant and the landlord.

2232. *Sheo Dulare v Anant Ram*, AIR 1954 All 475.
2233. *Sudarshan Trading Co Ltd v L D D'Souza*, AIR 1984 Kant 214, p 217.
2234. Ibid.
2235. *Indian Oil Corporation v Alka Agarwal*, AIR 2007 Bom 113 : (2007) 3 Bom CR 129.
2236. *Phool Rani Trivedi v Sheel Chandra*, AIR 2004 Del 424 : (2004) 111 DLT 820.
2237. *K K Verma v UOI*, AIR 1954 Bom 358 : (1954) 56 Bom LR 308.
2238. *Chander Kali Bail v Jagdish Singh Thakur*, AIR 1977 SC 2262, p 2265.
2239. *Ram Bharosey Lal Gupta v Hindustan Petroleum Corp Ltd*, 2013 (3) ALJ 757; *Paritosh Bhowmick v Nandulal Kar*, AIR 2012 (NOC) 192 (Cal).
2240. *Bibek Motors v Pyarimohan & Pramila Trust*, AIR 2012 Ori 87.
2241. *Ramratan Pannalal Jaiswal v Rohit Raghunathdas Udasi*, Second Appeal No. 197 of 2015, decided on 20 April 2015, High Court of Bombay (Nagpur Bench).

In *Tarun Kumar Ghose v The Credit Union Co-operative Enterprises Limited,*[2242] a lease was carried out for a period of twenty one years on two conditions: first, that the lessee was debarred from creating any sub-lease and second, there was no contemplation for renewal and/or extension of the period reserved. Despite this prohibition, the lessee sub-leased a portion of the premises. The lease expired by efflux of time and a suit for recovery of possession was filed. The sub-lessee, contended that even after expiry of time, they continued possession over the premises and the lessor continued to accept rent for the same, therefore there was a right of holding over. The Court held that if the head lease goes either on expiration of period by efflux of time or forfeiture, it annuls all sub-leases or under leases. It also noted that under section 108, the lessee had a write to sub-lease premises only if it was not specifically barred to do the same. As there was such a bar in the lease deed, the claims of the sub-lessee were found misplaced. Holding over, the Court said can result from a bilateral contract between the erstwhile lessor and the erstwhile lessee and mere acceptance of rent cannot be regarded as evidence of fresh tenancy.Where the lessee was continuously paying rent to the lessor for almost 14 years after the determination of the tenancy and the lessor accrete the rent, it would result in a new tenancy by way of holding over. This lease deed executed between the lessor and the lessee being unregistered would be considered as holding over and a month to month tenancy.[2243] A tenant continuing in possession after termination of the lease cannot be dispossessed except by authority of law. If he is dispossessed by force, he can seek back possession under the Specific Relief Act. This is so even where the lessor is the government.[2244] Where after determination of the tenancy, the landlord on his own snapped the power supply in order to resume possession extra-judicially by use of force the lessee's juridical possession would be protected and forceful dispossession would be prohibited. He would be entitled to a relief of restoration of power supply as he can be evicted only by following due process of law.[2245] He can get an injunction against eviction by the landlord otherwise than in due course of law, under section 38, Specific Relief Act, 1963.[2246]

The rule enacted in this section was followed before the TP Act.[2247] In the undernoted case,[2248] a tenant under a yearly lease was held at the expiry of the term to have become by payment of rent, a tenant from month to month, as the lease was not for an agricultural or manufacturing purpose. A tenant holding over as a tenant from month to month is entitled to notice to quit, of 15 days, expiring with the end of each month of the tenancy, and the day on which each month expires is calculated according to the rule in section 110 of TP Act.[2249] Section 116 is based upon consideration of justice, equity and good conscience and in

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2242. *Tarun Kumar Ghose v The Credit Union Co-operative Enterprises Limited,* (2016) 2 CALLT 568 (HC) (*Calcutta High Court*) : 2016 (3) CLJ (CAL) 500.
2243 *General Manager, Bharat Sanchar Nigam Limited (BSNL) v Radhika Chettri,* AIR 2018 (NOC) 285 (Sikkim).
2244. *M R S Ramakrishnan v Asstt Director, Ex-Servicemen Welfare,* AIR 1982 Mad 431, pp 435, 436, paras 10–11.
2245. *Bibak Motors v Pyarimohan and Promila Trust,* AIR 2012 Ori 87.
2246. *M Annapurnaiah v M Narsimha Rao,* AIR 1982 Pat 253.
2247. *Sheikh Enayutoolah v Elahee Buksh,* (1864) WR 42; *Nocoordass v Jewraj,* (1874) 12 Beng LR 263; *Ram Khelawun v Soondra,* (1867) 7 WR 152; *Sayaji v Umaji,* (1867) 3 Bom HC 27; *Chaturi Singh v Makund Lall,* (1881) ILR 7 Cal 710.
2248. *Secretary of State v Madhu Sudan Mukherji,* AIR 1932 Cal 260 : (1932) 36 Cal WN 918 : 141 IC 833.
2249. *Benoy Krishna Das v Salsiccioni,* 59 IA 414 : 37 Cal WN 1 : 56 Cal LJ 319 : 63 Mad LJ 685 : 1933 All LJ 423 : 35 Bom LR 6 : 141 IC 514 : AIR 1932 PC 279; *Susil Chunder Neogy v Birendrajil Shaw,* (1934) 38 Cal WN 782 : 153 IC 673 : AIR 1934 Cal 837; *Sm Sailbala Dassee v H A Tappassier,* AIR 1952 Cal 455.

the absence of anything to the contrary, its provisions are applicable even to cases not governed by the TP Act. Thus, where a lessee of agricultural land holds over after the expiry of the lease, he holds subject to all the covenants in the expired lease that are applicable to the new situation.[2250]

The expression "tenants at sufferance" is merely a fiction to distinguish their unlawful possession from that of the possession from that of the trespassers. Possession of "trespassers" is lawful both in its inception and in its continuance, whereas possession of a tenant at sufferance is rightful in its inception. A distinction can be drawn between tenant continuing in possession after determination of lease without the consent of the landlord and a tenant doing so with the consent of the landlord. The former is called a tenant by sufferance and later class of tenants is called tenants holding over or tenant at will. Act of holding over in any event after expiration of term does not necessarily create tenancy of any kind; if the lessee remains in possession after determination of term then for all practical purposes, he becomes tenant at sufferance. Where the heirs of the tenant were permitted to continue in possession of the suit land after the expiration of the lease period for some time upon the payment of rent, but they committed a default in the payment of rent, the continuation of possession by them would be deemed to be without consent of the landlord and they would be held to be the tenants at sufferance. Possession after the expiry of lease is juridical possession, the possession by a person in possession of the suit premises as tenant at sufferance is protected by law until their eviction by due process of law.[2251] After retirement, employees or their family members cannot claim their continuance over government allotted accommodation under the principle of holding over as the allotment of government accommodation cannot be termed a lease in favour of an employee. In absence of any other proof establishing their right on accommodation, they can be termed as unauthorised occupants and the authorities can evict them.[2252]

(3) Statutory Tenant

A person remaining in occupation of the premises let to him under a rent control legislation after the determination of or expiry of the period of the tenancy is commonly, though in law not accurately, called "a statutory tenant". Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute.[2253]

(4) Oral Lease

An oral lease for more than one year, if accompanied by delivery of possession, is valid for one year and the lessee continuing in possession thereafter with the assent of the lessor, becomes a tenant by holding over.[2254]

2250. *Amrit Lal v Mamteshwar,* AIR 1973 Del 75 : (1973) ILR 1 Del 43.
2251. *Mamata Panigrahy v Hemalata Dalai,* AIR 2017 Orissa 122.
2252. *Dinesh Chand v State of Uttarakhand,* AIR 2017 (NOC) 594 (Utr).
2253. *Anand Nivas (P) Ltd v Anandji Kalyanji Pedhi,* AIR 1965 SC 414 : [1964] 4 SCR 892.
2254. *Alauddin Ahmed v Aziz Ahmad,* AIR 1934 Pat 369 : 148 IC 684 : affirming AIR 1933 Pat 482; *Mohammad Mossa v Jaganand Singh,* 20 IC 715; *Ram Nath v Neta,* AIR 1962 All 604 : (1962) All LJ 773.

(5) Assents of his Continuing in Possession

The basis of the section is a bilateral contract between the erstwhile landlord and erstwhile tenant.[2255] On one side, there should be an offer of taking a new lease, evidenced by the lessee remaining in possession of the demised premises after his term was over. On the other side, there must be a definite consent of the landlord to the continuance of possession by the tenant, expressed by the acceptance of rent or otherwise.[2256] A plea under section 116, which is really based on an implied agreement, must be taken in the pleadings by the defendants. They cannot fall back upon such a plea on their failure to prove a defence to actual tenancy rights.[2257]

The assent of the lessor may be inferred from the acceptance of rent;[2258] or a demand for rent;[2259] or a suit for rent;[2260] or an agreement as to an item in an account for rent;[2261] or the grant of an invalid lease.[2262] But these circumstances merely create a presumption which may be rebutted. The Supreme Court has held that the context in which the provisions for the acceptance of rent find a place in the section, shows that what is contemplated is that the payment of rent should be made at such time and in such manner as to be equivalent to the landlord assenting to the lessee continuing in possession. When the payment is made at a time where there was no question of lessor assenting to the lessee's continuing in possession and neither party treated the payment as implying such assent, the case did not fall under the section.[2263]

Where the rent receipts were obtained by the lessee in collusion from a person who had no authority to realise rent on behalf of the landlord after the expiry of the period of the lease, it was held that such payment of rent cannot be held to be acceptance of rent by the lessor from the lessee within the meaning of these terms as used in section 116 of the TP Act.[2264] If an individual chooses to adopt a remedy at the back of the real owner/landlord by depositing the rent in a bank, unilaterally styling himself as a tenant under a particular person, the relationship of tenant holding over cannot be created.[2265] Where the tenant offered to renew the previous tenancy on the old terms after his interest under the earlier rent note had ceased, and there was positive assent by the landlord which could be inferred from his acceptance of rent from the tenant as such, it amounts to a clear recognition of tenancy rights asserted by the tenant who paid the rent.[2266] Where the landlord, after the expiry of the lease, accepted rent at the old rate for a number of years, he cannot be allowed to charge rent

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2255. *Bhawanji Lakhamshi v Himatlal Jamnadas,* AIR 1972 SC 819.
2256. *Sant Ram v State of Himachal Pradesh,* AIR 1989 HP 15; *Bhawanji Lakhanishi v Himatlal Jamnadas,* AIR 1972 SC 819 : (1972) 1 SCC 388 : (1973) MPLJ 1.
2257. *Tralok Chand v Arjun Singh,* AIR 1978 HP 2 : (1979) ILR HP 365.
2258. *Bishop v Howard,* (1832) 2 B & C 100; *Finch v Miller,* (1848) 5 CB 428; *Hyatt v Griffiths,* (1851) 17 QB 505; *Dougal v McCarthy,* (1893) 1 QB 736, p 740, (CA); *Bijay Chandra v Howrah Amta Rly,* AIR 1923 Cal 524 : (1923) 38 Cal LJ 177 : 72 IC 98; *Har Nath v Mohar Singh,* AIR 1931 Lah 675 : (1931) 32 Punj LR 469; *Gooderham and Works Ltd v Canadian Broadcasting Corpn,* AIR 1947 Cal 66 : AIR 1949 PC 90; *Sutti Devi v Seth Banarse Das,* (1949) ILR All 840; *Ambar Ali v Anjab Ali,* AIR 1949 Assam 87.
2259. *Dougal v McCarthy,* (1893) 1 QB 736, p 740.
2260. *Balaji v Ramchandra,* (1903) ILR 27 Bom 262.
2261. *Cox v Bent,* (1828) 5 Bing 185.
2262. *Mitarjit v Sheikh Leakut,* (1914) 18 Cal WN 858 : 23 IC 318; *Surya Lall v Tulsi Modak,* AIR 1951 Pat 483.
2263. *Karnani Industrial Bank Ltd v Province of Bengal,* AIR 1951 SC 285 : [1951] SCR 560 : [1951] SCJ 407 : [1952] SCA 18.
2264. *Rajendra Prasad v Ram Prasad Sao,* AIR 1985 Pat 104, p 108.
2265. *Charan Singh v Municipal Committee, Rania,* AIR 1996 P & H 207.
2266. *Municipal Committee, Kaithal v Pyare Lal Rikhiram,* AIR 1974 P&H 239.

at the enhanced rent provided in the penal clause of the earlier lease.[2267] In an Allahabad case, by a document executed by the defendant in favour of the plaintiff, the right to enjoy the pond, an immovable property for the purpose of pisciculture, was transferred on payment of certain amount annually by specifying the period for which the transfer was made. The document was also signed by both the parties, and was duly registered. After the expiry of the stipulated period, the plaintiff continued in possession of the pond. The document was held to be a lease, and the plaintiff was held to be a lessee from year to year by holding over. He could not be evicted from the pond by the defendant otherwise than by the due process of law on termination of the lease after terminating it by a notice under section 106.[2268]

The tenancy, created by holding over, is a new tenancy in law by implication. But in order to create a new tenancy, there must be a bilateral act. What section 116 contemplates is that there should be an offer to take a renewed or fresh lease, evidenced by the lessee continuing in possession. Acceptance of rent, unless explained on any other hypothesis, may be evidence of assent, depending upon the facts of each case, but it is not the only evidence or basis. Where the contract of tenancy has expired, but the tenant continues in possession by way of statutory protection, it cannot be said to be an offer on the part of the tenant to take a renewed or fresh lease, simply by continuing in possession. In such a case, while the statutory tenancy continues, acceptance of rent by the landlord by itself will not afford ground for holding that he assented to a new tenancy. In such a situation, the mere payment and acceptance of rent by themselves cannot be taken as evidence of a new lease arrangement. There must be independent evidence of assent by the landlord.[2269] Thus, the lessor may show that he accepted the rent in ignorance of the fact that the tenancy had terminated.[2270] The acceptance of the rent long before the expiry of the lease raises a presumption, but is not conclusive of the assent on the part of the lease.[2271] No implication of a holding over arises, therefore, in the case of a repudiating tenant,[2272] and if the tenant holds over against the wish of the landlord, he is liable for damages as a trespasser.[2273]

The assent of the lessor cannot be inferred merely from his delay in taking steps to evict the lessee;[2274] but in case where the tenant retained possession for 11 years after the expiration of the lease, the court inferred that there was a tenancy by holding over.[2275] The mere fact of service of notice to quit on a tenant who continues in occupation is not an assent or recognition of the tenancy.[2276] In a case which went upto the Supreme Court, municipal land was leased and a right to renewal of the lease was granted, subject to the condition that the lessee should pay upset price and increased rent within a specified period. The lessee did not comply with this condition, and thus did not obtain renewal of the lease. It was held that even though the rent which was paid at the old rate by the lessee was accepted by the

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2267. *Usto Ahmedoo v Abdul Rehman Darzi,* AIR 1977 J&K 79.
2268. *Bhola Nath v Maharao Raja Saheb Bundi State,* AIR 1984 All 60.
2269. *Padmanabha Pillai v Sankaran Viswambaram,* AIR 1987 Ker 98.
2270. *Deo d Lord v Crago,* (1848) 6 CB 90, p 98.
2271. *Karnani Industrial Bank Ltd v Province of Bengal,* AIR 1949 Cal 47.
2272. *Gokul Chand v Shib Charan,* (1912) 9 All LJ 574 : 13 IC 59; *Sujjad Ahmed v Ganga Charan,* (1905) 9 Cal WN 460.
2273. *Mackintosh v Gopee Mohun,* (1868) 4 WR 24; *Ram Sunder v Bataso Kuer,* AIR 1935 Pat 271 : 155 IC 367. See note "Damages" under section 108(q) and note "Double value".
2274. *Ratan Lal v Farshi Bibi,* (1907) ILR 34 Cal 396; *Govindaswami v Ramaswami,* (1916) 30 Mad LJ 492 : 34 IC 6; *Christian v Hari Prasad,* AIR 1955 Pat 158; *Pritilata Devi v Banke Bihari Lal,* AIR 1962 Pat 446; *Sheogobind v Sujan,* AIR 1960 Pat 156.
2275. *Munshi Safar Ali v Abdul Majid,* AIR 1927 Cal 279 : (1927) 31 Cal WN 282 : 100 IC 614; *Chaturbhuja v Gopal Dolai,* 18 IC 448; *Ram Hari Singh v Tirtha Pada,* AIR 1957 Cal 173 : (1956) 60 Cal WN 39.
2276. *Deo d Godsell v Inglis,* (1810) 3 Taunt 54; *Paramananda Singh v Syjou Singh,* (1916) 24 Cal LJ 30 : 37 IC 201.

Municipal Commissioner, the lessee could not be deemed to be a tenant holding over, but was only a tenant by sufferance, and could be evicted without notice.[2277]

After expiry of the lease, the successor in interest of the original tenant continued in possession. The landlord's successor in interest had assented to such possession by acceptance of rent offered by the tenant. In these circumstances, the burden of proving that the relationship of landlord and lessee had ceased to exist between the parties, lay on the landlord.[2278]

Mere delay in taking steps for evicting the tenant on expiry of a lease for a fixed term cannot lead to inference that the lessee assented to continuance of the tenant. Serving of notice to quit by the landlord cannot also lead to a presumption of holding over in such circumstances.[2279] In a Gujarat case, the lease was initially for one year, but the lessee continued as a tenant because of the rent control Act. Subsequently, the lessee committed a breach of terms of the lease deed which fell under one of the grounds of eviction provided in the rent control Act. The lessor served on the tenant a notice terminating the tenancy, describing the tenant as a 'monthly tenant'. It was held that merely because the lessor did not take any action for recovery of possession against the lessee soon after the expiry of the lease and, in fact, accepted rent, could not be indicative of his accepting the tenant as contractual tenant by holding over, in view of rent control legislation. Further, a fresh tenancy could not arise merely because he was described as a "tenant" in the notice.[2280]

If the tenancy rights are protected by special enactment, the mere acceptance of rent after expiry of the lease would not necessarily lead to the conclusion that there was an implied agreement to continue the original tenancy.[2281]

Mere acceptance of an amount equivalent to rent by the landlord from a tenant in possession after termination of the lease (whether by efflux of time or notice to quit) cannot, in itself, be regarded as creating a new agreement of "tenancy". This is especially so in the case of a statutory tenant.[2282]

The act of an employer in giving some time to an ex-employee to vacate the quarters is for the convenience of the employee, and cannot be taken to mean that the employer agreed to the holding over by the tenant. Ordinarily, in practice, employers would give some time to their ex-employees to vacate the quarters in the latter's possession.[2283] A tenant acting on his own, surrendered the lease premises, but did not hand over possession of two rooms. It was held that he was only a licensee, and not a statutory tenant.[2284] In a Calcutta case, after the passing of an ejectment decree against the tenant, the tenant approached the solicitors of the landlord for granting the tenant some time to vacate the premises. He had, in the meantime, offered to pay arrears of rent and mesne profits. Upon instructions from the landlord, the landlord's solicitors did not take any step in the execution case, the object being to enable the tenant to deliver possession amicably. In the meantime, the tenant went on paying the mesne profits. It was held that the consideration shown by the landlord could not in the circumstances be interpreted as evidence of an agreement to create a new tenancy in favour of the tenant.[2285]

2277. *Badri Lal v Indore Municipality,* AIR 1973 SC 508 : (1973) 2 SCC 388 : (1973) 1 SCWR 340.
2278. *Mohamad Ali v Nimar Ali,* AIR 1973 Gau 8.
2279. *Gordhan v Ali Bux,* AIR 1981 Raj 206.
2280. *Abdulahed Moulvi Abdulsammad v Gulam Mohamad Gulamnabi Bardoliwala,* AIR 1975 Guj 1
2281. *Tralok Chand v Arjun Singh,* AIR 1978 HP 2 : (1979) ILR HP 365.
2282. *Deep Chand v Babu Ram,* AIR 1976 All 478.
2283. *Pratap Narain v Juggilal Kamalapat Iron and Steel Co Ltd,* AIR 1975 All 73.
2284. *Marten Harris (P) Ltd v Elgin Properties,* AIR 1982 Cal 433.
2285. *DR Punjab Montgomery Transport Co v Raghuvanshi Private Ltd,* AIR 1983 Cal 343.

Where under such Acts as the Rent Control Act, a tenancy is converted into a statutory tenancy, the mere acceptance of rent is attributable to such statutory tenancy, and not to the tenancy contemplated by this section.[2286] The mere acceptance of rent is not enough, so, if rent is accepted pending appeal in an eviction suit, there is no holding over.[2287] But if it is tendered as rent and accepted, there is, even though it is accepted "without prejudice", for the landlord cannot appropriate it contrary to the wishes of the tenant.[2288]

As the basis of the section is an implied contract, the mere acceptance of the rent by a particular officer will not suffice where the local authority can only enter into a contract after following certain formalities.[2289] If there are several lessors who are tenants in common, payment to some of their share of the rent will not constitute a tenancy as regards the others, who will, therefore, be entitled to evict without notice to quit;[2290] and on the other hand, if there are several lessee and some only hold over without the consent of the others, those not holding over cannot be made liable for rent.[2291] Again as there is no privity of contract between the lessor and the heirs of the lessee, the heirs, if they continue in possession after the expiry of the lease, cannot become tenants by holding over. The new tenancy must be created by the consent of both sides; otherwise the heirs are trespassers.[2292] For the same reason, section 116 cannot apply to a lease for life. When the heirs of a lessee for life paid rent to a mortgagee of the lessor in order to support their claim that the leasehold was hereditary, and the lessor subsequently refused to accept rent except in the name of the lessee, the Privy Council held that there was no implied assent to the continuance of the tenancy.[2293] Unless there is a transfer of leasehold interest, no priority is created between the lessee and the transferee. The transferee cannot plead want of notice from the lessor, and no question of holding over arises.[2294] Similarly, an assignee of a lessee cannot invoke this section.[2295]

(6) Acceptance of Rent for Pre-termination Period

Section 116 provides that it is only acceptance of rent by way of assenting to the lessee's continuing in possession as a lessee, that constitutes holding over. Acceptance of rent for a period prior to termination would not, by itself, lead to any inference of the *material animus* on the part of the lessor assenting to the lessee's continuing in possession as a lessee, because what was being accepted by the lessor was an amount equivalent to rent for a period when he

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2286. *Ganga Dutt Murarka v Kartik Chandra Das,* AIR 1961 SC 1067 : [1961] 3 SCR 813; *Bhawanji Lakhamshi v Himatlal Jamnadas,* AIR 1972 SC 819 : (1972) 1 SCC 388; *Baldeodas Mahavir v G P Sonavalla,* AIR 1948 Bom 385 : (1948) 50 Bom LR 233; *Digambar Narain v Commr, Tirhut Division,* AIR 1959 Pat 1 : (1958) ILR 37 Pat 1307; *Abdul Karim v Abdul Rehman,* AIR 1960 MP 16; and see notes under section 113 above. See also *Hossain Buksh v Kudiram,* AIR 1971 Cal 376 : (1971) 75 Cal WN 421.

2287. *Shyamcharan v Sheoji Bhai,* AIR 1964 MP 288.

2288. *Kaikhushru v Bai Jarbai,* AIR 1949 FC 124, (1949) FCR 262; and see *Matthews v Smallwood,* (1910) 1 Ch 777, p 786 : [1908-10] All ER Rep 536, and other cases mentioned in note "Acceptance of Rent" under section 112 above.

2289. *Roman M S v Bangalore Corp,* AIR 1971 Mys 305.

2290. *Monmohan v Hatem Makbul,* (1919) 29 Cal LJ 473 : 49 IC 245.

2291. *Brojo Lal Roy v Belchambers,* (1904) 9 Cal WN 340.

2292. *Adimulam v Pir Ravuthan,* (1885) ILR 8 Mad 424, p 427; *Vadapalli v Dronamraju,* (1908) ILR 31 Mad 163.

2293. *Kumakhaya Narayan Singh v Ram Raksha Singh,* AIR 1928 PC 146 : (1928) ILR 7 Pat 649 : 55 IA 212 : 109 IC 663.

2294. *Sivjnanam Abraham v Mathevan Pillai,* AIR 1952 Tr & Coch 359.

2295. *Kisan Punjaji v Yashodabai,* (1968) 70 Bom LR 765.

had no right to evict the lessee. A new tenancy is not created between the parties, by "holding over" in such circumstances.[2296]

(7) Agreement to the Contrary

An agreement to the contrary is an agreement which settles the terms of the holding over.[2297] If there is such an express agreement, it will determine the duration and the terms of the renewed lease. In the Privy Council case last cited,[2298] the expression "agreement to the contrary" was used in a different sense. The heirs of a lease for life continued in possession and paid rent which the lessor accepted, giving receipts in the name of the original lessee. But when the heir demanded receipts in their own names, the lessor refused to accept the rent. The Privy Council said that this was an agreement to the contrary which prevented the application of the section, meaning that the refusal to give a receipt in the name of the heir rebutted the presumption of assent to the holding over. Their Lordship's judgment referred to the principle of the section, for the lease being a lease for the life of the lessee, there could be no question of holding over. When the lease had expired and the lessee continued in possession under an express agreement to do so till the lessee reached a final decision as to the passing of a fresh lease, there is no holding over by the lessee.[2299]

For the purposes of section 116 of the TP Act, it is not necessary that there may be an agreement to the contrary subsequent to the termination of the original lease regarding the period of notice required under section 106 of the TP Act. The contract could be either in the original lease or may be arrived at between the parties after the determination of the original lease.[2300]

(8) Duration

The question whether there is an implied assent is a question of fact.[2301] If there is an assent by implication, the lease is renewed from month to month or year to year according to section 106.[2302] An agricultural tenant who holds over is a tenant from year to year,[2303] and so is a tenant who holds over for manufacturing purposes.[2304] Where a person holds over under an unregistered lease for a manufacturing purpose for one year, but continues in possession by paying monthly rent, the holding over must be held as a tenancy from month to

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2296. *Khudiram Mukherjee v Samsul Bari,* AIR 1983 Cal 303 (reversing AIR 1971 Cal 376).
2297. *Gobinda Chandra v Dwarka Nath,* (1915) 19 Cal WN 489 : 26 IC 962; *Troilokya Nath v Sarat Chandra,* (1905) ILR 32 Cal 123, p 127; *Dasarathi Kumar v Sarat Chandra,* AIR 1934 Cal 135 : (1934) 37 Cal WN 971 : 149 IC 722; *Mati Lal v Darjeeling Municipality,* (1913) 17 Cal LJ 167 : 18 IC 844.
2298. *Kamakhya Narayan Singh v Ram Raksha Singh,* AIR 1928 PC 146 : (1928) ILR 7 Pat 649 : 55 IA 212 : 109 IC 663.
2299. *Subodh Gopal Bose v Province of Bihar,* AIR 1950 Pat 222; *Zahoor Ahmad v State of Uttar Pradesh,* AIR 1965 All 326 : (1965) All LJ 275.
2300. *Burma Shell Oil Storage and Distributing Co of India Ltd v State of Uttar Pradesh,* AIR 1984 All 89, p 91 — holding that there was no conflict between the decisions in *Radha Ballabh v Bahore Ram Chand,* AIR 1955 All 679 and *Zahoor Ahmed.*
2301. *Finlay v Bristol and Exeter Railway Co,* (1852) 7 Exch 409.
2302. *Durgi Nikarini v Gobordhan Bose,* (1915) 19 Cal WN 525 : 24 IC 183; citing *Digby v Atkinson,* (1815) 4 Camp 275; *Troilokya Nath v Sarat Chandra,* (1905) ILR 32 Cal 123; *Mati Lal v Darjeeling Municipality,* (1913) 17 Cal LJ 167; *Ram Prosad v Debi Prosad,* 49 IC 974 : 61 IC 503.
2303. *Administrator General v Asraf Ali,* (1901) ILR 28 Cal 227; *Manilal v Nandlal,* (1920) 22 Bom LR 133 : 55 IC 610; *Mahammad Ayojuddin v Prodyat Kumar,* AIR 1921 Cal 741 : (1921) ILR 48 Cal 359 : 61 IC 503; *Stone-wegg v Rameshwar,* AIR 1923 Pat 340 : 71 IC 1022; *Ram Lochan Baid v Kumar Kamakhya,* AIR 1923 Pat 201 : 71 IC 570.
2304. *Jacks & Co v Joosab,* (1921) ILR 48 Bom 38 : 82 IC 791; *Radha Ballabh v Bahore Ram,* AIR 1955 All 679 : (1955) All LJ 304.

month.[2305] The lessee of premises for purposes other than agricultural or manufacture holds over as a monthly tenant.[2306] It could not be contended that on the expiry of the lease by efflux of time, the power to resume could not be exercised because the lease was not in operation, and the government could not fall back upon its terms. A contrary view would mean that the lease becomes perpetual which could never be so.[2307] An order of the court, postponing the execution of a decree for delivery of possession by a period of four months, does not protect the tenancy rights of the judgment debtor. If the latter continues in possession despite the order of the court, he has no statutory protection during that period.[2308] A lessee who holds over after the expiry of one year becomes a monthly tenant.[2309] In the case of a lease for building purposes, the tenancy created by holding over under section 116 is a monthly tenancy terminable by either party by 30 days' notice.[2310] When section 116 applies, presumption that by reserving a monthly rent the tenancy was from month to month, has no relevance. The mere fact that the rent was being paid not according to the month of tenancy, but according to the calendar month, could not convert the month of tenancy into one from the first of the calendar month.[2311]

(9) Terms of holding over

If there is an agreement fixing the terms of the new lease, the implied tenancy is in English law subject to such of the terms of the old lease as are applicable to a yearly or monthly tenancy.[2312] In *Digby v Atkinson,*[2313] Lord Ellenborough said: Where the tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation. This has been explained in *Hyatt v Griffiths*[2314] to mean not merely the terms which are necessarily incident to a yearly or a monthly tenancy, but the terms, which may be incident to such a tenure. This rule has been followed in Indian cases, for the word "renewed" shows that there is no new contract of tenancy.[2315] But in *Kaikhusroo v Bai Jarbai,*[2316] the Federal Court held that a new tenancy was created, the terms of which by implication would be the same as the one which had expired, this judgment has been approved by the Supreme Court.[2317] The lessee holding over with the assent of the lessor acquires an interest he can assign and which the lessor can determine by a notice to quit.[2318] The renewal of a lease within the meaning of the section is not continuance of the original lease.[2319]

2305. *Keshavlal v Lal Ram Chander,* AIR 1952 All 634.
2306. *Troilokya Nath v Sarat Chandra,* (1905) ILR 32 Cal 123; *Bijay v Howrah Amta Light Rly,* (1923) 38 Cal LJ 177 : 72 IC 98; *Meghji v Dayalji,* (1924) ILR 48 Bom 341 : 80 IC 507; *Muharram Ali v Bansi Lal,* (1919) PR 34 : 51 IC 121; *Ram Prosad v Debi Prosad,* 49 IC 974; *Manmatha Nath v Peary Mohan,* (1919) 23 Cal WN 596 : 52 IC 180.
2307. *Gopichand Shivhare v UOI,* AIR 1991 Del 226, p 231.
2308. *Firm Dewan Kirpa Ram Radhakishen v Hari Kishen,* AIR 1977 All 22.
2309. *Balakala Budhia Patra v Durgasi Dandasi Patra,* AIR 1978 Ori 103 : (1978) ILR 1 Cut 235.
2310. *Munni Devi v State of Uttar Pradesh,* AIR 1977 All 386.
2311. *K Ramachandran Chettiar v G Lakshminarainswami Chettiar,* (1976) 2 Mad LJ 107.
2312. *Badal v Ram Bharosa,* AIR 1938 All 649 : 178 IC 986; *Ranga Swami v Jainabu,* AIR 1942 Mad 507.
2313. *Digby v Atkinson,* (1815) 4 Camp 275, p 278.
2314. *Hyatt v Griffiths,* (1851) 17 QB 505; *Wedd v Parter,* (1916) 2 KB 91 : [1916-17] All ER Rep 803.
2315. *Baijnath Prosad v Raghunath Rai,* (1911) 16 Cal WN 496 : 14 IC 817; *Moore v Makhan,* 53 IC 180; *Khuda Baksh v Abid Husain,* (1909) 12 OC 279 : 3 IC 873; *Alaphanso Pinto v Thukru Hengsu,* AIR 1955 Mad 206 : (1954) 2 Mad LJ 445; *Nandalal Das v Manmatha Nath,* AIR 1962 Cal 597.
2316. *Kaikhusroo v Bai Jarbai,* AIR 1949 FC 124 : (1949) FCR 262.
2317. *Bhawanji Lakhamshi v Himatlal Jamnadas,* AIR 1972 SC 819 : (1972) 1 SCC 388.
2318. *Bengal National Bank v Janaki Nath Roy,* AIR 1927 Cal 725 : (1927) ILR 54 Cal 813, p 827 : 104 IC 484.
2319. *Ambar Ali v Anjab Ali,* AIR 1949 Assam 87.

The time as to notice contained in an expired lease should not be held to be a term of the tenancy arising by holding over under this section.[2320] It has, however, been held that that an arbitration clause in the expired lease would not be applicable to the implied tenancy created by the tenant holding over.[2321]

(10) Legal Representative

This term refers to a person who occupies the same position as the lessor, it would include an assignee of the lessor, but not an underlessee.[2322]

(11) Underlessee

The rule as to holding over applies equally to a sublessee. If a sublessee holds over, he is a tenant at sufferance until the tenancy is renewed by the assent of the lessee.

(12) Mortgage by Tenant Holding Over

A mortgagee is entitled for the purposes of his security to a renewed lease under section 71. It has, therefore, been held that a tenant holding over with the assent of his landlord can affect a valid mortgage of the leasehold by deposit of the lease deed, although the term of the original letting has expired.[2323]

117. Exemption of leases for agricultural purposes.—None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the State Government [2324][***] may by notification published in the official Gazette declare all or any of such provisions to be so applicable in the case of all or any of such leases together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

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(1) Agricultural Leases

In view of the specific provision of section 117 excluding agricultural lease from the operation of the TP Act, the principles of section 107 cannot be extended to an agricultural lease.[2325]

These leases are exempted from the operation of this chapter because the rights of the parties are regulated by usages which have to a great extent been embodied in local Acts.

2320. *Bapayya v Yudvalli Venkataramam,* AIR 1953 Mad 884, Contra *Jacob Philip v State Bank of Travancore,* AIR 1973 Ker 51; *Chiranjit Lal v Narain Singh,* AIR 1972 P&H 432.
2321. *Dayal Chand v UOI,* AIR 1971 P & H 23.
2322. *Durgi Nikarini v Gobardhan,* (1915) 19 Cal WN 525 : 24 IC 183.
2323. *Villa v Petley,* AIR 1934 Rang 51 : 148 IC 721.
2324. The words "with the previous sanction of the Governor General in Council" omitted by Act 38 of 1920, sec. 2 and Sch. I.
2325. *Thakur Kishan Singh v Arvind Kumar,* AIR 1995 SC 73 : (1994) 6 SCC 591.

Thus, in tenancies governed by the Bengal Landlord and Tenant Procedure Act, 1869, a reasonable notice to quit, not necessarily determining the tenancy at the end of the year, is sufficient.[2326] The legislature has abstained from making the sections of this chapter apply *proprio vigore* for the fear of interfering with settled usage.[2327] But in the absence of any local Act, or custom, or any special reason to the contrary, the principles of English law as reproduced by TP Act are applied to agricultural leases;[2328] and in the absence of a contract to the contrary, such leases could be deemed to be from year to year.[2329] Thus, the principles of section 108(c) as to quiet enjoyment;[2330] section 108(e)[2331] and of section 108(j) as to assignment;[2332] of section 111(f)[2333] and section 111(g) as to forfeiture;[2334] but not the requirement contained therein of a notice in writing;[2335] of section 114 as to relief against forfeiture,[2336] and of section 116 as to holding over[2337] have been held to apply. But an agricultural tenant erecting buildings on the land does not necessarily incur a forfeiture.[2338]

(2) Oral Leases Valid

Section 107 does not apply to agricultural leases. An agricultural lease may, therefore, be made orally.[2339] If made in writing, an agricultural lease would require registration under section 17(l)(d) of the Registration Act, if from year to year or for any term exceeding a year or reserving a yearly rent.[2340] In a later case from Punjab, it was held that agricultural leases are still admissible in evidence even if they are unregistered.[2341]

Consequently A lease deed even though not registered would still be admissible,[2342] as oral settlement of agricultural land requires the vesting of title through the declaration based on unregistered hukumnamas.[2343]

(3) Agricultural Lease in Writing Without Possession

A valid lease of agricultural land can be made by a registered deed, though it may not be accompanied by delivery of possession.[2344]

2326. *Nabinchandra Chakrabarti v Rameshchandra,* (1953) ILR 60 Cal 771 : 37 Cal WN 727 : 146 IC 858; *Pratap Narain Deo v Maig Lal Singh,* (1909) ILR 36 Cal 927 : 2 IC 656.
2327. *Krishna Shetti v Gilbert Pinto,* (1919) ILR 42 Mad 654, p 660 : 50 IC 899.
2328. Ibid; *Gangamma v Bhommakka,* (1910) ILR 33 Mad 253 : 5 IC 437; *Vasudevan v Valia,* (1901) ILR 24 Mad 47; *Kesarbai v Rajabhan,* AIR 1944 Nag 94; *Nanjappa v Rangaswami,* AIR 1940 Mad 410 : (1940) 1 Mad LJ 200 : 51 Mad LW 258 : (1940) Mad WN 266.
2329. *Brahmayya v Sundaramma,* AIR 1949 Mad 275 : (1948) ILR Mad 767.
2330. *Srinivas Aiyangar v Rangaswari,* 25 IC 812.
2331. *Gurdashan Singh v Bishan Singh,* AIR 1963 Punj 49 : (1962) ILR 2 Punj 5.
2332. *Monica v Subraya Hebbara,* (1907) ILR 30 Mad 410.
2333. *Kuriminaidu v Padmanabham,* AIR 1964 AP 539.
2334. *Parameshri v Vittappa,* (1903) ILR 26 Mad 157; *Brojabashi v Saratchandra,* 53 IC 545; *Nizamuddin v Mamtazuddin,* (1901) ILR 28 Cal 135; *Kally Das Ahiri v Monmohini Dassee,* (1897) ILR 24 Cal 440; *Kemalooti v Muhamed,* (1918) ILR 41 Mad 629 : 45 IC 743; *Tatya Saolya v Yeshwant Kondiba,* AIR 1951 Bom 283 : (1951) ILR Bom 295.
2335. *Namdeo Lokman v Naradabai,* AIR 1953 SC 228 : [1953] SCR 1009.
2336. *Appayya Shetty v Mahammad Beari,* (1916) ILR 39 Mad 834 : 30 IC 596.
2337. *Administrator-General v Asraf Ali,* (1901) ILR 28 Cal 227; *K Narayan Nair v Kunhan Mannadiar,* AIR 1949 Mad 127 : (1947) 2 Mad LJ 559.
2338. *Periyan Chetty v Govind Rao,* AIR 1932 Mad 328 : (1932) 62 Mad LJ 496 : 137 IC 487; *Noyna Misser v Rupikin,* (1883) ILR 9 Cal 609.
2339. *Giribala Dasi v Dwarka Nath Mistri,* AIR 1932 Cal 715 : (1932) 55 Cal LJ 312 : 142 IC 81; *Narayan v Gokuldas,* AIR 1947 Mad 43; *Faqiria v Kalu Mal,* AIR 1952 Punj 52.
2340. *Sivasubramania v Theerpathi,* AIR 1933 Mad 451 : (1933) 64 Mad LJ 676 : 144 IC 27.
2341. *Shyam Lal v Deepa Das Chela Ram Chela Garib Das,* AIR 2011 (NOC) 187 (P&H).
2342. *Shyam Lal v Deepa Dass Chela Ram Chela Garib Dass,* AIR 2011 (NOC) 187 (P&H).
2343. *Nazir Ali Mian v Dokal Mian,* (2010) 7 SCC 384 : LNIND 2010 SC 558 : 2010 (6) SCALE 340.

(4) Agricultural Purposes

The report of the Special Committee of 11 March 1881 seems to exclude gardens from agricultural purposes, and under the Agra Tenancy Act (Uttar Pradesh Act 2 of 1901), the planting of a grove of trees was not an agricultural purpose.[2345] The Madras High Court at one time seemed to limit the phrase to cereals and excluded a coffee garden;[2346] but subsequently admitted that the same was wrong and extended the meaning to the tillage of soil in its widest sense, including not only field cultivation, but also garden cultivation for the purpose of procuring vegetables and fruit as food for man or beast, and other products for human consumption by way of luxury if not an article of diet, ie, a betel garden;[2347] and finally included arboriculture such as a casuarina plantation.[2348] The Calcutta High Court has said that "agricultural" is a term of wider import than cultivation and includes horticulture in agricultural purposes,[2349] but a lease merely for the purpose of gathering fruit from trees on the land is not for horticultural purposes.[2350] Rearing of tea plants is an agricultural purpose. Where the bulk of land leased was used for cultivation of tea plants and only a small portion of it is occupied by a factory for manufacturing tea, this lease is agricultural,[2351] but the fact that a portion of a holding let for residential purposes is planted with fruit trees does not make it agricultural, and the TP Act applies.[2352] The Privy Council has held that the creation of a tenancy for the purpose of the tenant realising the rent from cultivators is not a tenancy exempted from the provisions of this chapter.[2353] So also, a lease mainly executed with the object of making an arrangement for collecting rents and not with the object of cultivating, is not a lease for agricultural purposes.[2354]

It is not the actual use of the land, but the original purpose of the tenancy which determines the question of applicability or otherwise of the TP Act.[2355] So when the agricultural lease is surrendered, and the land is released for a non-agricultural purpose, the new lease is governed by the TP Act.[2356] But a *putni* lease is not one for an agricultural purpose merely because the lessee sublets to cultivators, for he could use the land for other purposes also.[2357] A permanent lease of a whole village was held not to be a lease for agricultural purposes and so exempt from the provisions of section 108 because there were waste lands in the village, for the primary object of the lessor was to secure his property right, and not to utilize the land for agriculture.[2358] But a lease of a village for the purpose of

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2344. *Jangal Singh v Mukund Kumar,* AIR 1948 Pat 446.
2345. *Jalesar Sahu v Raj Mangal,* AIR 1921 All 168 : (1921) ILR 43 All 606 : 63 IC 437.
2346. *Kunhayen Haji v Mayan,* (1894) ILR 17 Mad 98.
2347. *Murugesa Chetti v Chinnathambi,* (1901) ILR 24 Mad 421.
2348. *Panadai Pathan v Ramasami,* AIR 1922 Mad 351 : (1922) ILR 45 Mad 710 : 70 IC 657; dissenting from *Raja of Venkatagiri v Ayyapareddi,* (1915) ILR 38 Mad 738 : 21 IC 532.
2349. *Hedayet v Kamalanana,* (1913) 17 Cal LJ 411 : 20 IC 332.
2350. Ibid.
2351. *Prabhat Chandra v Bengal Central Bank,* AIR 1938 Cal 589 : (1938) ILR 2 Cal 434 : 42 Cal WN 761.
2352. *Sasibala v Amala,* AIR 1921 Cal 379 : (1921) 25 Cal WN 378 : 66 IC 61; *Gopal v Bhutnath,* AIR 1926 Cal 312 : (1926) 42 Cal LJ 520 : 92 IC 411; *Bithal Das v Iqbalmunissa,* AIR 1940 Oudh 425 : 190 IC 444.
2353. *Satya Niranjan v Sarajubala Debi,* AIR 1930 PC 13 : (1930) 33 Cal WN 865 : 127 IC 749; *Abdul Hossain v Shalimar Paint,* AIR 1947 Cal 36; *Budhan Mahton v Ramanugrah Singh,* AIR 1947 Pat 78.
2354. *Shiam Sunder v Chottey Lal,* AIR 1937 Oudh 151 : (1936) ILR 12 Luck 514 : 164 IC 830; *Prasad, B N v S M Asghar Hussain,* AIR 1967 Pat 142.
2355. *Raj Kumari v Samsuddin,* AIR 1942 Cal 330 : 200 IC 314; *Dassain Nonia v Ramdeo Prasad,* AIR 1957 Pat 692; *Dani Sahu v Rajabandhu Bal,* (1963) ILR Cut 643.
2356. *Orient Paper Mills v Sitaram Agarwala,* AIR 1957 Ori 276 : (1957) ILR Cut 509.
2357. *Promotho Nath Mitter v Kali Prasanna,* (1901) ILR 28 Cal 744, p 747.
2358. *Ballabh Das v Murat Narain Singh,* AIR 1926 All 432 : (1926) ILR 48 All 385 : 95 IC 1048.

bringing its lands under cultivation is, of course, a lease for agricultural purposes,[2359] and so is a reclamation lease for jungle clearance to make the land arable.[2360] A lease of land to an agriculturist, not for a homestead, but for a shop, is governed by the TP Act, and he is not protected from eviction by section 182 of the Bengal Tenancy Act.[2361] A sublease of homestead land for residential purposes, granted after the TP Act but before the Bengal Tenancy Act, is governed by the Act and the sublessee cannot be evicted without notice to quit.[2362] On the other hand, if the land is agricultural land, a liberal interpretation should be given to this section, so that the lessee should not be deprived of the privileges conferred on agriculturists by the Bengal Act.[2363] The cultivation of indigo is an agricultural purpose,[2364] and the Privy Council have held that the building of an indigo factory on a portion of an indigo plantation may be in conformity with the agricultural purpose.[2365] A lease of a tank used for the preservation and rearing of fish is not a lease for an agricultural purpose[2366] even though some land on the banks is included.[2367] But a lease of a tank with a considerable area of pasture land is for an agricultural purpose,[2368] because a lease of land for grazing is for an agricultural purpose, as grazing is ancillary to cultivation.[2369]

Where land as well as a tank within the land forms part of the lease, the true test as to whether the lease is for agricultural purposes, is to find out whether the primary object was lease of the tank or whether the primary object was lease of the land surrounding the tank for agriculture, alongwith the tank within the land. The area of the surrounding land is an important factor, as also the subsequent conduct of the plaintiff in cultivating the land. On the facts, it was held in a Patna case that the areas were such that agricultural lease of the embankment could be granted, and that the tank was an appurtenance of the embankment. Further, from the evidence, it was clear that the embankment was used for cultivation by the lessee, and that she had been appropriating the fish of the tank. Hence, the lease was for agricultural purposes.[2370]

(5) Local Law

By local tenancy legislations, the provisions of this chapter have been made applicable to agricultural leases so far as its provisions are not inconsistent with such legislation in many areas.[2371] In case of inconsistency between the Tamil Nadu Buildings (Lease and Rent Control) Act (Act 18 of 1960 and the Transfer of Property Act, 1882, the Tamil Nadu Rent Control Act shall prevail over the Transfer of Property Act and shall have overriding effect.[2372] Similarly, the provisions of the U.P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P Act No. 13 of 1972) will prevail over the provisions of the TP Act as it is a special law.[2373]

2359. *Banmali v Nihal,* 48 IC 354.
2360. *J Chandra v L Mohan,* 7 IC 864.
2361. *Purusottam v Panchanan,* AIR 1926 Cal 373 : (1925) 42 Cal LJ 197 : 90 IC 805.
2362. *Banwari Lal v Gopal Chandra,* AIR 1933 Cal 643 : (1933) 37 Cal WN 471 : 58 Cal LJ 226 : 146 IC 540.
2363. *Broucke v Panch Rani Chhatar Kumari Devi,* AIR 1925 Pat 421 : (1925) ILR 4 Pat 404 : 86 IC 597.
2364. *Surendra Narain Smgh v Hari Mohan,* (1904) ILR 31 Cal 174.
2365. *Hari Mohan Misser v Surendra Narayan,* (1907) ILR 34 Cal 718 : 34 IA 133 : reversing (1904) ILR 31 Cal 174.
2366. *Siboo Jelya v Gopal Chunder,* (1738) 19 WR 200.
2367. *Nidi Krishna v Ram Doss,* (1873) 20 WR 341; *Mahananda v Mangala,* (1904) ILR 31 Cal 937.
2368. *Surendra Kumar Sen v Chandratara Nath,* AIR 1931 Cal 135 : (1930) 34 Cal WN 1063 : 130 IC 219.
2369. *Hedayet v Kamalanand,* (1933) 17 Cal LJ 411, 20 IC 332.
2370. *Sardamoni Devi v State of Bihar,* AIR 1979 Pat 106.
2371. See, for instance, the Bombay Tenancy and Agricultural Lands Act, 1948, which is in force in Gujarat and Maharashtra.
2372. *Indian Bank v Nippon Enterprises South, Chennai,* AIR 2011 Mad 238 : LNIND 2011 MAD 1180 : AIR 2011 Madras 238 : 2011 (2) CTC 474.
2373. *Bhagwati Prashad Goel v The District Judge, Almora,* 2010 SCC OnLine Utt 900 : 2010 (1) UD 123.

CHAPTER 6

Of Exchanges

Sections 118–121, Transfer of Property Act, 1882

118. "Exchange" defined.—When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Synopsis

(1) Definition 1064
(2) Mode of Transfer 1066
(3) Part Performance 1066
(4) Section 23, Contract Act 1067

(1) Definition

"Exchange" means to part with, give or transfer for an equivalent.[1] Under section 118, a transaction is exchange when two persons mutually transfer the ownership of one thing for the ownership of another, provided it is not an exchange of money only. A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.[2] For a valid exchange, there must be a physical delivery of the property to the parties and each party to the exchange has the rights and is subject to the liability of the seller as to that which he gives and also has the rights and liabilities of the buyer as to that which he takes.[3] When we consider exchange of immovable property falling within the definition of "exchange" in section 118, both the properties should be situated in India.[4]

The definition of exchange is not limited to immovable property. An exchange is, therefore, not only exchange of land, but also barter of goods. If one of the items transferred is money, the transaction is not an exchange, but a sale.[5] An exchange of one stamp for another is not a sale.[6] A sale should always be for a price, but in the case of an exchange, the transfer of ownership of one thing is not one for the price paid or promised, but for the

1. *Ram Badan v Kunwar,* AIR 1938 All 229.
2. *Ram Kristo v Dhankisto,* AIR 1969 SC 204, p 208 : [1969] 1 SCR 342.
3. *Mohammadin v Asibun Nissa,* AIR 2005 Jhar 1 : (2004) 3 JCR 553.
4. *Harendra H Mehta v Mukesh H Mehta,* (1999) 5 SCC 108 : AIR 1999 SC 2054.
5. *CIT v Motor & General Stores (P) Ltd,* [1967] 3 SCR 876 : AIR 1968 SC 200 : [1968] 1 SCJ 96; Transfer of Property Act, 1882, section 554.
6. *Kedar Nath v Emperor,* (1903) ILR 30 Cal 921.

transfer of another thing in return.[7] So, a transaction in which the consideration for the transfer of certain properties are shares in a limited company, is an exchange.[8]

The ownership of one party must be exclusive of the ownership of the other, so that a partition is not an exchange.[9] However, if *A* mortgages *X* and *Y* to *B* and then transfers the equity of redemption in *X* to *B* in consideration of *B* transferring his mortgagee's right in *Y* to *A*, the transaction is an exchange.[10] Again, if *A* and *B* are joint owners of *X*, and *B* the sole owner of *Y*, and *A* transfers his shares in *X* to *B* in consideration of *B* transferring *Y* to *A*, the transaction has been held to be an exchange.[11] This would seem to be a partition of the shares in *X* followed by an exchange of the divided share for *Y*.

A transfer by a husband to a wife in discharge of her claim to maintenance is not an exchange, as the wife transfers no ownership in anything.[12] Similarly, if the lessee surrenders a lease, and the landlord grants him a lease of another property, the transaction is not an exchange.[13] There cannot, of course, be an exchange if the parties are not the same;[14] but there can be an exchange where the transferor of a property receives another property *benami* in the name of his wife.[15] This law may not hold good after promulgation of the Benami Transaction (Prohibition) Act, 1988. A document whereby one decree is set off against another and the balance made up by a transfer of land, is not an exchange, for there is no mutual transfer of two things.[16] The usual type of family settlement by which each party takes a share by virtue of an antecedent title which is admitted, does not involve an alienation, and does not fall within the definition of an exchange.[17] However, provided there is a reciprocal transfer of two things, it does not matter that money is paid for bringing about an equality of exchange, for the section requires that neither thing shall be money only.[18]

ILLUSTRATION

A transferred to *B* a house worth ₹1,50,000 and *B* transferred to *A* a field worth ₹1,00,000 and ₹50,000 in cash. The transaction is an exchange and therefore not subject to pre-emption as a sale.[19]

Where parties decided to transfer their rights in the respective plots situated in two villages, apparently for convenience in cultivating; it is an exchange, and the mere mention of sale consideration in the sale deed does not make it a sale.[20] Where a document was executed

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7. *Kama Sahu v Krishna Sahu,* (1953) ILR Cut 706 : AIR 1954 Ori 105.
8. *CIT v Motor & General Stores (P) Ltd,* AIR 1968 SC 200.
9. *Gyanessa v Moharakannessa,* (1898) ILR 25 Cal 210; *Satya Kumar v Satya Kripal,* (1909) 10 Cal LJ 503 : 3 IC 247.
10. *Ariyaputhira v Muthukomaraswami,* 15 IC 343; *Lachman Prasad v Mir Fida Hussain,* (1915) 18 OC 109 : 30 IC 232.
11. *Raj Narain v Khobdari,* (1900) 5 Cal WN 724.
12. *Madan Pillai v Badrakali,* AIR 1922 Mad 311.
13. *Waliul Hassan v Maharaj Kumar Gopal,* (1901) 6 Cal WN 905.
14. *Palacheria Anandu v Mallipudi Acharyulu,* (1958) ILR AP 525 : AIR 1958 AP 743.
15. *Haramani v Bauri,* AIR 1970 Ori 203.
16. *Dina Nath v Matimala,* (1906) 11 Cal WN 342.
17. *Ram Gopal v Tulsi Ram,* (1929) ILR 51 All 79 : 116 IC 861 : AIR 1928 All 641; *Khunni Lal v Gobind Krishna,* (1911) ILR 33 All 356 : 38 IA 87 : 10 IC 477.
18. *Fateh Singh v Prithi Singh,* (1930) 28 All LJ 1312 : 124 IC 557 : AIR 1930 All 426; *Ismail Shah v Saleh Muhammad,* 86 IC 266 : AIR 1925 Lah 326; *Nathu Mal v Har Dial,* (1900) PR 97; *Babu v Maruti,* (1907) 3 Nag LR 138; *Randhir Singh v Randhir Singh,* (1937) All LJ 743 : 171 IC 577 : AIR 1937 All 665; *Ram Badan Lal v Kunwar Singh,* (1938) All LJ 52 : 175 IC 618 : AIR 1938 All 229.
19. *Ismail Shah v Saleh Muhammad,* 86 IC 266 : AIR 1925 Lah 326.
20. *Banwari Lal v Asst Director of Consolidation,* (1981) All LJ 1239.

to correct the wrong entries made in the survey records, stating the respective ownership of the lands, the document does not constitute an exchange and would be admissible in evidence even if it is unregistered.[21]

When the parties to a document agree to rectify a "mistake" and call it a rectification under section 26, the document cannot be read as an "agreement to exchange". It can be only read as a rectification deed, which could have been done only by a settlor.[22]

(2) Mode of Transfer

The mode of transfer is the same as in the case of sales. Therefore, in the case of immovable property, the rules in section 54 as to registration or delivery of possession apply.[23] Thus, an exchange of tangible immovable property of the value of ₹100 and upward, if not made by a registered instrument, is invalid.[24] In the case of immovable property, an exchange is usually made by mutual conveyances,[25] but it is not necessary that there should be two separate deeds.[26] If the properties exchanged are movable, it is believed that this section and section 120 apply, as also the rules contained in the Sale of Goods Act, 1930, following the maxim *permutatio est vicina emption*.[27]

An oral exchange is not permissible in view of the amendment of section 49 of the Registration Act brought about by Amending Act no 21 of 1929, which by inserting in section 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882" has made it clear that the documents of which registration is necessary under the TP Act, but not under the Registration Act, fall within the scope of section 49 of the Registration Act, and if not registered, are not admissible as evidence of any transaction affecting any immovable property comprised therein, and do not affect any such immovable property. Transactions by exchange are required to be affected through registered instrument, if it was to affect any immovable property worth ₹100 or more,[28] but where consideration was paid by one to another as the properties exchanged were not of equal value, it would not be an exchange but a sale.[29]

However, an oral exchange of land was permissible in *Tehri Kullu*, which was in the state of Punjab in 1963, because section 118 of the TP Act was not made applicable to the state of Punjab.[30]

(3) Part Performance

If the parties have taken possession without a registered conveyance, in view of the amendment made to section 53A by the Registration and Other Related Laws (Amendment) Act, 2001 which has come into force with effect from 24 September 2001, the words "the contract, though required to be registered, has not been registered, or," as appearing in para 4

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21. *Mohammadin v Asibun Nissa*, AIR 2005 Jhar 1 : (2004) 3 JCR 553.
22. *Joseph John Peter Sandy v Veronica Thomas Rajkumar*, AIR 2013 SC 2028 : JT 2013 (4) SC 9 : 2013 (3) SCALE 328 : (2013) 3 SCC 801.
23. *Debi Prasad v Jaldhar Chaube*, (1945) All LJ 537 : AIR 1946 All 125.
24. *Chidambara Chettiar v Vaidilinga*, (1915) ILR 38 Mad 519 : 30 IC 408; *Shams Shah v Hussain Shah*, 4 IC 1004; See, however, *Bhagwan Kaur v Ranjit Singh* AIR 1990 P & H 89, p 90; *Hari Shanker Mishra v Vice-Chairman, Kanpur Development Authority*, AIR 2001 All 139.
25. *Nathu Mal v Har Dial*, (1900) PR 97.
26. *Gopi Ram v Durjan*, 113 IC 753 : AIR 1929 All 63; but see *Panchanan Mondal v Tarapada Mondal*, (1961) 65 Cal WN 661 : AIR 1961 Cal 193.
27. Exchange is analogous to sale.
28. *Satyawan v Raghbir*, AIR 2002 P&H 290, para 18.
29. *John Thomas v Joseph Thomas*, AIR 2000 Ker 408 : ILR 2000 (3) Kerala 517.
30. See also *Gulab Singh v Dilbaru*, AIR 1989 HP 23, p 25; *Kishori Lal v Babu Ram*, (2003) 1 RCR (Civil) 807 (P&H) .

of section 53A has been omitted. Simultaneously, sections 17 and 49 of the Registration Act, 1908 have been amended making it clear that unless the document containing contract to transfer for consideration any immovable property for the purpose of section 53A is registered, it shall not have effect for the purposes of section 53A.[31]

(4) Section 23, Contract Act

A deed of exchange executed with the intention of compromising some criminal cases pending between the parties is hit by section 23 of the Indian Contract Act, 1872 and accordingly, is not a valid contract.[32]

[33][**119. Right of party deprived of thing received in exchange.**—If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.]

Synopsis

(1) Amendment 1067
(2) Undertaking as to Title 1067
(3) Remedy 1068
(4) Contrary Intention 1068
(5) Limitation 1069
(6) Inapplicable 1069

(1) Amendment

This section was amended by the amending Act 20 of 1929.

The section provides not only for the rights of the party deprived, but of his transferee. The rights are also made subject to a contrary intention apparent from the terms of the exchange. The party deprived cannot get back the thing transferred by him, unless it is still in the possession of the other party.

(2) Undertaking as to Title

This section implies in the case of an exchange, an implied undertaking as to title, similar to that in section 14 of the Indian Sale of Goods Act, 1930, as to movables, or in the case of a sale of land in section 55(2) of the TP Act.

According to the Orissa High Court, the principle of section 119 also applies where, instead of subsequent deprivation of the property transferred, there is non-receipt of the property stipulated as the property to be received in exchange. It impliedly follows from

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31. See Appendix V.
32. AIR 2002 Ori 195 : (2002) 94 Cut LT 201; *following Ouseph Poulo v The Catholic Union Bank Ltd*, AIR 1965 SC 166 and *V Narasimharaju v V Gurumurthy Raju*, AIR 1963 SC 107 (The Supreme Court in these cases held that it if shown that there was an agreement between the parties that a certain consideration should proceed from the accused person to the complainant in return for the promise of the complainant to discontinue the criminal proceedings, that clearly is a transaction which is opposed to public policy under section 23 of the Contract Act).
33. Subs. by Act 20 of 1929, sec. 59, for the original section.

section 119 that when a party to an exchange has failed to obtain possession of the property which he is entitled to receive in exchange, then also he is entitled to his option for the return of property transferred by him, if the property is still in possession of the other party, or his legal representative, or a transferee from him without consideration.[34] Where the appellant had exchanged his lands with the first respondent, and had suffered a decree of two-third share of the *monors* who had admittedly taken possession to an extent of 52 *kanals* 10 *marlas* from the appellant, it was held that the appellant was deprived of that property, and the first respondent was liable to return to the appellant, land to the extent of 52 *kanals* 10 *marlas*.[35]

(3) Remedy

The remedy is similar to that for breach of an undertaking as to title under section 14 of the Indian Sale of Goods Act, or that for breach of an implied covenant for title under section 55(2) of TP Act. The party aggrieved may either rescind, or claim compensation. If he rescinds, he must, no doubt, surrender any advantage he receives. If he is evicted from a portion of the land, he is entitled to recover the whole of the land that he gave, but he cannot retain the portion from which he has not been evicted.[36] But it does not appear that he can both rescind, and claim damages other than *restitutio ad integrum* by re-entry.[37] The right may be exercised by a person claiming under the party aggrieved. However, the right of re-entry cannot be exercised if the land is in the possession of a transferee for consideration.

In *Ramsajivan v Lalji Ram*,[38] an exchange of land took place in 1941 between *A* and the predecessor of *B*, but *B* sold the same illegally to a third party in 1988. It was held that the purchaser of the land would not have any locus standi to say anything about the exchange nor that of the title of *A*.

The principle of the section has been applied in Punjab,[39] and also in a Madras case[40] where the exchange was not completed at all.

It impliedly follows from the section that when a party to an exchange has failed to obtain possession of the property which he was entitled to receive in exchange, then also he is entitled at his option for the return of the property transferred by him.[41]

(4) Contrary Intention

The exchange may, however, be subject to express covenants as to title, and these would exclude the covenant implied by this section. Thus, in *Subramania Ayyar v Saminatha*,[42] the covenant in the deeds of exchange was: If any claim or dispute arises, *I* hereby bind myself to settle it. If I do not get (the dispute) settled, I hereby bind myself to pay an amount not exceeding ₹4,014-8-6 at the rate of ₹1-4-0 per *kuli* of land for lands which go out of your possession. This was held to exclude the plaintiff's right under this section to recover the land he had transferred to the defendant. However, a clause that "neither party has after to-day any claim against the other contrary to the exchange; whatever proprietary rights each party

34. *Ch Seetharamaswamy v Narasingha Panda*, AIR 1975 Ori 73.
35. *Jattu Ram v Hakam Singh*, AIR 1994 SC 1653.
36. *Veera Pillai v Ponnambala Pillai*, (1899) 9 Mad LJ 137.
37. *Salabat v Abdul Rahman*, (1917) PR 51 : 41 IC 248.
38. *Ramsajivan v Lalji Ram*, AIR 2012 MP 183 : LNIND 2012 MP 130 : ILR [2012] MP 1633.
39. Ibid; See *Jattu Ram v Hakam Singh*, (1993) 4 SCC 403.
40. *Ranganathan v Calcutta Tramways Co*, (1956) ILR Mad 983 : (1956) 1 Mad LJ 335 : AIR 1956 Mad 285.
41. *Hari Shanker Mishra v Vice Chairman, Kanpur Development Authority*, AIR 2001 All 139 : (2001) 42 All LR 839 quoting *Seetaraswamy v Narsingh Panda*, AIR 1975 Ori 73.
42. *Subramania Ayyar v Saminatha*, (1898) ILR 21 Mad 69.

had in his own land will be owned by the other party"—is not a contract to the contrary, but merely a recital of the effect of the exchange.[43]

(5) Limitation

Under the Limitation Act, 1963, the period would be three years under Article 55. If the suit is to recover the land transferred, it is one for specific performance when it is founded on an express covenant to return, and Article 113 had been held to apply.[44] This corresponds to Article 54 of the Act of 1963, and the period is the same (three years). If the suit is to recover the land under the implied covenant, Article 143 had been held to apply;[45] the period is the same (12 years) under Article 66 of the Act of 1963, which corresponds to Article 143.

(6) Inapplicable

There is, of course, no right to the return of land, if there has been no exchange. There cannot be a triangular exchange.[46] Thus, if *A* transfers to *B* and *B* to *C* and *C* to *A*, then *A* could not, if evicted, require *B* to return the land. So also, if a lessee voluntarily surrenders his lease, and then receives another lease, there is no exchange, and if he is deprived of his leasehold, he cannot claim the return of the lease he has voluntarily surrendered.[47]

The sine qua non of the applicability of section 119 is, a party to the exchange losing possession by virtue of the defect in title of the property or thing received in exchange. If somebody forcibly dispossesses a person who has taken a property or thing in exchange by him, he cannot, by invoking section 119, seek recovery of the property or thing, which he gave in exchange to the other party.[48]

120. Rights and liabilities of parties.—Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Under this section, the parties to an exchange, each have the rights and liabilities of a seller of the thing given, and a buyer of the thing taken. The rules in section 55 apply in the case of an exchange of land, and it is believed that the rules in the Sale of Goods Act, 1930, apply in the case of a barter of goods. However, these rules only apply so far as they are applicable. An exchange does not involve payment of a price, and so there can be no charge for an unpaid price; and when the exchange is not complete, there is no charge on the land given for the value of the land agreed to be taken.[49] Even when money is paid for equality of exchange, there is no charge for the money so paid.[50] Again, a right of pre-emption which arises out of a sale, does not necessarily arise out of an exchange.[51]

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43. *Salabat v Abdul Rahman,* (1917) PR 51 : 41 IC 248.
44. *Hari Tiwari v Raghunath,* (1889) ILR 11 All 27; *Veera Pillai v Poonambala,* (1899) 9 Mad LJ 137.
45. *Rajagoplan v Somasundara,* (1907) ILR 30 Mad 316; *Sreenivasa Ayyangar v Johnsa,* (1919) ILR 42 Mad 690 : 51 IC 939.
46. *Eton College (Provost) v Winchester (Bishop),* (1774) 3 Wils 483.
47. *Waliul Hassan v Maharaj Kumar Gopal,* (1901) 6 Cal WN 905.
48. *T Bhaskara Rao v Tangella Mudi Gabriel,* AIR 2004 AP 106, para 9.
49. *Chidambara Chettiar v Vaidilinga,* (1915) ILR 38 Mad 519, p 522 : 30 IC 408.
50. *Krishna Nair v Kundu Nair,* (1912) Mad WN 535 : 16 IC 109.
51. *Samar Bahadur v Jit Lal,* (1924) ILR 46 All 359 : 79 IC 495 : AIR 1924 All 390.

In the case of goods, the rule in the Indian Sale of Goods Act, 1930, that property passes on delivery of ascertained goods was applied in the case of an agreement to exchange cotton. A dealer delivered cotton to a press under an agreement, implied by custom, to receive in exchange an equivalent amount of cleaned and pressed cotton. It was held that property passed on delivery, and that when the cotton was destroyed by fire, the press had to bear the loss.[52]

This section does not exclude the rule of estoppel enacted in section 43. When *A* had only half the property and he purported to give the whole of it to *B* in exchange, and subsequently purchased the other half, *B* was entitled to the other half also, as soon as *A* perfected the title.[53]

121. Exchange of Money.—On an exchange of money, each party thereby warrants the genuineness of the money given by him.

(1) Exchange of Money

Money here includes not only coins, but also currency notes.[54]

In an exchange of money, there is no occasion for a warranty of title, as the title to money passes by mere delivery to one who receives it honestly. There is, however, an implied warranty as to the genuineness of the money. A false coin, or a forged currency note would involve total failure of consideration. This has been held with reference to a forged banknote,[55] a worthless cheque,[56] and stolen goods.[57]

52. *Volkart Bros v Vettivelu,*(1888) ILR 11 Mad 459.
53. *Bhairab Chandra v Jiban,* (1921) 33 Cal LJ 184 : 60 IC 819 : AIR 1921 Cal 748.
54. Re *Mathur Lalbhai,* (1901) ILR 25 Bom 702, p 705.
55. *Jones v Ryde,* (1814) 5 Taunt 488.
56. *Timmins v Gibbins,* (1852) 18 QB 722.
57. *Eichholz v Bannister,* (1864) 17 CB (NS) 708.

CHAPTER 7

Of Gifts

Sections 122–129, Transfer of Property Act, 1882

122. "Gift" defined.—"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Synopsis

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(1) Scope

For understanding the provisions on "Gift" contained in chapter VII of the TP Act, all the sections contained therein which are inter-related have to be read conjointly to understand their import and effect.[1] Section 122 of the TP Act postulates that a gift is a transfer of certain existing movable or immovable property made voluntary, and without consideration by one person called the donor, to another, called a donee, and accepted by or on behalf of the donee. The essential elements of a gift are—

(a) the absence of consideration;

(b) the donor;

(c) the donee;

(d) to be voluntary;

(e) the subject-matter;

(f) the transfer; and

(g) the acceptance.

1. *K Balaksirhnan v K Kamalam*, AIR 2004 SC 1257, para 18 : (2004) 1 SCC 581 : AIR 2004 SC 1257.

The concept of gift is diametrically opposed to any presence of consideration or compensation. There may be certain transactions of transfer which may not amount to a gift within the meaning of section 122, but would be regarded as gifts for the purpose of subjecting such transfers to the levy of tax under the Gift Tax Act, 1958 because of the definition of gift contained in section 2(xii) read with section 4 of the Gift Tax Act.[2] Bequest under a will is not a transfer.[3] Therefore, a will cannot be a gift since gift, by its definition under this section, is a transfer of property.

The incidents of a gift between two Mohamedans are governed by the Mahomedan Law, and not by the TP Act.[4] The special features of that law are untouched by the provisions of this chapter.[5] Under Mahomedan Law, a gift requires declaration; acceptance and; delivery of such possession of the subject of the gift by the donor to the donee as the subject of the gift is susceptible of.[6] Writing is not essential. If evidenced in writing, such writing does not require registration or attestation.[7]

A deed of gift properly conveyed, transferred and exchanged as a consequence of a family arrangement is a deed of gift, even though the donee agrees to re-convey the property for a specified sum if called upon by the donor to do so within ten years.[8] *Pasupu Kumkuma* means a gift, a settlement or assignment of land to a daughter. The Andhra Pradesh High Court in *Allam Gangadhara Rao v Gollapallo Ganga Rao*[9] held that since the father is under an obligation to maintain a daughter under section 3 of the Adoptions and Maintenance Act, which includes the reasonable expenses of her marriage and, therefore, any property given to her for or at the time of marriage, is not gift under section 122. This decision was followed in *Bhubaneswara Nayak Santoshrai v The Special Tehsildar, Land Reforms Tekkali, Srikakulum District*[10] and *P Buchi Reddy v Ananthula Sudhakar.*[11] However, a Special Bench of the High Court in *Gandevalla Jayaram Reddy v Mokkala Padmavathamma*[12] overruling *Bhubaneswara Nayak Santoshrai* held that *Pasupu Kumkuma* creates a right in immovable property in one and the right of the owner thereof shall be extinguished, and hence is a "gift" requiring registration. It further observed that the daughters save and except under a customary or statutory right, cannot have any share in a joint family property.

A deed of relinquishment is in the nature of a deed of gift. A deed of relinquishment or a deed of gift, differs from a deed of partition in which it is not possible to hold that the partition is valid in respect of some properties, and not in respect of others because right of persons being partitioned are adjusted with reference to the properties subject to partition as a whole.[13] Relinquishment of share by a tenant-in-common in favour of another amounts to

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2. *CIT v Sirchmal Nawalakha,* (2001) 6 SCC 641 : AIR 2001 SC 3648.
3. *N Ramaiah v Nagaraj,* AIR 2001 Kant 395 : (2001) 4 Kar LJ 12.
4. *Babu Lal v Ghansham Das,* (1922) ILR 44 All 633.
5. See section 129 below.
6. *Qamarunnisa Begum v Fathima Begum,* AIR 1968 Mad 367 : (1968) ILR 1 Mad 64.
7. *Nasib Ali v Wajid Ali,* AIR 1927 Cal 197; *Kamarunissa Bibi v Hussaini Babi,* (1880) ILR 3 All 266; *Karam Ilahi v Sharfuddin,* (1910) ILR 38 All 212; *Abdul Rahman v Gaya Prasad,* AIR 1929 Oudh 435; *Tabera v Ajodhya,* AIR 1929 Pat 417; *Nasib Ali v Munshi Wajid Ali,* (1926) 44 CLJ 490; *Qamar-ud-din v Hassan Jan,* (1935) ILR 16 Lah 629.
8. *Deba Prsad Basu v Ashrukana Das,* (1977) 81 Cal WN 449.
9. *Allam Gangadhara Rao v Gollapallo Ganga Rao,* AIR 1968 AP 291, para 5.
10. *Bhubaneswara Nayak Santoshrai v The Special Tehsildar, Land Reforms Tekkali, Srikakulum District,* AIR 1980 AP 139 : (1979) 2 AP LJ 421.
11. *P Buchi Reddy v Ananthula Sudhakar,* AIR 1999 AP 188
12. *Jayaram Reddy v Mokkala Padmavathamma,* AIR 2002 AP 75, p 76; overruled *Bhabaheswar Nail Santoshrai v The Special Tahsildar, Land Reforms, Tekkali,* AIR 1980 AP 139.
13. AIR 1967 SC 401, p 405.

a gift.[14] *Dan* literally means a gift, and for all material purposes is governed by the TP Act.[15] A gift of immovable property by a Hindu by way of *sankalpa* would not be a valid gift. It cannot divest the donor of the proprietary rights or clothe the donee with title without a registered instrument.[16] A licence is not a gift under the Act as it constitutes a permissible use of property given out of love and affection and the descendants of original beneficiary cannot take benefit of magnanimity of original grantor.[17]

Unlike a gift, a will need not be necessarily registered.[5] But mere registration of a "will" will not render the document to be a settlement or a gift. This is the only reliable test for distinguishing, to find out whether it transferred any interest in present in favour of the setlees or it intended to transfer interest in favour of the settlors only on the death of the settlors. In former case, it is a gift, while it is a will in the latter case.[18] To determine whether it is a settlement deed or gift or a Will, the tests are (i) the name by which the document is styled; (ii) registration of the document; (iii) reservation of life estate in favour of executant; (iv) express words as to when possession passed; (v) use of the present or future tense in the document; and (vi) reservation of the power of revocation.[19]

(2) Voluntarily and Without Consideration[20]

The essence of a gift is that it is a gratuitous transfer. Blackstone says: "Gifts are always gratuitous, grants are upon some consideration or equivalent".[21] A gift does not contemplate payment of any consideration or compensation as it is a voluntary transfer of property without consideration; it is a parting by the owner of property without any pecuniary benefit. In a gift deed, the intention of the executor must be clear for the gift to be valid as a mere purchase of property in the name of someone, will not create a valid gift in his favour, without any other evidence supporting the said claim.[22] Money spent for purchase of stamp duty does not amount to consideration. Where in a transfer document, bhumidari lands were said to be gifted to the donee with a mention of Rs 40,000/ as the valuation of the land and not the consideration for the purposes of payment of stamp duty, the transaction would be a gift and not a sale.[23]

The word "voluntarily" in the section is used in its popular sense denoting the exercise of unfettered will, and not in its technical sense of "without consideration".[24] For proving that the deed was executed with free and voluntary consent of the donor it must be proved that the physical act of signing the deed coincided with the animus (mental act) ie, an intention to execute the gift.[25] The principles laid down in the Indian Contract Act, 1872, relating to free consent would apply in determining whether a gift is voluntary. This follows from

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14. *State of Uttar Pradesh v Shanti,* AIR 1979 All 305.
15. *Debi Sharan v Nanlal Chaubey,* AIR 1929 Pat 591.
16. *Madhavrao v Kashibai,* (1910) ILR 34 Bom 287.
17. *Balkrishna S Dalwale v Vithabai C Rathod,* (2010) 13 SCC 291.
18. *Mathai Samuel v Eapen Eapen,* (2012) 13 SCC 80 : AIR 2013 SC 532.
19. *M Lakshminarayana v D B Pradeep Kumar,* (2010) 1 UP LJ 192 (DB)
20. See also note "Revocation by rescission" under section 126.
21. 2 Bl Com 440.
22. *Padam Chand v Lakshmi Devi,* (2010) 173 DLT 604 (Delhi); *Gaddam Ramakrishnareddy v Gaddam Ramireddy,* (2010) 9 SCC 602; *Vathsala Manickavasagam v N Ganesan,* (2013) 9 SCC 152.
23. *Chaudhary Ramesar v Prabhawati Phool Chand,* AIR 2012 All 173; *Padam Chand v Lakshmi Devi,* (2010) 173 DLT 604 (Delhi).
24. *U Thita v U Aresena,* AIR 1938 Rang 76 : 199 IC 903.
25. *Shiv Kishan v Hari Narain,* AIR 2008 (NOC) 1170 (Bom); *Surjit Singh v Vimla Devi,* AIR 2008 (NOC) 969 (HP); *Virender Singh v Kashi Ram,* AIR 2004 Raj 196 : RLW 2004 (3) Raj 1979; *Balai Chandra Rarni v Durga Bala Dasi,* AIR 2004 Cal 276 : (2006) 1 Cal LT 403; *R Kuppayye v Raja Gounder,* AIR 2004 SC 1248.

section 4 of the TP Act. A bare allegation of gift being concocted or the non-appearance of witnesses would not indicate non execution of gift,[26] more so when the executants himself admits its execution.[27] In *Subhas Chandra v Ganga Prosad,*[28] the Supreme Court recognised this when it observed that it was well-settled that the law as to undue influence was the same in the case of a gift *inter vivos*, as in the case of a contract. In cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars, and the case can only be decided on the particulars as laid. There can be departure from them in evidence.[29] Merely because the parties were nearly related to each other, no presumption of undue influence can arise.[30] Thus a gift by the donor to his wife,[31] or by the grandmother to the grandson[32] in absence of undue influence would be valid. A gift by a person to his lawyer's wife is not liable to be set aside, if the gift is spontaneous.[33]

In a subsequent case also, it has been held that the law as to undue influence in the case of gifts is the same as that in case of contracts, ie, section 16(1), Indian Contract Act, 1872. More than mere "influence" must be proved to render the influence "undue". It is not sufficient to prove merely a relationship wherein one person is in a position to dominate the will of the other. It must also be proved that the transaction was unconscionable.[34] Where the evidence showed that the executant, a law graduate and capable to take care of herself, executed a gift deed, mere fact of her old age and frequent hospitalization would not shift the burden on the donee to prove absence of fraud and undue influence,[35] but where a very old man, with weak eye sight, sues for a declaration and possession of a land on the ground that the gift deed executed by him was not a voluntary act and circumstances show that the donee was in a position to dominate the will of the donor, the onus shifts on the donee to prove that the gift was made voluntarily.[36] Thus, old age alone is not the determining or disability criteria and free and voluntary consent of the donor must be demonstrated.[37] Where the intention of the donee was to get the land of the donor for consideration which he had spent over his maintenance, once such monetary consideration is proved it ceases to be a gift and it could be said that donee was able to dominate his Will and that donee exercised undue influence to get the deed executed.[38] In *Sulender Singh v Pritam*,[39] in an alleged gift executed

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26. *Radhika Devi v Rajesh Kumar Niranjan,* AIR 2009 Pat 109.
27. *Sri Sannaboraiah v Kanana Mallaiah,* AIR 2010 (NOC) 148 (Kant); 2009 (5) AIR Karn 371.
28. *Subhas Chandra v Ganga Prosad,* [1967] I SCR 331 : AIR 1967 SC 878 : [1967] 2 SCJ 159. See also *Samitra Devi v Sukwinder Pal,* AIR 1990 P & H 23, p 26; *Sukhdeo Rai v Champa Debi,* AIR 1985 Pat 89, p 90.
29. *Bishnudeo Narain v Seogeni Rai,* AIR 1951 SC 280, para 25; *Ladli Parshad Jaiswal v The Karnal Distillery Co Ltd Karnal,* AIR 1963 SC 1279, para 20; *Subhash Chandra Das Mushib v Ganga Prosad Das Mushib,* AIR 1967 SC 878, para 10; *Roshan Lal v Kartar Chand,* AIR 2002 HP 131, para 13.
30. *Subhash Chandra Das Mushib v Ganga Prosad Das Mushib,* AIR 1967 SC 878; *Raghunath Prasad Sahu v Sarju Prasad Sahu,* AIR 1924 PC 60.
31. *Inum Beevi v K S Syed Ahamed Kabir,* AIR 2001 (NOC) 25 (Mad).
32. *Krishna Prasad v Gopal Prasad,* AIR 2001 Pat 1 : (2000) 48 BLJR 1834.
33. *Bireswar v Ashalata,* AIR 1969 Cal 111, pp 116, 117, paras 62, 64; *Hall v Roberts,* (1978) 1 & 11 ER 767.
34. *Afsar Shaikh v Soleman Bibi,* AIR 1976 SC 163 : [1976] 2 SCR 327 : (1976) 2 SCC 142 : [1976] 2 SCJ 374.
35. *Roshan Lal v Kartar Chand,* AIR 2002 HP 131.
36. *Ajmer Singh v Atma Singh,* AIR 1985 P & H 315. (In this case, the donor was father of defendant. There was misrepresentation regarding character of the deed and he was told that it was a special power of attorney); see also *Virendra Singh v Kashiram,* AIR 2004 Raj 196 (where the gift deed was cancelled by the court on the ground of undue influence and fraud by the donee upon the 60 year old illiterate donor).
37. *Manirajan Pillai v K K Karunakaran Nair,* AIR 2011 Ker 55 : (2011) 1 KLJ 344.
38. *Pawan Kumar v Tilak Raj,* AIR 2011 (NOC) 98 (HP).
39. *Sulender Singh v Pritam,* AIR 2014 (NOC) 236 (HP).

by an aged and ailing donor, the registrar was not examined to show whether the gift deed was read over to the donor and was understood by her, and it was held that the donees had taken undue advantage of the age and ill health of the donor for getting the gift deed executed in their favour and therefore the gift deed was held as invalid, but it was shown to the satisfaction of the court that the donor always wanted to make a gift of not the complete property but a portion of the land in favour of the donee and had even allowed them to construct over such portion. In such circumstances, the gift for that portion of the property was held as valid.

It has been held that if the plaintiff alleges fraud, then the plaintiff may establish the same, but if the plaintiff is an illiterate or a *pardanashin* lady and alleges fraud, the defendant must establish the fact that the plaintiff executed the document after it was read over and explained to her, and after she understood the contents thereof.[40] In case of an old illiterate lady, it was held that the absence of the husband's attestation to her left thumb impression on the deed of gift creates a doubt as to the fact that the donor was fully conscious and aware of the contents of the deed.[41]

When a court of competent jurisdiction has declared a gift deed to be valid, a party cannot be said to be lawfully in possession of land or be a deemed tenant.[42] Where the gift was executed by the owner 30 years back and he during his life time never revoked the gift nor was any question raised about its validity, it can be concluded that the right, title and interest of the donee over the gift property was fully established, and his legal heirs cannot be deprived of their respective share in the property upon his death.[43]

On behalf of the donor, the essential ingredient is that he should voluntarily and without consideration transfer the property to the donee, and the giving away implies a complete divesting of the ownership in the property by the donor.[44] An allotment by a Burmese father, on re-marriage, of lands to the children of his first wife is not a gift, but a partition.[45] A transfer can be a gift even if it is described as a release, if it is found that it vests title without consideration in a person having no right, title or interest in the subject matter.[46]

The word "consideration" is used in the same sense as in the Indian Contract Act, 1872, and excludes natural love and affection. A transfer in consideration of an expectation of spiritual and moral benefit, or in consideration of natural love and affection is a gift, for such consideration is not that contemplated by the section.[47] In an Allahabad case, a gift deed of property was executed by the mother in favour of her only daughter, and the daughter promised to look after and maintain the mother throughout her life. It was held that the promise was not enforceable in law as such. The gift was held to have been made on account of natural love and affection, and not in consideration of the assurance or promise made by the daughter.[48] However, a "gift" in consideration of a donee undertaking the liability of the donor is not gratuitous, and is not a gift.[49] Where the intention of the donee is proved that he wanted to get the land of the donor for monetary consideration which he had spent over his

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40. *Kishore Ray Thakur Bije v Basanti Kumar Das,* AIR 1994 Ori 113, p 116.
41. *Mukhraj Devi v Manoj Kumar Singh,* AIR 2002 Jha 87
42. *Bhimappa Channappa Kapali v Bhimappa Satyappa Kamagouda,* (2012) 13 SCC 759.
43. *Gouranga Chandra Roy v Gobinda Ballab Roy,* AIR 2014 Tri 26.
44. *Deo Saran v Deoki Bharthi,* (1924) ILR 3 Pat 842 : 80 IC 980 : AIR 1924 Pat 657.
45. *Ma Htay v U Tha Hline,* (1924) ILR 2 Rang 649 : 88 IC 66 : AIR 1925 Rang 184.
46. *Kuppuswamy Chettiar v Arumugam,* [1967] 1 SCR 275 : AIR 1967 SC 1395 : [1967] 2 SCJ 5.
47. *Debi Saran v Nandlal,* 125 IC 127; See *Tulsidas Kilachand v CIT,* AIR 1961 SC 1023 : [1961] 3 SCR 35.
48. *Munni Devi v Chhoti,* AIR 1983 All 444, pp 447, 448, para 7.
49. *Kulasekara Perumal v Pathakutty,* AIR 1961 Mad 405; *Sonia Bhatia v State of Uttar Pradesh,* (1981) 2 SCC 585, pp 597, 598.

maintenance, it ceases to be a gift.[50] A gift of immovable property effected by a deed of gift but brought about by undue influence of the donee, though the donor acted voluntarily in making it, is not void, but is only voidable and a suit to set it aside, before possession can be claimed by the donor or anyone claiming under him, must be brought within the three years' period prescribed by Article 91 of the Limitation Act, 1908,[51] which corresponds to Article 59 of the Limitation Act, 1963. A gift in consideration of past, or with the object of future cohabitation is immoral, and invalid under section 6(h) of the TP Act.[52] A transfer for services rendered may be a gift, if the services are the motive, and not the consideration, for the transfer.[53] A deed of gift by which property is conveyed, transferred and exchanged as a consequence of a family arrangement is a deed of gift, even though the donee agrees to re-convey the property for a specified sum, if called upon by the donor to do so within 10 years.[54] According to the Allahabad High Court, an undertaking by the donee (a municipal corporation) that the donee would permit the donor to live in a small room of the gifted premises and would pay him ₹ 100 per month as maintenance, does not constitute a "consideration".[55] A settlement on a wife is a gift, although the marriage proves to be invalid.[56] An "agreement to give" lacks consideration, and is void under section 25 of the Indian Contract Act, 1872, but that section admits of an exception if it is in writing, registered and made on account of natural love and affection between parties standing in a near relation to each other. Again, if the effect of the gift is to defeat or delay the creditors of the donor, it is, under section 53, voidable at the option of any creditor so defeated or delayed. And if the donor is adjudged insolvent within two years of the gift, it may be void as against the official assignee or official receiver under section 55 of the Presidency-Towns Insolvency Act, and section 53 of the Provincial Insolvency Act.

An order passed by an erstwhile ruler of a state providing for annual allowance to his sons with retrospective effect, from the date of their birth till the date of their attaining majority, was held to be a gift.[57]

(3) Donor

The donor is the person who gives. Any person who is *sui juris* can make a gift of his property. A gift of property by a daughter who was not a coparcener would be valid even if she had not consulted any of the family members.[58] Similarly, a gift executed by the wife and the son of a Hindu man who disinherited them and bequeathed his property in favour of the trust would not be valid as the donee cannot claim any better title than what his predecessor in title did not possess.[59] As the concept of joint family property or coparceners under Hindu Law is not applicable to Christians so, a Christian, who is an absolute owner of the property, is entitled to divide and distribute his property as he considers fit.[60] A minor, being incompetent to contract,[61] is incompetent to transfer,[62] and a gift by the minor would,

50. *Pawan Kumar v Tilak Raj,* AIR 2011 (NOC) 98 (HP).
51. *Ramchandra v Laxman,* 72 IA 21 : (1945) ILR Bom 440 : (1945) All LJ 280 : 47 Bom LR 274 : 49 Cal WN 303 : (1945) 1 Mad LJ 253 : 220 IC 28 : AIR 1945 PC 54.
52. *Subana v Yamanappa,* (1933) 35 Bom LR 345 : 149 IC 464 : AIR 1933 Bom 209.
53. *Hiralal v Gavrishankar,* (1928) 30 Bom LR 451, p 454 : 109 IC 149 : AIR 1928 Bom 250; *Madhavrao v Kashibai,* (1910) ILR 34 Bom 287 : 5 IC 599.
54. *Deba Prasad Basu v Ashrukana Das,* (1977) 81 Cal WN 449.
55. *Subhash Chandra v Nagar Mahapalika Kanpur,* AIR 1984 All 228.
56. *Gopal Saran v Sita Devi,* (1932) 36 Cal WN 392 : 135 IC 753 : AIR 1932 PC 34.
57. *Maharaj Dhiraj Himatsinhji v State of Rajasthan,* AIR 1987 SC 82, p 85.
58. *Kamalakanta Mohapatra v Pratap Chandra Mohapatra,* AIR 2010 Ori 13.
59. *Pratima Shukla v Patna Municipal Corporation,* AIR 2014 (NOC) 205 (Pat).
60. *Lalitha Theresa Sequeria v Dolfy A Pias,* (2014) 10 SCC 731.
61. *Mohori Bibee v Dhurmodas Ghose,* (1903) ILR 30 Cal 539 : 30 IA 114.
62. Tansfer of Property Act, 1882, section 7.

therefore, be void. It was upon the donor to prove that he was minor at the time of execution of gift, and not upon the donee.[63] Where the gift is by several donors and one of them although was a minor, had represented him to be 22 years old, the gift would be valid unless it is proved that his admission with respect to his majority was under duress, coercion or undue influence.[64] Trustees cannot make a gift out of trust property, unless authorised by the terms of the trust.

A coparcener is entitled to execute a gift of his share of property specified after affecting a partition. Mutation in records can be made on the basis of such registered gift.[65] The owner should have a title over the property that she purports to gift. The property that is once sold for legal necessity cannot be claimed by the seller once again to execute a gift after the alienation has been complete. Such a gift executed would be liable to be declared as void.[66] Where the gift is executed by the donor, a co-sharer of the property in favour of her son, the same cannot be challenged by a third party.[67] A guardian of property of a minor cannot make a valid gift of the minor's property.[68] He can however, on behalf of a minor accept a gift containing a condition that the person nominated in the gift deed shall act as a manager of the gifted property. Such acceptance would amount to recognition by the natural guardian of the nominated person as the manager or agent of the minor for the purpose of such property. Such a condition cannot be characterised as an onerous term involving any burden on the property, or on the minor's personality. Act of the natural guardian of the minors in accepting the gift, amounted to a ratification and recognition of the appointment of the mother of the minor as their de facto manager for the suit property. Consequently, the mother became (in that capacity) a "landlord" within the meaning of section 2(c) of Uttar Pradesh Act no III of 1947, and was entitled to serve on the tenant a notice of demand under section 3(l)(a) of that Act.[69] A Hindu man cannot execute a gift of the property of wife.[70]

The father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father to make such a gift is not confined to the marriage occasion. It is moral obligation and can be discharged either during the lifetime of the father, or thereafter.[71] Question as to whether a particular gift is within reasonable limits, has to be judged according to the status of the family at the time of making a gift, the extent of the immovable property owned by the family and the extent of property gifted. No hard and fast rule prescribing quantitative limits of such a gift can be laid down. The answer to such a question would vary from family to family.[72] A Hindu widow in possession of the estate of her deceased husband can make an alienation for religious acts which are not essential or obligatory, but are still pious observances which conduce to the bliss of the deceased husband's soul. Gifts by a widow of landed property to her daughter or son-in-law are valid.[73] In Lakshadweep, upon division of

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63. *Habib Ullah Bhat v Jana,* AIR 2003 J&K 32.
64. *Patel Prabhudas Hergovandas v Heirs of P B Kachrabhai,* AIR 2007 Guj 148.
65. *Rajbansh Dubey v State of Bihar,* AIR 2018 (NOC) 286 (Patna).
66. *Gopiballav Joshi v Murlidhar Joshi,* AIR 2017 (NOC) 647 (Orissa).
67. *Gita Devi v Kameshwar Chaudhary,* AIR 2017 (NOC) 1100 (Pat).
68. *Lakhvinder Singh v Paramjit Kaur,* 2003 (4) RCR (Civil) 26 (P&H).
69. *Janardan Prasad v Girija Prasad Seth,* AIR 1981 All 86 (review case law).
70. *Chand Bee v Hamidunnissa,* AIR 2007 AP 150 : (2007) 1 ALD 810 : (2007) 2 ALT 112.
71. *Guramma Bhratar Chanbasappa Deshmukh v Mallappa Chanbasappa,* AIR 1964 SC 510 : [1964] 4 SCR 497; *M Vijayakumari v K Devabalan,* AIR 2003 Ker 363.
72. *R Kuppayee v Raja Gounder,* AIR 2004 SC 1284, para 21 : (2004) 1 SCC 295.
73. *Kamla Devi v Bachulal Gupta,* AIR 1957 SC 434 : [1957] SCR 452.

properties between branches or *tavazhis* of the family, a *tavazhi* does not possess the right to mortgage or sell or alienate the *tarwad* property so divided, and has only the right to enjoy the income from property during the lifetime of the members of the *tavazhi.* On that basis, a gift deed alienating such property was held to be invalid.[74] However, where the donor admits execution of the gift deed in cross examination and the evidence was found true, sufficient and satisfactory, the gift deed would be held valid.[75]

(4) Donee

The donee is the person who accepts the gift. Acceptance must be of donee and not of donor.[76] A gift may be accepted by, or on behalf of a person who is not competent to contract. A minor may, therefore, be a donee;[77] but if the gift is onerous, the obligation cannot be enforced against him while he is a minor. But when he attains majority he must either accept the burden, or return the gift.

The words "accepted by or on behalf of the donee" show that the donee may be a person unable to express acceptance. A gift can be made to a child *en ventre sa mere,* and could be accepted on its behalf.

The donee must be an ascertainable person, and so the public cannot be a donee under this section;[78] nor can a gift be made to an unregistered society.[79] Gifts to an idol, which though is a juristic person, and capable of holding property, is not a gift within the meaning of section 122[80] as an idol is not a living person.

A gift to two or more persons may be a gift to them as joint tenants, or as tenants in common. The presumption of English law in favour of a joint tenancy does not apply to a Hindu gift, and in a Hindu gift, the donees are presumed to take as tenants in common.[81]

Gift to two donees jointly with the right of survivorship, is valid in law,[82] but a person who is not given any share under either a gift or arbitration award would not be called a donee.[83] In *Chaudhary Ramesar v Prabhawati Phool Chand,*[84] the donee was around 21 years on the date of the execution of the gift and as per the clear recitals in the gift that the donor was transferring his possession under the bhumidari rights and that the gift is accepted by the donee with recitals in the gift deed entitling the donee to effect mutation of property in his name in the revenue records. The actual physical possession remained with the donor father. It was held that the gift would not be invalidated on this account. Where the donees were put in possession of the property gifted to them and the Land Revenue was shown to be paid by them and the final Khitans were issued in their favour, the acceptance of the gift would be proved.[85]

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74. *Neelathupura Shaikoya v Monthrapally,* AIR 2003 Ker 344, para 10.
75. *R Seethamma v M Thimma Reddy,* AIR 2017 Hyd 125.
76. *Charu Kishor Mehta v Joint Charity Commissioner, greater Bombay region,* 2015 SCC OnLine SC 234.
77. *K Balakrishnan v K Kamalam,* AIR 2004 SC 1257. See also *Habbib Ullah Bhat v Jana,* AIR 2003 J&K 32.
78. *Pallayya v Ramavadhanulu,* (1903) 13 Mad LJ 364.
79. *Mathura Kuer v Dharan Samaj,* (1916) 14 All LJ 1038 : 38 IC 183.
80. *Roshan Freight Carrier v Trilok Chand Jain,* 2010 SCC OnLine All 2233 : (2011) 84 ALR 135 : (2011) 98 AIC (Sum 2) 2.
81. *Jogeswar Narain v Ram Chand Dutt,* 23 IA 37 : (1896) ILR 23 Cal 670 (PC).
82. *Cheria Kannan v Karumbi,* AIR 1973 Ker 64 : (1973) KLT 235.
83. *Gian Chand Kapur v Rabindra Mohan Kapur,* AIR 1987 SC 240 : (1987) 1 SCC 80.
84. *Chaudhary Ramesar v Prabhawati Phool Chand,* AIR 2012 All 173.
85. *Sudhangshu Kumar Das v Jagadish Chandra Das,* AIR 2014 Gau 19.

(5) Subject-matter

The subject matter of the gift must be certain existing movable or immovable property. It may be land, goods, or actionable claims. It must be transferable under section 6. However, it cannot be future property.[86] A gift of a right of management is valid;[87] but a gift of a future revenue of a village is invalid.[88] These cases were decided under Hindu and Mahomedan law respectively, but they illustrate the principle. A coparcener cannot make a valid gift of his undivided share in a coparcenary,[89] but a gift of property obtained after a preliminary decree of partition is passed by court would be valid.[90] In a Calcutta case,[91] it was said that the release of a debt is not a gift, as a gift must be of tangible property. It is submitted that the release of a debt is not a gift as it does not involve a transfer of property, but is merely a renunciation of a right of action. It is quite clear that an actionable claim such as a policy of insurance may be the subject of a gift (section 130).

In order to constitute a valid gift, there must be an existing property. Where the donor (assessee) has a credit account with a firm or with a family or with a company, and the sum gifted is available to that firm or the company on the date of the gift, then a valid gift of that sum by book entries might be possible; but where a sum was not available with the firm or the family or a company which was not a banking company, and had no overdraft facility, such entries would not effectuate a valid gift.

The assessee, who maintained an account in a company, made a gift of a certain sum, by directing the company to debit his account with that sum and to credit the amount in the name of the donee. However, on the date of the gift, the company did not have sufficient cash balance and did not have any overdraft facilities with any bank, nor did the company itself carry on banking business. It was held that the gift made by assessee, even though accepted by the donee, was not valid.[92]

(6) Transfer

For "transfer", section 123 may be referred to.

(7) Acceptance

In order to constitute a valid gift, the pivotal requirement is acceptance thereof. No particular mode of acceptance is required, and the circumstances throw light on that aspect. A transaction of gift in order to be complete must be accepted by the donee during the lifetime of the donor. Factum of acceptance can be established by different circumstances such as donee taking a property, or being in possession of deed of gift alone. If a document of gift after its execution or registration in favour of donee is handed over to him by the donor which he accepts, it amounts to a valid acceptance of gift in law. The specific recital in the deed that possession is given,[93] or delivery of duly executed instrument of gift,[94] raises a presumption of acceptance. However, once it is found that the gift was accepted and the

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86. Transfer of Property Act, 1882, section 124.
87. *Madhavrao v Kashibai*, (1910) ILR 34 Bom 287 : 5 IC 599; *Deo Narain v Board of Revenue*, (1964) ILR 1 All 375 : (1963) All LJ 1088 : AIR 1964 All 419.
88. *Amtul Nissa v Mir Nuruddin*, (1898) ILR 22 Bom 489.
89. *Munnilal Mahto v Chandreshwar Mahto*, AIR 2007 Pat 66 : (2006) 4 PLJR 352.
90. *Renu Devi v Mahendra Singh*, AIR 2003 SC 1608 : (2003) 10 SCC 200.
91. *Mahim Chandra v Ram Dayal*, (1925) 42 Cal LJ 582 : 91 IC 757 : AIR 1926 Cal 170.
92. *CIT Kanpur v R S Gupta*, AIR 1987 SC 785, followed in *Controller of Estate Duty v Vithal Das*, AIR 1987 SC 791 : (1987) 2 SCC 37.
93. *Sanjukta Ray v Bimelendu Mohanty*, AIR 1997 Ori 131.
94. *Nanak Chand v Amilal*, 2003 (3) RCR (Civil) 260 (P&H).

truth of the contents of the gift deed was admitted, clinching evidence is required to establish that the donor still retained possession with him, and the document was not acted upon.[95]

There was a divergence of view between the two schools of Hindu law as to the necessity of acceptance of the gift by the donee, Dayabhaga holding that it was not necessary, but Mistkshara holding the contrary. This section has modified the indigenous Dayabhaga law.[96] A transfer of a stock to the name of the donee vests the property in him, subject to his right to repudiate the gift, even though he be unaware of the transfer.[97] And this is so even though the gift be onerous.[98] It is, however, settled principle of law that normally a donee is expected to accept a gift which is not onerous.[99] The mutation entries of the property alleged to be gifted do not convey or extinguish any title, and those entries are relevant only for the purpose of collection of land revenue,[100] but where mutation in Municipal Registers is effected after filing a suit with a claim of ownership, it would signify acceptance of gift.[101] When the gift deed reserves a life interest in the property in favour of the donor and further stipulates that the donor shall pay the revenue charges of the property during her lifetime, absence of mutation in favour of the donee is not of much significance.[102] There is nothing in the section to show that the acceptance under this section should be express.[103] The acceptance may be inferred,[104] and it may be proved by the donee's possession of the property,[105] or even by the donee's possession of the deed of gift.[106] Oral evidence can be looked into for finding out whether the gift had, in fact, been acted upon.[107] Delivery of possession of the gifted property can prove the assent of the donor, but mere assent to the gift deed cannot prove delivery of possession of the property.[108]

Where there is a specific recital in the gift deed that possession has been handed over to the donee, a presumption arises to that effect.[109] When title has passed on to the donee on acceptance of the gift, it has to be presumed that possession over the property also passed with such title.[110] Where a father made a gift to his daughter and on its acceptance by her, she allows her father to enjoy the income from the properties settled in view of the relationship of father and daughter between the donor and donee, it could not be said that there was no acceptance of gift by the donee even assuming that the donor continued to be in possession and enjoyment of the property gifted. Delivery of possession of the gifted property is not absolute requirement, for the completeness or the validity of the gift as found in Muslim law of gifts.[111]

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95. *Ganpat Mahadeo Gawand v Shrinivas M Pendse,* AIR 2003 SC 4060, para 4 : (2003) 5 SCC 409.
96. *Kanai Lal v Kumar Purnendu Nath,* (1946) 51 Cal WN 227.
97. *Standing v Bowring,* (1885) 31 Ch D 282.
98. *Siggers v Evans,* (1855) 5 E & B 367; *Sarba Mohan Banerjee v Manmohan Banerjee,* (1933) 37 Cal WN 149 : 143 IC 757 : AIR 1933 Cal 488.
99. *Ramjeet Mahto v Baban Mahto,* AIR 2004 Jha 58, p 63.
100. *Balwant Singh v Daulat Singh,* AIR 1997 SC 2719.
101. *Gorachand Mukherjee v Malabika Dutta,* AIR 2002 Cal 26 : (2002) II DMC 571.
102. *Kuttian Padmini v Nelliyullaparambath Mathu,* 2014 (1) KLJ 816 : 2014 (1) KHC 759.
103. If *Pallayya v Rama Yadhanulu,* (1903) 13 Mad LJ 364 is intended to lay down proposition to the contrary, it is submitted that it is not good law; *Gangadhar Iyer v K B Iyer,* AIR 1952 Tr & Coch 47.
104. *Shakuntla Devi v Amar Devi,* AIR 1985 HP 109, p 111.
105. See note "Hindu Law" below.
106. *Balmakund v Bhagwan Das,* (1894) ILR 16 All 185; *Man Bhari v Naunidh,* (1882) ILR 4 All 40; *Sanjukta Ray v Bimelendu Mohanty,* AIR 1997 Ori 131.
107. *Gauranga Sahu v Maguni Dev,* AIR 1991 Ori 151, p 155.
108. *Mukhtiar Kaur v Gulab Kaur,* AIR 1977 Punj 257 : 79 Punj LR 185.
109. *Sanjukta Ray v Bimelendu Mohanty,* AIR 1997 Ori 131.
110. *Balakrishnan Nambeesan P v A P Meenakshyamma,* 2014 (2) KLJ 158 : 2014 (2) KHC 23.
111. *Kamakshi Ammal v Rajalakshmi,* AIR 1995 Mad 415.

When the donor continues with the physical possession of the property as stipulated in the gift deed, the delivery of possession is neither possible, nor required to complete gift. No express acceptance by the donee is necessary for completing a gift in such cases.[112]

Acceptance has been inferred from the acceptance of the right to collect rents in the case of a gift of tenanted property,[113] or from the mutation in the register.[114] However, mere standing by when the deed was executed or registered will not be sufficient proof of acceptance.[115] Provided the donee is in possession of the property, the donor's retention of the deed is not necessarily proof of the fact that there has been no acceptance.[116] In a Calcutta case, the gift deed was in possession of donee. He filed civil suit claiming his ownership right over the gifted property. The suit was decreed in his favour. He also got his name mutated in municipal records. It was thus held that the donee had duly accepted the deed of gift from the donor, and acted on the basis of the same thereby complying with the requirements of section 122.[117]

When a gift of immovable property is not onerous, only slight evidence is sufficient for establishing the fact of acceptance by the donee. When it is shown that the donee had knowledge of the gift, it is only normal to assume that the donee had accepted the gift, because the acceptance would only promote his own interest.[118] Mere silence may sometimes be indicative of acceptance, provided it is shown that the donee knew about the gift. No express acceptance is necessary for completing a gift.[119] While mere possession by, or on behalf of, a donee may amount to acceptance, mere possession cannot be treated as evidence of acceptance where the subject matter is jointly enjoyed by the donor and the donee.[120] Where a deed of gift was delivered by the donor to the donee, the Privy Council held that on delivery of the deed there was an acceptance of the transfer within the meaning of this section, and, therefore, the gift became effectual, subject to registration as required by section 123;[121] and it is immaterial that the deed was not stamped. Failure to stamp the deed will render the document inadmissible in evidence, but will not affect its validity, and the deed becomes effectual from the very moment of its execution, subject to its being stamped and registered as required by law.[122] Acceptance of duly exercised instrument of gift may constitute sufficient acceptance.[123] In a Patna case, the fact that the gift deed was handed over by the donor to the donee, who accepted it, was regarded as sufficient evidence of acceptance.[124] Acceptance may be by a donee, who is not competent to contract,[125] for a minor may accept benefit, although he cannot incur an obligation. Where a gift is made in favour of a child of the donor, who is the guardian of the child, the acceptance of gift can be presumed to have been made by him, or on his behalf without any overt act signifying

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112. *Kuttian Padmini v Nelliyullaparambath Mathu,* 2014 (1) KLJ 816 : 2014 (1) KHC 759.
113. *Kolandiyli Ammal v Changaram,* AIR 1963 Ker 344.
114. *Tara Sahuani v Raghunath Sahu,* (1962) ILR Cut 575 : AIR 1963 Ori 50.
115. *R Jamuna Bai v M A Anusuya,* AIR 2001 Mad 392, para 13 : (2001) 2 Mad LJ 355.
116. *Amrithammal v Ponnusani,* (1907) 17 Mad LJ 386.
117. *Gorachand Mukherjee v Malabika Dutta,* AIR 2002 Cal 26, pp 32,33.
118. *Kuttian Padmini v Nelliyullaparambath Mathu,* 2014 (1) KLJ 816 : 2014 (1) KHC 759.
119. *Vannathi Valappil Janaki v Puthiya Purayil Paru,* AIR 1986 Ker 110; *Narayani Bhanumathi v Karthyayani Lalitha Bhai,* (1973) KLT 961 : (1973) KLJ 354.
120. *Baucha Bhoi v Saria Bewa,* AIR 1973 Ori 18.
121. *Kalyanasundaram v Karuppa,* (1927) ILR 50 Mad 193 : 54 IA 89 : 100 IC 105 : AIR 1927 PC 42; followed in *Venkatasubba Shrinivas v Subba Rama,* (1928) ILR 22 Bom 313 : 108 IC 367 : AIR 1928 PC 86; See also *Nobadwepchandra Das v Loke Nath Roy,* (1933) ILR 59 Cal 1176 : 36 Cal WN 733 : 142 IC 452 : AIR 1933 Cal 212; *Gauranga Sahu v Maguni Dei,* AIR 1991 Ori 151, p 156.
122. *Purna Chandra v Kalipada Roy,* 201 IC 551 : AIR 1942 Cal 386.
123. *Samrathi v Parasuram,* AIR 1975 Pat 140 (following *Kalyan Sundram v Karuppi,* AIR 1927 PC 42).
124. Ibid.
125. *Ganeshdas Bhiwraj v Suryabhan,* (1917) 13 Nag LR 18 : 39 IC 46.

acceptance by the minor.[126] And a minor's guardian may accept a gift for him. Gift would be complete where the guardian accepts the gifts on behalf of the minors and in token of acceptance, appends his thumb impression on the gift deed,[127] or takes possession of the property.[128] Where, after execution of a registered gift deed in favour of a minor, thumb impression of the minor's mother was obtained in token of acceptance of gift, the gift can be said to have been accepted by the mother to whom the deed is handed over after registration. In such circumstances, delivery of possession is not necessary.[129] So also in the case of a deity, this acceptance may be by its agent.[130] Where a gift deed had been signed by the donees in token of their acceptance of the gift, it is only the donor who can raise an objection that possession had not been delivered. If the donor supports the validity of the gift, the non-delivery of possession (even if such non-delivery be proved) becomes immaterial.[131] A third party cannot challenge the validity of a gift on the ground that the donee has not got into possession of the property.[132]

(8) Trusts

A gift may be made by the equitable machinery of a trust; and the interposition of the trustees enables a gift to be made to a person not yet in existence and, therefore, incapable of being the donee of a direct gift.

A trust is not complete until the trust property is vested in trustees for the benefit of the *cestui que trust.* The settlor may do this by a declaration of trust, if he is himself the sole trustee, using language which, taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it, and to exercise dominion and control over it exclusively in the character of a trustee.[133] Otherwise, he must transfer the trust property to trustees by registered conveyance or delivery of possession, as the case may be.[134] According to the Gujarat High Court, when a settler creates a trust by settling some of his properties and appoints himself as the sole trustee, he makes a vesting declaration, and not a gift. It is not a transfer. He bifurcates his real ownership, he retains for himself the legal ownership of the property, and transfers the beneficial or equitable ownership to those for whose benefit he has created the trust. Looking to section 6, Indian Trusts Act, 1882, when the settler appoints himself as the sole trustee, there is no "transfer". A transaction in which there is no transfer is not a gift. The creation of a gift by trust and the vesting in the trustee of the property, is a mode independent of, and *de hors,* a gift. Therefore, the transaction in question did not amount to a "gift".[135] If the settler has not perfected the trust either by constituting himself a trustee, or by transferring the trust property to trustees, the court will not enforce the trust;[136] nor will the court perfect an

126. *K Balakrishnan v K Kamalam,* AIR 2004 SC 1257, para 26 : (2004) 1 SCC 581.
127. *Ashkar Singh v Rawal Singh,* AIR 1992 P & H 148, p 150; *Gurjant Singh v Surjit Singh,* AIR 2004 P&H 257, paras 17, 20.
128. *Ramjeet Mahto v Baban Mahto,* AIR 2004 Jha 58, p 63.
129. *Balwant Singh v Chatin Singh,* AIR 1985 P & H 74.
130. *Ram Bharose v Rameeshwar Prasad Singh,* (1937) ILR 13 Luck 697 : AIR 1938 Oudh 26 : 171 IC 481.
131. *Tirath v Manmohan Singh,* AIR 1981 Punj 174.
132. *Turmall v Anwar Rasul,* AIR 1973 Gau 90.
133. *Richards v Delbridgee,* (1874) LR 18 Eq 11; *Heartley v Nicholson,* (1875) LR 19 ES 233; Re *Richards, Sherstone v Brock,* (1887) 36 Ch D 541; *Ashabai v Haji Tyeb,* (1885) ILR 9 Bom 115, p 122
134. Indian Trusts Act, 1882, section 6; *Gordhandas v Bai Ramcoover,* (1902) ILR Bom 449, p 472.
135. *Suleman Isubji Dadabhai v Naranbhai Dayabhai Patel,* (1980) 21 Guj LR 232; reversing *Naranbhai v Suleman,* (1975) 16 Guj LR 289.
136. *Ellison v Ellison,* (1802) 6 Ves 656; *Dening v Ware,* (1856) 22 Beav 184; *Weale v Ollive,* (1853) 17 Beav 252; *Moore v Moore,* (1874) LR 18 Eq 474; *Hording v Hording,* (1886) 17 QB D 442.

incomplete gift by holding that the property was transferred in equity, or that an imperfect gift amounted to a declaration of trust.[137]

(9) Hindu Law

The section applies to Hindus, and it contains nothing that is inconsistent with Hindu law,[138] except as to acceptance of the gift not being essential according to Dayabhaga. The rule of pure Hindu law that a gift in favour of an unborn person is wholly void so that it cannot be made even through the medium of a trust, was modified by the Hindu Disposition of Property Act, 1916, by the Madras Act 1 of 1914, and by Act 8 of 1921.[139] These Acts have been amended by sections 11, 12 and 13 of Act 21 of 1929; and the effect of the amendment is that, subject to the limitations in chapter II of TP Act and in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925, no transfer inter vivos, or by will, or property of a Hindu shall be invalid by reason that only that any person for whose benefit it may have been made was not born at the date such disposition took effect.

There is no presumption of a joint tenancy in the case of a gift of several donees in Hindu law. The donees in Hindu law take as tenants in common. In *Jogeswar Narain v Ram Chund Dutt,*[140] the Privy Council said that the principle of joint tenancy was unknown to Hindu law, except in the case of a coparcenary. In this connection, note "Joint tenancy or Tenancy in common" under section 45 may be referred.

Acceptance has been held proved in cases decided under Hindu law by the assent of a donee already in possession,[141] or by the donee's possession of the deed of gift.[142] Although an idol is a juristic person capable of holding property, yet it has been held in some cases that an idol is not a living person, and that a dedication of land to an idol is not a gift within the meaning of sections 122 and 5, and need not be affected by registered instrument.[143] But these decisions have been criticised as whittling down the provisions of section 123 in a manner not contemplated when the Act was made;[144] for a gift is still a gift though made through the medium of a trust,[145] and in some cases a registered instrument has been held to be necessary.[146] It has also been said that an idol is a symbol of a deity, and that it would be contrary to the Hindu religion for an idol to make an acceptance of worldly goods.[147] A gift

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137. *Antrobus v Smith,* (1806) 12 Ves 39; *Milray v Lord,* (1862) 4 De GF & J 264; *Manchershaw v Ardeshir,* (1908) 10 Bom LR 1209; *Natha Gulab v Shaller,* (1923) 25 Bom LR 599 : 87 IC 312 : AIR 1924 Bom 88; ef *Amarendra v Monimunjary,* (1921) ILR 48 Cal 986 : 66 IC 586 : AIR 1921 Cal 148.
138. *Deo Saran v Deoki Bharthi,* (1924) ILR 3 Pat 842 : 80 IC 980 : AIR 1924 Pat 657.
139. For Act 15 of 1916, see Appendix I. That Act has been amended in 1959 to extend to Madras, and the Madras Acts referred to in the text have been repealed.
140. *Jogeswar Narain v Ram Chund Dutt,* (1896) ILR 23 Cal 670 : 23 IA 37.
141. *Bal Kushal v Lakhma Mana,* (1883) ILR 7 Bom 452.
142. *Balmakund v Bhagwan Das,* (1894) ILR 16 All 185.
143. *Pallaya v Ramavadhanulu,* (1903) 13 Mad LJ 364; *Narasimha v Venkatalingam,* (1921) ILR 50 Mad 687 : 103 IC 302 : AIR 1927 Mad 636; *Ramalinga v Sivachidambara,* (1919) ILR 42 Mad 440 : 49 IC 742; *Rambrahma v Kedar,* (1922) 36 Cal LJ 478 : 72 IC 1026 : AIR 1923 Cal 60; *Harihar Prasad v Sri Gurugranth,* 129 IC 791 : AIR 1930 Pat 610. See also *Shri Ram Kishan Mission v Dogar Singh,* AIR 1984 All 72, p 75.
144. *Birendra Keshri Prasad v Bahuria Saraswati Kuer,* (1934) ILR 13 Pat 356 : 155 IC 756 : AIR 1934 Pat 612.
145. *Sadik Husain v Hashim Ali,* 43 IA 212 : 36 IC 104.
146. *Shaukat Begam v Sri Thakurji,* 131 IC 442 : AIR 1931 Oudh 14.
147. *Bhupati Nath v Ram Lal,* (1910) ILR 37 Cal 128 : 3 IC 642; *Ramalinga v Sivachidambaram,* (1919) ILR 42 Mad 440 : 49 IC 742.

to an idol not yet instituted is invalid,[148] unless the transfer is to *pujaris* on trust to establ an idol.[149] The Indian Trusts Act, 1882 does not apply to religious or charita endowments.[150] A Hindu may establish a religious or charitable institution without writi and without the intervention of a trust.[151] A gift to *dharam* is void for uncertainty as object is too vague and uncertain for its administration to be under the control of court.[152] Property can be gifted to religious or charitable institution with conditions.[153] A to an "adopted son to look after and perform obsequies of adoptive parents" would fail the failure of adoption.[154]

(10) Fiduciary Relationship

Gift between parties in a fiduciary relationship are often questioned on the grounds fraud, misrepresentation or undue influence. When fraud, misrepresentation or unc influence is alleged by a party in a suit, normally, the burden is on him to prove such fra undue influence or misrepresentation. But, when a person is in a fiduciary relationship w another and the latter is in a position of active confidence the burden of proving the abse of fraud, misrepresentation or undue influence is upon the person in the dominating positi and he has to prove that there was fair play in the transaction and that the apparent is real other words that the transaction is genuine and *bona fide*. In such a case the burden proving the good faith of the transaction is thrown upon the dominant party, that is to s the party who is in a position of active confidence. A person standing in a fiduci relationship to another has a duty to protect the interest given to his care and the Co watches with jealousy all transactions between such persons so that the protector may not his influence or the confidence to his advantage. When the party complaining shows su relation the law presumes everything against the transaction and the onus is cast against person holding the position of confidence or trust to show that the transaction is perfec fair and reasonable, and that no advantage has been taken of his position.[155] In *Vaths Manickavasagam v N Ganesan*,[156] the father had purchased a property in the name of his s The other legal heirs claimed partition of the said property on the ground that it was no gift and that the purchase was made in the name of the son only to avoid violation of ru relating to his service. The Supreme Court held that, Going by the facts placed before Court, except the *ipse dixit* statement made in the written statement, that late Nithyanand gifted away the first item of the suit property in his favour, there was no other evidence le in support of the said claim of gift. In fact, at that time, when the property was purchas the first respondent was a college going student. Merely because the property was purcha in the name of the first respondent, it cannot be held that there was a valid gift in his favo

umental in preparing the stamp paper would not lead to a presumption of the gift being uted under fraud and misrepresentation as the donee was able to prove the execution of a tered gift deed in his favour.[158]

) Legal validity

third party cannot challenge the validity of a gift deed. Such a challenge can be assed only by the donor or those who claim under him, and not by a third party. n the donor is not even a party to the suit, it is pointless to impeach the validity of the deed. Even if a person has continued in occupation of the house and enjoyed the erty at the time of execution and acceptance of gift deed, he cannot, by that mstance alone, challenge the transfer of title and legal possession over the property in ır of the donee under the gift. Anyone who claims possession over the property rse to the donor or donee must establish his antecedent title to such property or rse possession.[159]

hen donee has accepted gift during lifetime of donor, then such gift is deemed to be In the recital in the deed itself it appears that the donees were put into possession of erty gifted away and when it is proved that land revenue was paid by or on behalf of lonees, it presupposes possession of the donees and lends support to the case of tance of gift.[160]

gift can be made in favour of a minor and the minor himself can accept the gift ally a non-onerous gift. If the donor is the parent of the minor, possession of the rty by the parent on behalf of the minor would be sufficient to hold that the gift was ted.[161]

document has to be read as a whole and when there is repugnancy or inconsistency en two recitals in a document, harmonious construction has to be adopted to give to the real intention of the executants.[162]

here the executant transferred the property in favour of her grandsons while reserving in vn favour a right to reside, possess and enjoy the property during her life time and a of residence in favour of her daughter in law but prohibiting her from alienating the rty, such deed would be a gift and not a Will in absence of any recital in the document he document would be effective only on the death of the executant. Since through the she did not confer/reserve in her favour a right to revoke it in any eventuality, a tion without satisfying the condition would not be valid and the deed would confer a

[165]**123. Transfer how effected.**—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Synopsis

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(2) Signed by or on Behalf of the Donor 1087
(3) Attested 1087
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(1) Mode of Transfer—Immovables

Section 123 provides that for the purposes of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.[166]

This provision excludes every other mode of transfer and even if the intended donee is put in possession, a gift of immovable property is invalid without a registered instrument.[167] However, 12 years' possession under an oral gift will perfect a title by prescription.[168] A gift by way of dowry or *sankalap* to a bridegroom is invalid if not made by a registered instrument.[169] Recitals in an unregistered petition to the collector will not take the place of a registered deed of a gift.[170] So also, mere entries in a mutation register will not be sufficient.[171] Mere residence in the alleged gifted house without adducing independent evidence to prove the alleged oral gift cannot be treated as gift of the property.[172] A release deed which unambiguously transfers the right, title and interest of the executant, and is attested by two witnesses, would operate as a gift.[173] *"Pasupu Kumkuma"* is a gift of immovable property, the consideration whereof is love and affection and, therefore, requires registration under section

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165. As to limitation to the territorial operation of section 123, *see* section 1, *supra*, section 123 extends to every cantonment—*see* section 287 of the Cantonments Act, 1924 (2 of 1924).
166. *CIT v Sirchmal Nawalakha,* (2001) 6 SCC 641, para 2; *Nishamani Singh v Nishamani Dibya,* AIR 2003 Ori 123, para 9; *Raghunath Mohanty v Juti Devi,* AIR 2010 (NOC) 149 (Ori).
167. *Kuverji v Municipality of Lonavla,* (1921) ILR 45 Bom 164 : 58 IC 403 : AIR 1921 Bom 198; *Lashkar Singh v Rawal Singh,* AIR 1992 P& H 148, p 150; *R N Dawar v Ganga Saran Dhama,* AIR 1993 Del 19, p 22.
168. *Venkatarayudu v Subbamma,* (1903) 13 Mad LJ 302.
169. *Hira Mani v Anmol Singh,* (1928) 26 All LJ 944 : 117 IC 351 : AIR 1928 All 699; *Allam Gangadhara Rao v G Gangarao,* AIR 1968 Pat 291.
170. *Vartha Pillai v Jeevarathammal,* (1919) ILR 43 Mad 244 : 46 IA 285 : 53 IC 901.
171. *Assudibai v Haribai,* (1943) ILR Kant 227 : AIR 1943 Sau 177.
172. *Ponthinoda Sainabi v Vatakkiloda Aboobackerkoya,* AIR 2001 Ker 331, para 16 : (2001) 2 Ker LT 555.
173. *Satyesh Chandra Banerjee v Rani Banerjee,* AIR 1977 Cal 509.

123.[174] Transfer of land in the wife's favour not followed by acceptance creates no gift, particularly where the wife showed complete disinterest in the property.[175]

In cases where the TP Act applies, an oral gift is void in law, unless there is a specific statutory provision dispensing with the formalities for gifts as laid down in the TP Act.[176]

ILLUSTRATION

A registered owner of two villages presented a petition to the Collector, praying for the transfer of the villages to the name of *B* and stating that he had given the villages to *B* as *stridhanam*. The Collector registered the villages in *B*'s name. Subsequently *A*'s heir sued to recover the villages. The suit was dismissed as *B* had acquired a title by adverse possession; but with reference to the petition to the Collector, the Judicial Committee said:

It was not contended before the Board that the transactions effected a valid gift of the property to *B*; for such a gift must, under section 123 of the Transfer of Property Act, be made by registered deed. Nor, having regard to section 91 of the Indian Evidence Act, can the recitals in the petition be used as evidence of a gift having been made.[177]

(2) Signed by or on Behalf of the Donor

The deed must be signed by the donor, and a deed signed by the intended donee will not affect a transfer.[178] It is curious that while this section uses the words "signed by or on behalf of the donor", yet in the case of mortgages—section 59—the words are "signed by the mortgagor." There is, however, no significance in this distinction, and the words "on behalf of" are mere surplusage,[179] for where a party is illiterate, another person may with his consent sign his name for him.[180] A person cannot claim title on the basis of an oral gift when there is no mention of presence of any witness at the time of such alleged oral gift as the three essentials of the gift, namely declaration, acceptance and followed by delivery of possession of property were within the knowledge of the donee. Thus where the evidence on record showed that there was no gift made during the life time of the donor, no title can be claimed on its basis.[181]

(3) Attested

The definition of the word "attested" in section 3 as amended by Act 27 of 1926 and Act 10 of 1927, makes it clear that attestation in acknowledgement of execution is sufficient. The definition requires that the attesting witnesses should have signed in the presence of the executant. In this connection, the note under the same heading in section 3 may be referred.

The essential conditions of a valid attestation under section 3 of the TP Act are that, two or more witnesses must have seen the executant sign the instrument or have received from him personal knowledge of his signature, and with a view to attest or to bear witnesses to this fact, each of them has signed the instrument in the presence of the

174. *Gandevalla Jayaram Reddy v Mokkala Padmavathamma,* AIR 2002 AP 75, p 76 : (2001) 5 Andh LD 402; *overruled Bhabaheswar Nail Santoshrai v The Special Tahsildar, Land Reforms, Tekkali,* AIR 1980 AP 139.
175. *State of Punjab v Sant Singh,* (1976) 78 Punj LR 87.
176. *M Singh v Gram Panchayat,* AIR 1974 Punj 28.
177. *Varatha Pillai v Jeevarathammal,* (1919) ILR 43 Mad 244, p 249 : 46 IA 285, p 290 : 53 IC 901.
178. *Girjaprasad v Purshottam,* (1926) 28 Bom LR 421 : 94 IC 609 : AIR 1926 Bom 261.
179. *Deo Narain v Kukar Bind,* (1902) ILR 24 All 319.
180. Ibid; *Sasi Bhusan v Chandra Peshkar,* (1906) ILR 33 Cal 861.
181. *Ayita Begum Chaudhury v Kumar Kanti Sinha,* AIR 2017 Gau 131.

executant. It is essential that the witnesses should have put the signature *animo attestandi*, ie, for the purpose of attesting he has seen the executant sign or has received from him personal acknowledgment of his signature. If a person has put his signature on the document for some other purpose, for instance, to certify that he is the scribe or an identifier or a registering officer, he is not an attesting witness. A gift is a document which requires two attesting witnesses.[182] Where a person is not only the scribe of the document, but he has also seen execution and signing of the said document, he could also be treated as an attestator to the said document with the required animus. The scribe of a document can also be an attesting witness thereof, if he has signed the document with the required animus to attest.[183] In *B Sudharmani v N Devarajan*,[184] the court held that section 123 requires attestation of a gift deed by two witnesses and there is no law which prohibits a scribe from attesting the document prepared by him.

The proviso to section 68 of the Indian Evidence Act, 1872 dispenses with the necessity of calling an attesting witness in proof of any document except a will, which has been registered in accordance with the provisions of the Registration Act, 1908 when there is no specific denial by the party against whom the document is relied upon. Therefore, a registered deed of gift can be received in evidence without examination of the attestors, if the person who has executed the deed of gift has not specifically denied its execution.[185]

A gift deed not attested by witnesses is void.[186] Where validity of a gift-deed was specifically denied, it was necessary for the donee to examine the attesting witness of the gift deed.[187] Merely signing a document would not tantamount to conscious execution, and it requires something more. Where the signature of a person on a document is obtained on misrepresentation, there is no proper execution of the deed in the eyes of law. The execution does not mean mechanical act of signing the document, or getting it signed without understanding the contents thereof.[188]

(4) Registration

The word "registered" in this section does not mean registered in the lifetime of the donor. If the other conditions to the validity of the gift are complied with, neither the death of the donor, nor his express revocation is a ground for refusing registration.[189] When a gift of an amount is made by a promissory note which is registered, the gift is valid and complete.[190] Any gift of immovable property cannot be made in violation of this rule, as

182. *Marci Celine DG Sets' souza v Renie Fernandez*, AIR 1998 Ker 280.
183. *Kamakshi Ammal v Rajalakshmi*, AIR 1995 Mad 415.
184. *B Sudharmani v N Devarajan*, MANU/KE/2114/2015.
185. *Brij Raj Singh v Sewak Ram*, (1999) 4 SCC 331, para 19 : (1999) 3 LRI 178; *Surendra Kumar v Nathulal*, (2001) 5 SCC 46, para 13 : AIR 2001 SC 2040; *Shayama Devi v Premvati*, AIR 1996 All 57; *Nishamani Singh v Nishamani Dibya*, AIR 2003 Ori 123, para 10.
186. *Samrathi Devi v Parasuram Pandey*, AIR 1975 Pat 140.
187. *Mallo v Baktawari*, AIR 1985 All 160, p 162
188. *Nishamani Singh v Nishamani Dibya*, AIR 2003 Ori 123, para 16.
189. *Kalyanasundaram v Karuppa*, (1927) ILR 50 Mad 193 : 54 IA 89 : 100 IC 105 : AIR 1925 PC 42; *Venkati Rama v Pillati Rama*, (1917) ILR 40 Mad 204 : 38 IC 707; *Parbati v Baij Nath*, (1913) ILR 35 All 3 : 16 IC 406.
190. *A Krishnan Iyer v Lakshmi Amma*, AIR 1950 Tr & Coch 73.

mere delivery of possession without registered instrument cannot confer any title.[191] If a deed of gift of immovable property is not registered, the gift cannot be enforced, and cannot be supported under the doctrine of part performance. That doctrine does not apply to gifts.[192] In a Madras case,[193] the members of a coparcenary effected a partition, and allotted a share to a person who was not a coparcener; but the court held that as the deed of partition was not registered it could not operate as a gift to confer title on a stranger. In another case, where a father allotted a share of property to his sons by a registered deed of gift, the gift was valid although the sons executed a power of attorney authorising the father to manage the property, and to take the profits during his lifetime.[194] Registration will not perfect an imperfect gift if any of the essential ingredients of a gift are lacking;[195] and on the other hand, title cannot pass without there being a registered deed of gift.[196]

The gift of immovable property should be made only for transferring the right, title and interest by the donor to the donee by a registered instrument signed by or on behalf of the donor, and must be attested by at least two witnesses. The pre-existing right, title and interest of donor thereby stand divested in the donee by the operation of section 17 of the Registration Act only when the gift deed is duly registered and thereafter, the donor would lose the title to the property.[197] A gift of immovable property which is not registered is bad in law, and cannot pass any title to the donee. Any oral gift of immovable property cannot be made in view of the provisions of section 123 of the TP Act. Mere delivery of possession without a written instrument cannot confer any title.[198] A property in respect of which there is a pre-existing right does not require registration whereas a decree in respect of a property requires registration if it created right, title, interest in favour of a person.[199]

If the parties feel that they had committed any mistake, section 26 of Contract Act provides for rectification of the document. Only a donor can seek for rectification of a gift deed.[200] A proof of registration of document of gift of immovable property is not by itself a proof of its genuineness.[201]

Where the person who executed the release deed himself admitted it execution, it would not be necessary to examine the attesting witnesses to prove its execution.[202] Where the gift was executed through a registered instrument and the plaintiffs failed to prove that the gift

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191. *A Rosaline v The Church of South India*, S A Nos. 157 to 159 of 2007 and C M P No 17640 of 2016; decided on 7 February 2017, High Court of Madras; *Makhan Singh v Joginder Singh*, (2010) 5 RCR (Civil) 747.
192. *Maung Hla Maung v Maung Po Htai*, 123 IC 142 : AIR 1929 Rang 316; *Hiralal v Gavrishankar*, (1928) 30 Bom LR 451 : 109 IC 149 : AIR 1928 Bom 250. See note "Contracts to transfer for consideration" under section 53A.
193. *Made Gouda v Chenne Gouda*, (1925) 49 Mad LJ 150 : 90 IC 331 : AIR 1925 Mad 1174, dissenting from *Girhi Rani v Chandra Lal*, (1912) 17 Cal WN 62 : 17 IC 885.
194. *Ma Shin v Ma Thin Kyi*, 150 IC 966 : AIR 1934 Rang 129.
195. *Deo Saran v Deoki Bharthi*, (1924) ILR 3 Pat 842 : 80 IC 980 : AIR 1924 Pat 657.
196. *Lim Charlie v Official Receiver*, (1934) ILR 12 Rang 238 : 66 Mad LJ 144 : 59 Cal LJ 91 : 36 Bom LR 235 : 1934 All LJ 146 : 147 IC 328 : AIR 1934 PC 67; *Bachchi Lal v Debi Din*, (1929) ILR 51 All 629 : 119 IC 503 : AIR 1929 All 300; *Hira Mani v Anmol Singh*, (1928) 26 All LJ 944 : 17 IC 351 : AIR 1928 All 699.
197. *Gomtibai v Mattulal*, AIR 1997 SC 127.
198. *R N Dawar v Ganga Saran Dhama*, (1992) 24 DRJ 532.
199. *Phool Patti v Ram Singh*, (2015) 3 SCC 164.
200. *Joseph John Peter Sandy v Veronica Thomas Rajkumar*, AIR 2013 SC 2028 : JT 2013 (4) SC 9 : 2013 (3) SCALE 328 : (2013) 3 SCC 801.
201. *Om Prakash v Shanti Devi*, (2015) 4 SCC 601.
202. *Bhaurao Jagoji Junankar v Vandana Moreshwar Korale*, AIR 2014 (NOC)118 (Bom).

deed executed by their mother in favour of his brother was a fabricated one, the gift would be valid and a prayer to declare it void would be dismissed.[203] Where the plaintiff claimed that he put in possession of the property on the strength of an unregistered gift deed acquisition of title through gift would not be proved more so as the plaintiff himself acknowledged the title of the municipality over such land and prayed for settlement.[204]

A dedication of property to an idol in strict legal sense is neither a gift as understood in the Transfer of Property Act which requires acceptance by the donee of the property donated nor it is a simple "trust".[205] The validity of oral/unregistered gift in favour of deity does not require registration as it constitutes religious trust, therefore a gift to idol may be oral and it may also be effected by an unregistered document.[206]

An unregistered gift deed if also not in compliance with the requirements of section 122, and 123 would not be validated.[207]

(5) Whether Donor May Revoke Gift after Delivery of Deed and Before Registration

This question was considered by the courts in India in several cases,[208] and it was ultimately set at rest by the Privy Council which decided that after delivery of the deed of gift and before registration, the donor cannot revoke the gift.[209]

In *Kalyanasundaram v Karuppa*,[210] *Lord Salvesen* said:

> Their Lordships are unable to see how the provisions of section 123 of the Transfer of Property Act can be reconciled with section 47 of the Registration Act, except upon the view that, while registration is a necessary solemnity for the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose.

Where a gift has been affected by a registered instrument duly attested and the gift has been acted upon by the donee, the title legally passes to the donee, and cannot be defeated by any intention of the donor to the contrary.[211] Thus, in a case where the gift deed was deposited with the Registrar, but was taken away by murdering the Registrar, it was held that the gift was completed, and could not be superseded by a subsequently registered deed.[212]

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203. *Balachandran v S Sujatha*, AIR 2014 Ker 80.
204. *Pratima Shukla v Patna Municipal Corporation*, AIR 2014 (NOC) 205 (Pat).
205. *Roshan Freight Carrier v Trilok Chand Jain*, 2010 SCC OnLine All 2233 : (2011) 84 ALR 135 : (2011) 98 AIC (Sum 2) 2.
206. *Sainath Mandir Trust v Vijaya*, (2011) 1 SCC 623
207. *Topden Pintso Bhutia v Sonam Plazor Bhutia*, AIR 2018 Sikkim 1.
208. *Parbati v Baijnath*, (1913) ILR 35 All 3 : 16 IC 406; *Venkati Rama v Pillati Rama*, 38 IC 707; *Atmaram Sakharam v Vaman Janardhan*, (1925) ILR 49 Bom 388 : 87 IC 490 : AIR 1925 Bom 210, overruling *Subba Rama v Venkat Subba*, (1924) ILR 48 Bom 435 : 80 IC 477 : AIR 1924 Bom 434.
209. *Kalyanasundaram Pillai v Karuppa Mooppanar*, AIR 1927 PC 42; *Venkatsubba Srinivas v Subba Rama*, (1928) ILR 52 Bom 313 : 108 IC 367 : AIR 1928 PC 86.
210. *Kalyanasundaram v Karuppa*, (1927) ILR 50 Mad 193 : 54 IA 89 : 100 IC 105 : AIR 1927 PC 42.
211. *Bhagatrai v Ghanshyamdas*, AIR 1948 Nag 326.
212. *Dikshit v Radha Krishna*, AIR 1948 Oudh 226.

If there is an acceptance of the gift after execution of the deed, even though the registration was postponed to a later date, the gift would remain irrevocable,[213] but if there is no acceptance at all, registration does not make the gift irrevocable.[214]

Where the donor transferred the property ie, both title and possession of the property was delivered to the donee and the donee had purchased the stamp papers in his name and mutation of the property and payment of taxes were done by the donee himself, it was held that the gift had come into effect through proper acceptance and therefore the gift cannot be cancelled for want of acceptance by the donee of the same.[215]

(6) Mode of Transfer—Movables

With regard to movables, the section allows two alternative modes of transfer—

(1) Registered deed signed by or on behalf of the donor; or

(2) delivery of possession.

Delivery of possession is the usual mode of transfer in a gift of goods.[216] As in English law,[217] an oral gift without delivery of possession would be a promise without consideration. It would transfer no property to the donee, and would in fact be no gift at all. So, when the directors of a railway company resolved to give a bonus to an employee and the sum had not been paid over by the district paymaster, the money could not be attached by a creditor of the employee as the gift was not complete.[218] When the donee is already in possession, no further delivery is required according to the English cases.[219] These would no doubt be followed in India, for the same rule obtains in regard to immovable property.[220] In an Allahabad case,[221] a husband made a fixed deposit of money in a bank repayable to himself or his wife or survivor, and it was held that this involved no delivery and was not, therefore, a gift to the wife. The court referred to the general rule in India that a purchase by a husband in his wife's name is presumed to be *benami,* and that the presumption of English law that it is an advancement does not apply.[222] No oral gift can be made under section 123.[223]

In an Allahabad case, a gift deed by a Muslim recited that by this agreement certain household property is given by the executor to his three brothers. It further recited that the executor or his heirs will henceforth have no right in the property. However, there was no mention of the word "gift" in the entire document. It was held that the

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213. *Chennupati Venkatasubbamma v Nelluri Narayanaswami,* AIR 1954 Mad 215. See also *Union Bank Ltd v Ram Rati,* AIR 1954 All 595.
214. *Venkatasubbamma v Narayanaswami,* (1954) 1 Mad LJ 194 : AIR 1954 Mad 215.
215. *Velayudhan Pillai Sreekumar v S Sarojini Amma,* AIR 2017 (NOC) 822 (Ker).
216. *Rameshwar Narain Singh v Biknath Koeri,* 67 IC 451 : AIR 1923 Pat 165.
217. *Irons v Smallpiece,* (1819) 2 B & Ald 551; *Cochrane v Moore,* (1890) 25 QBD 57.
218. *Janki Das v East Indian Rly Co,* (1884) ILR 6 All 634; *Natha Gulab v Shaller,* (1923) 25 Bom LR 599 : 87 IC 312 : AIR 1924 Bom 88.
219. *Winter v Winter,* (1861) 4 LT 639 (barge given to donor's servant who has previously been in possession as a servant); *Kilpin v Ratley,* (1892) 1 QB 582 (furniture given by a father to his daughter in whose house it was).
220. *Bai Kushal v Lakhma Mana,* (1883) ILR 7 Bom 452; *Nazi v Mohanlal,* (1957) ILR 7 Raj 487 : AIR 1957 Raj 128; *Jaidayal v Umrao Harchand,* (1958) ILR 8 Raj 350 : AIR 1958 Raj 199.
221. *Paul v Nathaniel,* (1931) 29 All LJ 417 : 132 IC 573 : AIR 1931 All 596.
222. *Gopee Krist Gosain v Gunga Pershad,* (1854) 6 Mad IA 53; *Moulvie Sayyud Uzhur Ali v Bebee Ultaf Fatima,* (1869) 13 Mad IA 232; *Bilas Kunwar v Desraj Banjit Singh,* (1915) ILR 37 All 557 : 42 IA 202 : 30 IC 299; *Sura Lukshmiah v Kothandarama,* (1925) ILR 48 Mad 605 : 52 IA 286 : 88 IC 327 : AIR 1925 PC 181.
223. *Chanan Singh v Pritam Kaur,* AIR 1984 P & H 153, p 156.

document was an agreement of transfer, and not a gift by a Muslim, or a document executed in recognition of an earlier oral gift. It was further held that the said document required registration. And, since the document was unregistered, it was inadmissible in evidence.[224]

(7) Delivery

Where the gift deed clearly showed that the possession of the property covered by the deed had been handed over to the donee, there was acceptance of the gift, and the gift could not be revoked.[225]

A valid gift must be ordinarily followed by possession, according to the High Court of Punjab and Haryana. Where the gifted property is capable of physical possession, non-delivery of the property makes a gift invalid.[226] In order that a gift of movable property is valid under the provisions of section 123, the donor should have done all that he can to put the subject-matter of the gift within the power of the donee to obtain possession.[227] Where the donee is a minor and is living with the donor and under his care, the question of delivery of possession to complete the gift does not arise. The gift is valid.[228] A deposit of money by one person in the names of himself and another jointly, payable to "either or survivor", cannot be held to be a gift of money by the depositor to the others.[229] A deposit of money made by a Hindu in the joint names of himself and his wife (or himself and any other person) on the terms that it shall be payable to "either or survivor" does not, on his death, constitute a gift by him to his wife (or to the other person, as the case may be). The burden of proving that it was a gift lies on the person so alleging. Though the Post Office Savings Bank Accounts Rules contain provisions for payment to the survivor in the case of such accounts, those rules are designed only to regulate the easy operation of the account, and do not touch (i) the rights inter se among the depositors; or (ii) the right of inheritance,[230] but, a transfer from the account of the donor to that of the donees who were his parents has been held to be a valid delivery, even though there were insufficient funds in the donor's account.[231] Mere entries in account books in favour of the wife would not be sufficient to complete a gift.[232] Where money is deposited in bank and the certificate was retained by the donor, there was no gift.[233]

(8) Actionable Claims

Before the amendment of section 130 by the insertion of the words "whether with or without consideration", it was held that actionable claims were not movable property under this section, and a gift of an actionable claim must be in writing under section 130, and need not be registered.[234] However, delivery was held to be a sufficient transfer in the case of a promissory note, bill of exchange or cheque payable to bearer. Government promissory notes

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224. *Gulam Mohammad v Taj Mohammad Khan,* AIR 1995 All 333.
225. *Kasi Ammal v Vellat Gounder,* (1980) 2 Mad LJ 232.
226. *Mukhtiar Kaur v Gulab Kaur,* AIR 1977 Punj 257 : 79 Punj LR 185.
227. *Gara Surppadu v Pandranki Rami Naidu,* AIR 1984 AP 386, p 390.
228. *Sunder Bai v Anandi Lal,* AIR 1983 All 23.
229. *Krushandas Nagindas Bhai v Bhagwandas Ranchhoddas,* AIR 1976 Bom 153.
230. *Padmanabhan Bhawani v Govindan Bhargav,* AIR 1975 Ker 83 : (1974) KLT 822.
231. *K P Bros v CIT,* (1961) ILR 11 Raj 70 : AIR 1962 Raj 152.
232. *Chambers v Chambers,* (1941) ILR Mad 232 : (1940) 2 Mad LJ 963 : 195 IC 507 : AIR 1941 Mad 154; *CIT v Shyamo,* AIR 1967 All 821.
233. *Salibala Das v Jitendra Kumar,* AIR 1962 Ori 74.
234. *Perumal Ammal v Perumal Naicker,* (1921) ILR 44 Mad 196, p 202 : 61 IC 461 : AIR 1921 Mad 137.

were transferable by endorsement, and unless so endorsed, the gift was not complete.[235] The donee could not retain the paper on which the note was inscribed as a chattel, for it could not be separated from the debt.[236] In the case of a gift of shares to be allotted, a direction to the company to allot them to the donee perfects the gift, as the donor has done all that is in his power to do.

In a Supreme Court case,[237] the question arose whether signature and delivery of a registered deed of a gift in respect of shares amounted to a valid gift of the right to the shares, where the donor had not actually got the shares transferred in the records of the company. In this case, the female donor had died before getting such transfer recorded. Before she died, she had signed several blank transfer forms (which were apparently intended to be filed by the donee), so as to enable the donee to obtain the transfer of the donated shares. But the shares could not, before the donor's death, be transferred in the registers of the various companies (in accordance with the relevant provisions of company law). The respondent, who was a nephew of the deceased husband of the donor, disputed the claim of the appellant (donee) to these shares in an administration suit. The question arose whether the appellant (donee) was entitled to the shares covered by the registered gift deed to which the blank transfer forms could be related. The registered document was signed by the donor as "the giver" as well as by the donee as "the acceptor" of the gift, and it was attested by six witnesses. In the deed, the donor specified and gave particulars of the shares meant to be gifted, and undertook to get the name of the donee put on the registers of the companies concerned. The donor even stated that she was henceforth a trustee for the benefit of the donee with regard to the income which, as a shareholder; she may get while her name was still in the registers of the companies concerned. The donor delivered the registered gift-deed together with the share-certificates to the donee. On these facts, the Supreme Court held that donation of the right to get the share-certificates made out in the name of the donee became irrevocable by registration as well as by delivery. The donation of such a right as a form of property was shown to be completed, so that nothing was left to be done so far as the vesting of such a right in the donee was concerned. The actual transfers in the registers of the companies concerned were to constitute mere enforcement of this right. They were necessary to enable the donee to exercise the rights of a shareholder. But the mere fact that such transfer had to be recorded in accordance with company law did not detract from the completeness of what had been donated.

(9) Hindu Law

section 123 superseded the rules of old Hindu law and delivery of possession of immovable property is not an essential condition in so far as there was an insistence on such rules of requirement of delivery of possession of the property and even if the donor retained the right to use the property during her lifetime and there was no immediate delivery of possession of property, if the gift is executed through a registered document and the recitals in the deed show complete transfer of absolute title of such property from the donor to the donee and the same is accepted by the donee, the gift would be complete and valid.[238]

This section applies to Hindus. It applied to Hindus even before the amending Act 20 of 1929, for it was made applicable to Hindus by the old section 129, which expressly abrogated the Hindu rule.[239] The section was held to abrogate the rule of Hindu law that

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235. *Merbai v Perozbai,* (1881) ILR 5 Bom 268; *Khursedji v Pestonji,* (1888) ILR 12 Bom 573.
236. *Khursedji v Pestonji,* (1888) ILR 12 Bom 573.
237. *Vasudev Ramachandra Shelat v Pranlal Yayananda Thakur,* [1975] 2 SCJ 20 : [1975] 1 SCR 534 : (1974) 2 SCC 323 : AIR 1975 SC 1728, relying on *M P Bharucha v Sarabhai & Co,* AIR 1926 PC 38.
238. *Renikuntla Rajamma v K Sarwanamma,* (2014) 9 SCC 445 : AIR 2014 SC 2906.
239. *Debi Saran v Nandalal,* 125 IC 127 : AIR 1929 Pat 591.

delivery of possession is essential to the validity of a gift.[240] But the decision of the Privy Council in *Kali Das v Kanhya Lal*,[241] shows that there is no such rule. In *Lallu Singh v Gur Narain*[242] a gift by a Hindu lady of seven villages made by a registered deed was held valid, although she reserved to herself a life interest in three of them. As to gifts to an idol, the note "Hindu law", under section 122 may be referred.

Where the gift deed by the husband in favour of his wife unequivocally showed that the properties mentioned in the deed were being given to her absolutely, it was held that a mere reference to the son in the recital of the document does not indicate any intention of creating any trust or of making any conveyance of the properties in favour of the son, and the wife had a perfect title in the properties gifted, and she could make a gift thereof to her granddaughter.[243]

(10) Mahomedan Law

Section 129 enacts that section 123 shall not affect any rule of Mahomedan law. Under Mahomedan law, delivery of possession, either actual or constructive, is necessary to validate a gift.[244] Under Shia law, delivery of actual possession of appropriated property to the *mutwalli* by or by the direction of the *wakf*, is a condition precedent to a *wakf* having validity and effect. The *wakf* may appoint himself as *mutwalli* and in such a case, the change in the character of possession amounts to delivery of possession, eg by mutation of his name as *mutwalli*.[245] If that rule is complied with, a gift of immovable property is valid even though a deed be executed and the deed is not attested,[246] or not registered.[247] However, the Andhra Pradesh High Court, has held that the document which evidences a gift even though made by a Muslim cannot be acted upon unless it accords with section 123 of TPAct and thus an unregistered deed cannot be recognized.[248] This interpretation appears to be inconsistent with both the principles of classical Muslim law that permits an oral and even an unregistered gift and also with the apex court ruling,[249] that if a gift fulfills all the essentials of a Muslim law and is also reduced to writing, it would not be converted into formal document or an instrument that required compulsory registration under section 17 of the Registration Act.[250]

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240. *Lallu Singh v Gur Narain*, (1923) ILR 45 All 115 : 68 IC 798 : AIR 1922 All 467; *Phulchand v Lakkhu*, (1903) ILR 25 All 358; *Pahlwan Singh v Ram Bharose*, (1905) ILR 27 All 169; *Madhavrao v Kashibai*, (1910) ILR 34 Bom 287 : 5 IC 599; *Balbhadra v Bhowani*, (1907) ILR 34 Cal 853; *Dharmodas v Nistarini Dasi*, (1887) ILR 14 Cal 446; *Bai Rambai v Bai Mani*, (1899) ILR 23 Bom 234; *Nandu v Chand Datt*, (1902) 5 OC 89; *Muhammad Abdul v Jhouti Mahton*, 41 IC 389; *Debi Singh v Bansidhar*, 66 IC 480 : AIR 1922 All 44; *Bhagwan Prasad v Hari Singh*, 83 IC 41 : AIR 1925 Nag 199; *Kanai Lal v Kumar Purnendu Nath*, (1946) 51 Cal WN 227; *Revappa v Madhava Rao*, AIR 1960 Mys 97.
241. *Kali Das v Kanhya Lal*, (1884) ILR 11 Cal 121 : 11 IA 218.
242. *Lallu Singh v Gur Narain*, (1923) ILR 45 All 115 : 68 IC 798 : AIR 1922 All 467.
243. *Kuppala Obul Reddy v Bonala Venpata Narayana Reddy*, (1984) 3 SCC 447, p 456.
244. *Mohbool Alam Khan v Khodaija*, [1966] 3 SCR 479 : AIR 1969 SC 1194 : [1967] 1 SCJ 63; See *Mulla's Mahomedan Law; Qamaruddin v Hasan Jan*, (1935) ILR 16 Lah 629 : AIR 1935 Lah 795; *Muhammad Yusuf v Muhammad Yusuf*, (1958) Mad LJ 44 : AIR 1958 Mad 527.
245. *Syed Ali Zamin v Syed Akbar Ali Khan*, 64 IA 158 : (1937) All LJ 868 : 39 Bom LR 970 : 41 Cal WN 709 : (1937) 2 Mad LJ 493 : 167 IC 884 : AIR 1927 PC 127.
246. *Karam Ilahi v Sharf-ud-Din*, (1916) ILR 38 All 212 : 35 IC 14.
247. *Nasib Ali v Munshi Wajed Ali*, (1926) 44 Cal LJ 490 : 100 IC 296 : AIR 1927 Cal 197; *Kulsum Bibi v Shiam Sunderlal*, 164 IC 515 : AIR 1936 All 600. See notes under section 129.
248. *Mayana Saheb Khan v Mayana Gulab Jan*, AIR 2011 (NOC) 97 (AP).
249. *Hafeeza Bibi v Sheikh Farid*, AIR 2011 SC 1695 : (2011) 5 SCC 654.
250. See also the discussion under section 129.

A mere registration will not perfect an imperfect gift if any of the essential ingredients of a gift are lacking.[251]

(11) Extent

The section does not apply to territories excluded from the operation of the Registration Act.

124. Gift of existing and future property.—A gift comprising both existing and future property is void as to the latter.

There cannot be a gift of future property,[252] for such a gift can only be a promise, and a promise not supported by consideration is invalid as a contract. Accordingly, the definition in section 122 is limited to existing property.[253] In a sale or mortgage, there is consideration, and so an assignment of future property by way of sale or mortgage operates as a contract.[254]

However, a deed of gift of existing property is not invalid as to that property; because it also professes to include future property. Similarly, an unregistered deed of gift of actionable claims and of immovable property was held to be valid as to the former, but void as to the latter.[255]

There cannot be a gift of future property either under Hindu or Mahomedan law.

125. Gift to several of whom one does not accept.—A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

This section, it is submitted, applied only when the gift is to two or more donees as tenants in common. The refusal of one will not prevent the gift taking effect as regards the share of the others.[256] It is submitted that the terms of the section indicate a severance, and assume that the donees take as tenants in common, for when the donees take as joint tenants, there is only one donee.[257] As already noted,[258] the presumption of English law is in favour of a joint tenancy, while that of Hindu law is in favour of a tenancy in common. But when the terms of a Hindu gift clearly indicated that the gift was to be held in joint tenancy, the rule of survivorship was followed as a consequence to the nature of the gift, and not due to any peculiarity of English law.[259]

126. When gift may be suspended or revoked.—The donor and donee may agree that on the happening of any specified event which does not

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251. *Abdul Rahim v S K Abdul Zabar,* (2009) 6 SCC 160 : AIR 2010 SC 211.
252. *Brindabini Behari v Oudh Behari,* AIR 1947 All 179.
253. See note "Subject-matter" under section 122.
254. *Rajah Sahib Perhlad v Budhoo,* (1869) 12 Mad IA 275, p 307 : 2 Beng LR 111 (PC).
255. *Perumal v Perumal,* (1921) ILR 44 Mad 196 : 61 IC 461 : AIR 1921 Mad 137.
256. *Sankaran Poulu v Sundari Vijayamma,* 2013 (3) KLJ 237 : 2013 (3) KHC 93 : 2013 (4) RCR (Civil) 85.
257. *Sankaran Poulu v Sundari Vijayamma,* 2013 (3) KLJ 237 : 2013 (3) KHC 93 : 2013 (4) RCR (Civil) 85.
258. See note "Donee" under section 122.
259. *Nandi Singh v Sita Ram,* (1889) ILR 16 Cal 677, p 682 : 16 IA 44; *N Manekal v Bai Savita* (unrep), (1965) SCN 301.

depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

ILLUSTRATIONS

(a) *A* gives a field to *B*, reserving to himself, with *B*'s assent, the right to take back the field in case *B* and his descendants die before *A*. *B* dies without descendants in *A*'s lifetime. *A* may take back the field.

(b) *A* gives a lakh of rupees to *B*, reserving to himself, with *B*'s assent, the right to take back at pleasure ₹ 10,000 out of the lakh. The gift holds good as to ₹ 90,000, but is void as to ₹ 10,000 which continue to belong to *A*.

Synopsis

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(1) Conditional Gift

A gift is a transfer of property and is, therefore, subject to the rules enacted in chapter II of TP Act. Thus, if an absolute gift is made, subject to a condition restricting alienation, the condition would be void.[260] Section 126 is controlled by section 10. A clause in a gift deed totally prohibiting alienation is void in view of section 10.[261] Section 126 is not to be read in isolation and has to be read along with section 10 of the Transfer of Property Act which says that any stipulation completely restraining the donee from transferring the gifted property is void, and if read together, which must be so read, the only reasonable conclusion that one can arrive at is that section 126 is the general section which is controlled by section 10.[262]

The condition so imposed must be one which is a valid condition subsequent, and is not repugnant to the gift under sections 10 and 11 of TP Act. But even if it is invalid as a condition limiting the interest transferred, it may be valid as a personal covenant binding on the immediate parties.[263]

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260. *Re Dugdale,* (1888) 38 Ch D 176; *Nabob Amiruddaula v Nateri,* (1876) 6 Mad HC 356 (Mahomedan law); *Anantha v Nagamuthu,* (1882) ILR 4 Mad 200 (Hindu Law); *Ali Hasan v Dhirja,* (1882) ILR 4 All 518; *Bhairo v Parmeshri,* (1885) ILR 7 All 516; *Moulvi Muhammad v Fatima Bibi,* (1886) ILR 8 All 39 : 12 IA 159 (Mahomedan law); *Muthukamara v Anthony,* (1915) ILR 38 Mad 867 : 24 IC 120 (Hindu law); *Narayanan v Kannan,* (1884) 7 Mad 315 (Hindu law—condition restraining partition).
261. *Jagdeo Sharma v Nandan Mahto,* AIR 1982 Pat 32. See note "Restraint against alienation in a gift" under section 10.
262. *M Lakshminarayana v D B Pradeep Kumar,* (2010) 1 UP LJ 192 (DB).
263. *Mukund v Rajrup,* (1907) 4 All LJ 708; *Ma Yin Hu v Ma Chit May,* (1929) ILR 7 Rang 306 : 119 IC 737 : AIR 1929 Rang 226.

Where the gift is made for a specific charitable purpose and the condition attached to the gift for compliance in a particular manner or time, the donor can recall the gift on the breach of such condition. In case of such conditional gifts, the relationship between the donor and the donee is fiduciary in nature. In such cases, the donee is merely a custodian till condition is complied with and till then, gift does not take effect. Such gifts have been distinguished from gifts simplicitor.[264]

The Supreme Court has held that it is open to the donor to transfer by gift, title and ownership in the property, and at the same time reserve its possession and enjoyment to herself during lifetime. There is no prohibition in law that ownership in property cannot be gifted without its possession and right of enjoyment.[265] However, in *Narmadaben Maganlal v Pranjivandas Maganlal,*[266] it has been held that in case of a conditional gift, the gift may not be complete with the execution of the deed. For instance, where the donor himself retains possession and enjoyment till he is alive, there cannot be any delivery of possession of the property. In a case like this, the gift confers only a limited right upon the donee. Unless the donee fulfils the condition subject to which the donor has made a gift in his favour, it is open to the donor to cancel the conditional gift by another registered instrument. This is because the donor having retained enjoyment and possession of the gifted property during his lifetime, the gift never became complete during the lifetime of the donor. The result is that the gift becomes ineffective and inoperative, and puts an end to the conditional gift.

A condition reserving the profits to the donor for life is not repugnant,[267] but a condition absolutely restraining the donee from alienating the interest in the property would be repugnant to the interest so created and would be void.[268] Where a document is a gift, it would not cease so merely because there is preservation of life interest in it, or it provides for maintenance of the executant.[269] A gift may be subject to a condition precedent under section 21, and there is no transfer and no gift, unless and until the condition is fulfilled. If the condition precedent is impossible or illegal, or immoral, the gift fails under section 25. This is exemplified by the illustrations to that section, and also by the illustrations to sections 126 and 127 of the Succession Act, 1925. A gift to a husband and wife on condition of the donor having physical possession of the wife, is invalid.[270]

A gift may be subject to a condition subsequent under section 31, and then the gift fails and property revests in the donor if the condition is not fulfilled.[271] Such a condition may be implied by custom as in the case of a gift by a Hindu widow. The custom may provide that on her remarriage, the jewels given to her at the time of the first marriage, revert to the donor.[272] Such conditions are exemplified by the illustrations to section 31 of TP Act and section 134 of the Succession Act, 1925. A gift to a daughter with a condition that no other heir, but her issue should take it, has been construed as a gift with a condition subsequent of

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264. *Thakur Raghunath Ji Maharaj v Ramesh Chandra,* (2001) 5 SCC 18 : AIR 2001 SC 2340; *State of Uttar Pradesh v Banshi Dhar,* AIR 1974 SC 1084.
265. *K Balakrishna v K Kamalam,* AIR 2004 SC 1257, para 11 : (2004) 1 SCC 581.
266. *Narmadaben Maganlal v Pranjivandas Maganlal,* (1997) 2 SCC 255.
267. *Lallu Singh v Gur Narain,* (1923) ILR 45 All 115 : 68 IC 798 : AIR 1922 All 467; *cf Ma Shin v Ma thin Kji,* 150 IC 966 : AIR 1934 Rang; *Gangadhar Iyer v K B Iyer,* AIR 1952 Tra & Coch 47.
268. *S R Radhakrishnan v Neelamagam,* AIR 2003 SC 4152 : (2003) 10 SCC 705.
269. *Murarilal v Narayanlal,* AIR 1956 Pat 345.
270. *Ghumna v Ramchandra,* (1925) ILR 47 All 619 : 88 IC 411 : AIR 1925 All 437.
271. *Somashekarrao v K S Mishra,* AIR 1944 Nag 185; *Govindamma v Secretary Municipal First Grade College, Chintamani,* AIR 1987 Kant 227, p 230.
272. *Palla Sanyasi v Kayitha Guruvulu,* (1949) 2 Mad LJ 738 : AIR 1950 Mad 271.

defeasance on the failure of an issue living at the time of her death.[273] A curious instance of such a condition was a gift to a relation, by a man sentenced to transportation for life, on his land, on condition that the land should be given back if he returned to his village.[274] A condition of residence in a gift of a house is a valid condition subsequent,[275] but if the gift is absolute, such a condition is invalid and cannot be enforced.[276] A condition subsequent is intended to put an end to a gift. So if the condition subsequent is impossible or illegal or immoral, the condition is void under section 32, and the gift stands.

The section has, of course, no application where there is no condition as such, but a mere pious wish that the donee should maintain the donor,[277] but a condition that the donee would serve the donor in her old age is valid and the gift would be absolute upon the donee performing such a condition.[278]

(2) Suspension or Revocation of Gifts

There is no scope in the normal course for revocation of a deed of gift when the said deed was executed by the donor, accepted by the donee, and registered by the registering authority. Thus a gift deed once executed and registered cannot be revoked unless the mandatory requirements of the said section are fulfilled,[279] but it can be cancelled only by mutual consent with participation of both parties and in absence of consent or participation would be improper.[280] A deed of gift can be revoked if there is a prior condition that the gift can be revoked, or if the deed of gift has been executed under undue influence, or if donee commits fraud.[281]

Revocation under the first paragraph of this section depends upon the donor and the donee at the time of acceptance agreeing to a condition subsequent which puts an end to the gift. The condition must be made at the time, for the donor cannot impose such a condition after the gift is absolute.[282] Such a condition must be express. In the absence of such condition, the donor has no power of revocation, and the court will not help him.[283] Where the gift was not a conditional one and it was acted upon by handing over possession of properties to the beneficiary, subsequent cancellation was held to be impermissible.[284] The gift and the revocation may be in separate documents. But if executed at the same time, they should be considered as one and the same transaction.[285] The Supreme Court[286] has held that position in law under the TP Act read with the Indian Contract Act is that the acquisition of property being generally beneficial, a child can take property in any manner whatsoever

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273. *Bhoobun Mohini v Hurrish Chunder,* (1879) ILR 4 Cal 23 : 5 IA 138. See also *Sham Shivendar v Janki Koer,* (1909) ILR 36 Cal 311 : 36 IA 11.
274. *Venkatarama v Aiyasami,* (1922) 43 Mad LJ 340 : 69 IC 673 : AIR 1923 Mad 67.
275. *Ambika Charan v Sasitara,* (1915) 22 Cal LJ 61 : 30 IC 868; *Bhoba v Peary Lall,* (1897) ILR 24 Cal 646; cf *Srish Chandra v Kadambini,* (1926) 44 Cal LJ 18 : 97 IC 685 : AIR 1926 Cal 1175.
276. *Rukminibai v Laxmibai,* (1920) ILR 44 Bom 304 : 56 IC 36.
277. *Tila Bewa v Mana Bewa,* AIR 1962 Ori 130.
278. *Chameli v Naresh Kumar,* AIR 2010 P&H 55.
279. *Kamalakanta Mohapatra v Pratap Chandra Mohapatra,* AIR 2010 Ori 13.
280. *Garagaboyina Radhakrishna v District Registrar, Vishakhapatnam,* AIR 2012 AP 190.
281. *Balai Chandra Parui v Durga Bala Dasi,* AIR 2004 Cal 276, paras 33, 34, 34A.
282. *Collector of Ratnagiri v Vyankatrav,* (1872) 8 Bom HC 1; *Ram Sarup v Bela,* 11 IA 44; *Hussain Khan v Nateri,* (1876) Mad HC 356.
283. *Murikipudi Ankamma v Tummalacheruvu Narsaya,* AIR 1947 Mad 127; *Tokha v Biru,* AIR 2003 HP 107, para 23.
284. *Palnisamy Gounder v Periammal,* AIR 2003 Mad 343 (NOC) : 2003 AIHC 2306.
285. *Jagal Singh v Dungar Singh,* AIR 1951 All 599; *Purnia v Manindra Nath,* AIR 1968 Ass & Nag 50.
286. *K Balakrishnan v K Kamalam,* AIR 2004 SC 1257, para 22 : (2004) 1 SCC 581.

either under intestacy or by will or by purchase or gift or other assurance inter vivos, except where it is clearly to his prejudice to do so. A gift inter vivos to a child cannot be revoked. There is a presumption in favour of the validity of a gift of a parent or a grandparent to a child, if it is complete.[287] When a gift is made to a child, generally there is a presumption of its acceptance, because express acceptance in his case is not possible, and only an implied acceptance can be expected.[288]

Where the gift deed was executed and necessary mutation were also made in the records after delivery of possession of the property with the donee paying electricity and water charges, a deed of cancellation of such gift simplicities and its registration unilaterally is not permissible.[289] In *S Lingeshwaran v The Sub-Registrar, Purasawalkam,*[290] a gift was executed by a woman in favour of her adoptive daughter and later cancelled unilaterally and the deed of cancellation of gift was duly registered. She then executed a settlement deed of the same property in favour of *B* and *C* who were minors. The main issue was whether cancellation of gift can be done unilaterally by the registrar under the exceptions laid down in section 126? The court held that section 127 permits revocation of a gift deed by way of a cancellation deed lays but only if it falls within the exception under section 126 of the transfer property act, the same has to be looked into by a competent authority, ie, a civil court. The registrar is not a competent person to register the unilateral cancellation deed by deciding the question and the same was not valid.

(3) Service Tenures

Service tenures are closely analogous to gifts with an implied condition of revocation. All service tenures are resumable on a refusal to render the services.[291] But there is a distinction between the grant of a land burdened with a condition of service, and the grant of land as remuneration for an office.

There is again a further distinction as to the services to be rendered, which may be either personal, or public.

The classification, therefore, is as follows:—

A. Grants of land burdened with a condition of service either (1) personal; or (2) public.

B. Grants of land as remuneration for service.

Grants of class A(1) are resumable not only if the performance of service is refused, but also if the services are no longer required.[292] Grants of class A(2) are resumable if the performance of service is refused, but they are not resumable if the services are no longer required.[293]

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287. *Halsbury's Laws of England,* vol 5(2), 4th Edn, paras. 642 and 647.
288. *K Balakrishan v Kamalam,* AIR 2004 SC 1257.
289. *Fazalullah Khan v State of Andhra Pradesh,* AIR 2012 AP 163.
290. *S Lingeshwaran v The Sub-Registrar, Purasawalkam,* MANU/TN/1328/ 2015.
291. *Hurrogobind Raha v Ramrutno,* (1879) ILR 4 Cal 67; *Ansar Ali v Grey,* (1905) 2 Cal LJ 403.
292. *Unidi Rajaha v Pemmasamy,* (1858) 4 WR 121 : 7 Mad IA 128; *Sanniyasi v Salur,* (1884) ILR 7 Mad 268; *Mahadevi v Vikrama,* (1891) ILR 14 Mad 365; *Radha Pershad v Budhu Dashad,* (1895) ILR 22 Cal 938; *Raja of Vizianagram v Appalaswami,* (1930) 59 Mad LJ 183 : 127 IC 231 : AIR 1930 Mad 755.
293. *Joykishen Mookerjee v Collector of East Burdwan,* (1866) 1 WR 26 : 10 Mad IA 16; *Forbes v Meer Mahomed Tuquee,* (1870) 14 WR 28, p 32 : 13 Mad IA 438; *Raja Nilmoney v The Government,* (1872) 18 WR 321; *Raja Lalanund v Thakoor Munoorunjun,* (1874) 13 Beng LR; *Bhimapaiya v Ramchandra,* (1838) ILR 22 Bom 422, *Sri Raja Vencata Narasimha v Sri Raja Sobhanadri,* (1906) ILR 29 Mad 52 : 33 IA 46.

Grants of class B are really grants of an office of which the remuneration is the land. When the office is terminated, the lands can be resumed. If the office is hereditary, the grantor can determine the office, and resume the land when the services are no longer required.[294] But if services are required and the office is hereditary, the grantor cannot resume the land, and appoint another person to officiate.[295]

(4) Revocable at Pleasure—No Gift

A gift may be revocable by being subject to a condition subsequent; or it may be contingent so that there is no gift at all, unless a condition precedent is fulfilled. But the condition cannot depend upon the will of the donor, for a gift revocable at pleasure is no gift at all. The same principle applies in the law of contracts, for a promise to pay what the promisor pleases is no promise at all, and when a party to be bound by the declaration of his will annexes to such declaration a condition that he will be bound when he wills it, he is not bound at all.[296]

It is well settled that when a gift or immovable property has been accepted by the donees and they are in possession of the property, the fact that after making the gift the donors felt that it was a folly or imprudence or want of foresight on their part to have executed the deed of gift, will not clothe them with the power of revocation of the gift. A gift cannot be revoked by the donor, for a transfer by gift is as complete and binding on the parties when once completed, as any other form of transfer. The donor cannot set aside the gift once made on the plea that he had made a mistake,[297] or that he had not read it.[298]

Where no specific condition for revocation has been made in the deed itself, in the event of the failure of the donee to render services to the donor or maintain the donor, the gift cannot be revoked.[299]

(5) Revocation by Rescission[300]

As the donee may not profit by his wrong, a gift may be revoked for coercion, fraud, misrepresentation or undue influence in the same way as a contract may be rescinded. But if the donor does not revoke, he cannot transfer his right to sue for revocation.[301] However, in case of the donor's death, the cause of action survives to his legal representatives.[302] This is the effect of the general law enacted in section 306 of the Indian Succession Act, 1925.

Coercion as defined in section 15 of the Indian Contract Act, 1872 is wider than in English law, and need not proceed from the donee. It includes the committing or threatening to commit any act forbidden by the Indian Penal Code. The Madras High Court has held that this includes a threat to commit suicide, and that a deed of release

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294. *Krishaji v Vithalrav,* (1888) ILR 12 Bom 80, *Bhimapaiya v Ramchandra,* (1838) ILR 22 Bom 422.
295. *Bhimapaiya v Ramchandra,* (1838) ILR 22 Bom 422, p 426.
296. *Secretary of State v Arathoon,* (1882) ILR 5 Mad 173, p 179.
297. *Vannathi Valappil Janaki v Puthiya Purayil Paru,* AIR 1986 Ker 110; *Mool Raj v Jamma Devi,* AIR 1995 HP 117; *Perumal v Rajamanickam,* AIR 2003 Mad 27.
298. *Ragendra v C Gounder,* AIR 2007 (NOC) 1325 (Mad).
299. *Mool Raj v Jamna Devi,* AIR 1995 HP 117.
300. See also the note "Voluntarily and without consideration" under section 122.
301. *Baijnath Singh v Mussammat Biraj,* (1923) ILR 2 Pat 52 : 68 IC 383 : AIR 1922 Pat 514.
302. *Ghumma v Ramachandra,* (1925) ILR 47 All 619, p 621 : 88 IC 411 : AIR 1925 All 437. The decision to the contrary in *Aziz-un-nissa v Suraj Husain,* (1934) All LJ 814 : 152 IC 146 : AIR 1934 All 507 is, it is submitted, unsound.

executed by a mother and son in consequence of the father's threat to commit suicide is voidable for coercion.[303]

Fraud of the donor or his agent makes a gift voidable. However, where the donor by reason of such fraud signs a deed of gift believing it to be an instrument of a different kind, the deed is a nullity and void ab initio by the rule of *non est factum*. Such a gift is void, and need not be revoked.[304] Not only fraud, but even innocent misrepresentation under section 18(3) of the Indian Contract Act, 1872 is a ground for revoking a gift.[305]

The most usual ground for revocation is undue influence, as defined in section 18 of the Contract Act. The court cannot prevent a man from making an improvident gift or disposing off his property in a way that no right-minded man would be disposed to do; and if he does so deliberately, the court cannot help him,[306] for it is not the province of the court to decide upon what terms a man may dispose off his property.[307] But the improvidence of the deed may afford an argument that the donor did not intend it.[308] So when an improvident gift is made to a person, who is in a position to dominate the will of the donor, the presumption is that the gift was obtained by undue influence. When the parties are in fiduciary relationship and a person is in position to dominate the will of another person, the burden to prove that the transaction in question is a genuine transaction lies upon a person in whose favour the document has been executed.[309] Instances of such undue influence are a gift by a child to a parent;[310] a *cestui que* trust to a trustee;[311] a religious inferior to a religious superior;[312] a patient to a physician,[313] or a client to a solicitor,[314] or to a person who is considered as an inmate of the family.[315]

Where there was evidence of spiritual domination over the mind of the donor and an attempt was made to keep the transaction a guarded secret, the registration of deed was made at a far away place and donee had a life long ill-health and almost a blind religious devotional frame of mind, the gift of his only property by the donor was held to be vitiated by undue influence and fraud.[316]

If a gift is not a spontaneous and an independent act of donor, there maybe a question of undue influence, but the presumption of undue influence will appear only when the gift is unconscionable particularly keeping in view the relationship of the parties.

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303. *Ammiraju v Seshamma,* (1918) ILR 41 Mad 33 : 40 IC 352.
304. *Baijnath Singh v Mussamat Biraj,* (1923) ILR 2 Pat 52 : 68 IC 383 : AIR 1922 Pat 514.
305. *Cf Glubb, Bamfield v Rogers,* (1900) 1 Ch 354.
306. *Phillips v Mullings,* (1871) 7 Ch App 244.
307. *Dutton v Thompson,* (1883) 23 Ch D 278 (CA); *James v Couchman,* (1885) 29 Ch D 212.
308. Ibid; *Hall v Hall,* (1873) 8 Ch App 430.
309. *Girraj Prasad v Tribeni Devi,* AIR 2004 All 348, para 7.
310. *Lakshmi Doss v Roop Laul,* (1907) ILR 30 Mad 169; *Lancashire Loans Ltd v Black,* (1934) KB 380 : [1933] All ER Rep 201; *Abdul Mallick v Md Yousuf,* (1960) 2 Mad LJ 355 : AIR 1961 Mad 190.
311. *Hylton v Hylton,* (1754) 2 Ves Sen 547; *Hatch v Hatch,* (1804) 9 Ves 292; *Vaughton v Noble,* (1861) 30 Beav 34; *Phul Chand v Lakkhu,* (1906) ILR 25 All 358; *Raghunath v Varjivandas,* (1906) ILR 30 Bom 578 and *Walid Khan v Ewas Ali Khan,* (1891) ILR 18 Cal 545 : 18 IA 144 (both cases of a gift by a woman to a managing agent).
312. *Mannu Singh v Umadat Pande,* (1890) ILR 12 All 523 (an old man to a guru); *Bai Manigavri v Narondas Callandas,* (1891) ILR 15 Bom 549 (gift to a family priest to provide for funeral expenses); *Philip Lukka v Franciscan Association, Vazhappally,* AIR 1987 Ker 204, p 208.
313. *Mitchell v Homfray,* (1881) 8 QBD 587 (CA).
314. *Raja Papamma v Sitaramayya,* (1895) 5 Mad LJ 233; *Kaminee Dasee v Krishna Chandra,* (1912) ILR 39 Cal 933 : 16 IC 110.
315. *Rani Chander v Sital Prasad,* AIR 1948 Pat 130.
316. *Philip Lukka v Franciscan Association, Vazhappally,* AIR 1987 Ker 204, pp 208-209.

In India, the *paradanashin* ladies have been given a special protection,[317] and the general rule that the onus is on the person who alleges fraud, duress and undue influence, does not apply to them. On the contrary, there is a presumption of undue influence which is supported by the fact that the donors are *pardanishin* women.[318] These women live in a certain degree of seclusion and the courts have, therefore, thrown round them a cloak of protection. The donee must show that the transaction was a bona fide one, and fully understood by her, and that the deed was explained to and understood by her.[319] The test laid down is that the disposition made must be substantially understood, and must really be the mental act, as its execution is the physical act, of the person who makes it.[320] Where the donee though a 90-year old lady was not weak, was intelligent, had been doing all her outdoor works herself, had taken the advice of the neighbours before gifting the property, and had announced about the gift after its execution, it was held that the onus to prove fraud and misrepresentation was on the donor and the gift deed was valid.[321] Not only in the case of a *pardanishin* woman, but in all cases where there is a presumption of undue influence, the donee may rebut the presumption by evidence that the donor exercised a free and independent will[322] after a fair understanding of the whole matter;[323] and the court will consider whether the transaction was a righteous one, whether the intention to make the gift originated with the donor,[324] and whether the donor had the benefit of independent advice.[325] In some cases, the absence of a power of revocation in the deed is a circumstance which indicates undue influence, but it is not conclusive.[326]

The period of limitation for the revocation of a gift on the ground of coercion, fraud, misrepresentation or undue influence is three years from the time when the facts entitling the plaintiff to revoke became known to him under Article 59 of the Limitation Act, 1963.

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317. *Kharbuja Kuer v Jangbahadur,* AIR 1963 SC 1203.
318. *Soondur Koomaree v Kishoree Lal,* (1867) 5 WR 246; *Ram Pershad v Ranee Phoolputtee,* (1867) 7 WR 98; *Sonkyaboye v Latchmi,* 13 WR 3 (PC); *Geresh Chunder v Mussamat, Bhuggobutty,* (1870) 13 Mad IA 419; *Delroos Banoo v Nowab Syud Asgur,* (1875) 23 WR 453; *Ashgar Ali v Delroos,* (1878) ILR 3 Cal 324 (PC); *T Sivithri v M Vusudevan,* (1881) ILR 3 Mad 215; *Mahomed Buksh v Hosseini Bibi,* (1888) ILR 15 Cal 684 : 15 IA 81; *Marium Bibi v Sakina,* (1892) ILR 14 All 8; *Deo Kuar v Man Kuar,* (1895) ILR 17 All 1 : 21 IA 148; *Khas Mehal v Administrator General of Bengal,* (1900) 5 Cal WN 505; *Kamini Daseee v Krishna Chandra,* 16 IC 110; *Kali Baksh v Ram Gopal,* (1914) ILR 36 All 81 : 41 IA 23 : 21 IC 985; *Kamawati v Digbijai Singh,* (1921) ILR 43 All 525 : 48 IA 378 : 64 IC 559 : AIR 1922 PC 14; *Ruhulla v Hassanali,* (1928) 32 Cal WN 929 : 110 IC 260 : AIR 1928 PC 303.
319. *Tacoordeen Tewarry v Nawab Syed Ali Hossein Khan,* (1874) 21 WR 340 : 1 IA 192; *Shambati Koeri v Jago Bibi,* (1902) ILR 29 Cal 749 : 29 IA 127; *Sajjad Hussain v Wazir Ali Khan,* (1912) ILR 34 All 455 : 39 IA 156 : 16 IC 197.
320. *Faridunissa v Mukhtar Ahmad,* (1925) ILR 47 All 703 : 52 IA 342 : 89 IC 649 : AIR 1925 PC 204; *Tara Kumari v Chandra Mauleshwar,* (1931) 54 Cal LJ 431 : 58 IA 450 : 134 IC 1076 : AIR 1931 PC 303.
321. *Krishna Prasad v Gopal Prasad,* AIR 2001 Pat 1, pp 6, 7 : (2000) 3 BLJR 1834.
322. *Ganga Baksh v Jagat Bahadur,* (1895) ILR 23 Cal 15 : 22 IA 153; *Kali Baksh Singh v Ram Gopal Singh,* (1914) ILR 36 All 81 : 41 IA 23 : 21 IC 985; *Kaminee Dasee v Krishna Chandra,* (1912) ILR 39 Cal 933 : 16 IC 110; *Phul Chand v Lakkhu,* (1903) ILR 25 All 358; *Fairdunnisa v Mukhtar Ahmad,* (1925) ILR 47 All 703 : 52 IA 342 : 89 IC 649 : AIR 1925 PC 204; *Barktunnissa v Debi Baksh,* (1927) 25 All LJ 314 : 101 IC 29 : AIR 1927 PC 84.
323. *Sunitabala Debi v Dhara Sundari,* (1919) ILR 47 Cal 175 : 46 IA 272 : 53 IC 131 : AIR 1949 PC 24; *Wright v Vanderplank,* (1856) 8 Deg M & G 133 (CA).
324. *Mahomed Buksh v Hosseini Bibi,* (1888) ILR 15 Cal 684 : 15 IA 81.
325. *Powell v Powell,* (1900) 1 Ch 243; *Wright v Carter,* (1903) 1 Ch 27 : [1900-03] All ER Rep 706 (CA); *Mahomed Baksh v Hosseini Bibi,* (1888) ILR 15 Cal 684 : 15 IA 81; *Kali Baksh v Ram Gopal,* (1914) ILR 36 All 81 : 41 IA 23 : 21 IC 985; *Mariam Bibi v Ibrahim,* (1918) 28 Cal LJ 306 : 48 IC 561.
326. *Hall v Hall,* (1873) 8 Ch App 450; *Kaminee Dasee v Krishna Chandra,* (1912) ILR 39 Cal 933, p 951; *Raja Ram v Khandu,* (1912) 14 Bom LR 340 : 15 IC 529.

(6) Mistake

A contract is not voidable because of the mistake of one party, and if both parties are under a mistake as to an essential matter, the contract is void, and does not require rescission. If both parties are under a mistake as to a matter that is not essential, the remedy is not rescission, but rectification. However, it is clear that a gift cannot be revoked on account of the mistake of the donor alone. So in a Madras case,[327] the collector was not allowed to revoke a grant made under a mistake as to the effect of certain departmental orders. However, a mutual mistake will justify cancellation, as when a husband made and the wife accepted a gift in ignorance of the fact that it would be subject to a covenant in the marriage settlement.[328] A mere mistake of law would not be sufficient for the revocation of a deed of gift.[329]

(7) No Revocation Aliunde

A gift may be revocable on a condition subsequent not depending upon the will of the donor; or it may be revocable on grounds which would justify rescission in the case of a contract. However, it cannot be revoked for any other reason, for as already explained, a gift revocable at pleasure is no gift at all. In *Behari Lal Ghose v Sindhubala Dasi,*[330] the Calcutta High Court said that the third paragraph in this section—"Save as aforesaid, a gift cannot be revoked"—was a legislative recognition of the doctrine enunciated by Lord Nottingham in *Villers v Beamont*:[331]

> If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not lose the fetters he hath put upon himself, but he must lie down under his own folly; for it you would relieve in such a case, you must consequently establish this proposition, viz that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd.

The Calcutta High Court in the case last cited decided that the heir of the donor or an occupancy holding could not revoke the gift on the ground that the holding was not transferable. Again in Re *Antaji Keshav Tambe,*[332] it was held that government could not by proclamation in 1851 withdraw the rights to trees, which had been granted by a proclamation of 1824. And in *Rajaram v Ganesh,*[333] it was held that after a gift of a *vritii* was complete, the donor could not revoke it by his will. The donor cannot unilaterally revoke a valid gift by executing a registered deed of cancellation.[334]

(8) Incomplete Gift

The rule that a gift cannot be revoked except on the grounds mentioned in section 126, does not apply to an incomplete gift. An incomplete gift can be revoked at any time.[335] The Rangoon High Court has held that when a donee is in possession under a gift incomplete for

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327. *Collector of Salem v Rangappa,* (1889) ILR 12 Mad 404.
328. *Ellis v Ellis,* (1909) 26 TLR 166.
329. *Narasingh v Radhakanta,* (1950) ILR Cut 374 : AIR 1951 Ori 132.
330. *Behari Lal Ghose v Sindhubala Dasi,* (1918) ILR 45 Cal 434, p 438 : 41 IC 878; *Luky Moss v Mah Nyein May,* 149 IC 1113 : AIR 1933 Rang 418.
331. *Villers v Beamont,* (1682) 1 Vern 100. See also *Slater v Burnley Corporation,* (1888) 59 LT 636.
332. Re *Antaji Keshav Tambe,* (1894) ILR 18 Bom 670.
333. *Rajaram v Ganesh,* (1899) ILR 23 Bom 131, p 134.
334. *Shakuntla Devi v Amar Devi,* AIR 1985 HP 109, p 111.
335. *Standing v Bowring,* (1885) 31 Ch D 282, p 290 (CA).

want of a registered deed, the donor may be estopped from denying the donee's title.[336] A gift is effective, but cannot be enforced until the deed is registered.[337]

A cheque is an order to the donor's bankers which is revoked by the donor's death; but it is not revoked by the donor's death if it was presented in the donor's lifetime, and funds were appropriated by the bankers to meet it.[338]

127. Onerous gifts.—Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person.—A donee not competent to contract and accepting property burdened to any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

ILLUSTRATIONS

(a) *A* has shares in *X*, a prosperous joint-stock company, and also shares in *Y*, a joint-stock company in difficulties. Heavy falls are expected in respect of the shares in *Y*. *A* gives *B* all his shares in joint-stock companies. *B* refuses to accept the shares in *Y*. He cannot take the shares in *X*.

(b) *A* having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to *B* the lease, and also, as a separate and independent transaction, a sum of money. *B* refuses to accept the lease. He does not by this refusal forfeit the money.

(1) Onerous Gifts

The first paragraph of this section corresponds to section 122 of the Indian Succession Act, 1925, which refers to gifts by will. The first illustration is adapted from the case of *Moffett v Bates*.[339] The second paragraph corresponds to section 123 of the Indian Succession Act, 1925, and the second illustration is taken from the case of *Warren v Rudall Ex paret Godfrey*.[340] In the first case, there is one gift of several properties and the donee must take all or none. In the second case, there are separate gifts to the same donee, and he may accept those that are beneficial, and reject those that are onerous. The gifts may be distinct although

336. *Ma Shin v Maung Hman,* (1923) ILR 1 Rang 651 : 79 IC 579 : AIR 1924 Rang 651; *M P L M P Chetty v Ma Ngwe Sin,* (1923) ILR 1 Rang 665 : 79 IC 485 : AIR 1924 Rang 200.
337. *Kalyanasundaram v Karuppa,* (1927) ILR 50 Mad 193 : 54 IA 89 : 100 IC 105 : AIR 1927 PC 42; *Venkatasubba Shrinivas v Subba Rama,* (1928) ILR 52 Bom 313 : 108 IC 367 : AIR 1928 PC 86.
338. *Tate v Leithead* (1854) Kay 658; Re *Swinburne Sutton v Featherley,* (1926) Ch 38 : [1925] All ER Rep 313, overruling *Bromley v Brunton,* (1868) LR 6 Eq 275.
339. *Moffett v Bates,* (1857) 3 Sm & G 468.
340. *Warren v Rudall Ex paret Godfrey,* (1860) 1 John & H 1.

they are included in the same words of gift, and it is a question of the intention of the donor whether they are to be taken together.[341]

The rule as to onerous gifts in the first paragraph is analogous to the rule of election under section 35. Under that section, if an instrument confers a benefit and at the same time purports to deprive the beneficiary of other property, the beneficiary cannot take the benefit without surrendering the property, for it is said that he must either take under the instrument, or against it.[342]

The Supreme Court has held that the last paragraph of section 127 clearly indicates a minor donee, who can be said to be in law incompetent to contract under section 11 of the Indian Contract Act, 1872, is, however, competent to accept a non-onerous gift. Acceptance of an onerous gift, however, cannot bind the minor. If he accepts the gift, during his minority, of a property burdened with obligation and on attaining majority does not repudiate but retains it, he would be bound by the obligation attached to it.[343]

The principle is the same as that applied in the case of minor partners by section 30 of the Indian Partnership Act, 1932. In the case of a partnership, the estoppel arises from omission to repudiate within a reasonable time. In the case of the gift, the estoppel arises from the retention of the property, and no doubt a reasonable time would be allowed for repudiation. Similarly, when a minor has been made a shareholder in a jointstock company, he cannot repudiate his holding in the company if he has drawn dividends after attaining majority.[344] But during minority, the gift is complete, so that if the donee dies a minor, his heir takes.[345]

128. Universal donee.—Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by [346][and liabilities of] the donor at the time of the gift to the extent of the property comprised therein.

Synopsis

(1) Universal Donee 1105
(2) Subject to the Provisions of Section 127 1106
(3) Muslims 1107

(1) Universal Donee

A universal donee is unknown to English law, according to which there is no universal succession, except in the case of death or bankruptcy. However, in Hindu law, this would occur when a man retires from the world, and becomes an ascetic.

A gift of the whole estate of the donor would in most cases be impeachable as to land as a fraudulent transfer under section 53.

However, this section is exclusive of section 53, and rests on the same principle as the first paragraph of section 127—*Qui sensit commodum debet et sentire onus.* The donee accepting the whole property becomes liable for the debts and other liabilities of the donor. Similarly,

341. *Guthrie v Walrond,* (1883) 22 Ch D 573.
342. *Cooper v Cooper,* (1874) LR 7 HL 53; *Whistler v Webster,* (1794) 2 Ves 367; Re *Chesham Lord Cavendish v Dacre,* (1886) 31 Ch D 466.
343. *K Balakrishnan v K Kamalam,* AIR 2004 SC 1257, para 20 : (2004) 1 SCC 581.
344. *Fazulbhay v Credit Bank of India,* (1915) ILR 39 Bom 331 : 27 IC 335.
345. *Subramania Ayyar v Sitha Lakshmi,* (1897) ILR 20 Mad 147.
346. Ins. by Act 20 of 1929, sec. 60.

when a Hindu widow transfers the whole of her estate in favour of the next reversioner, the donee is liable for her maintenance.[347]

ILLUSTRATION

A executed a promissory note in favour of *B*, and subject to the payment of the amount due thereunder made a gift of his entire property in favour of *C*. It was held that *C* could not retain the benefit, and at the same time repudiate the burden.[348] In another case, a reversioner in whose favour a Hindu female taking a woman's interest relinquished the property was held liable for her debts.[349]

Section 128 of the TP Act does not provide anywhere that the donee is liable for all the debts due by the donor at the time of the gift. On a plain reading of the section, it is clear that the liability of the donee is to the extent of the property acquired by him by virtue of a gift deed from the donor, and cannot travel beyond the same. It is thus well settled that legal representatives of judgment debtors are liable for the debts of the predecessor to the extent of the estate acquired by the legal representatives from their predecessor.[350]

In section 2 (11) of the Code of Civil Procedure, the statutory definition of "legal representative" goes so far as to say that even the inter-meddler with the estate of a deceased will be his legal representative. If that is so, why cannot a universal donee, who by virtue of getting a gift, enters upon possession of the estate of a deceased, be regarded as his legal representative. It is particularly important to know that universal donees only take the estate of the deceased subject to the liabilities of the deceased. In fact, section 128 of the TP Act fastens the personal liability upon the universal donee for all debts due by the donor at the time of the gift, though that liability is confined to the extent of the properties comprised in the gift. The liability of the universal donee to pay decree debt of the donor arises not only by the reason of the donee accepting the gift and on being the legal representative of the deceased, but also by the very terms under which he becomes a universal donee.[351]

When a universal donee sued to redeem a mortgagee of the donor, the mortgagee was allowed to tack a simple contract debt of the donor on to the mortgage debt.[352] The position of the universal legatee and the universal donee is practically the same. In the case of a universal donee, it was necessary to provide for his liability under section 128, as otherwise, in case of personal liabilities, the donor being still alive, the donee would escape such liabilities.[353]

(2) Subject to the Provisions of Section 127

If the universal donee were a minor, he would be under no liability unless he retained the property after attaining majority.

If any portion of the donor's property, whether movable or immovable, is excluded from the gift, the donee is not a universal donee and the creditor is not entitled to the

347. *Narbadabai v Mahadeo,* (1880) ILR 5 Bom 99.
348. *Ram Sarup v Shiv Dayal,* 190 IC 463 : AIR 1940 Lah 285.
349. *Sudhamoyee v Bhujendra Nath,* AIR 1937 Cal 226.
350. *Madhukas Sagun Karpe v Institute of Public Assistance,* AIR 1998 Bom 201.
351. *Shanmugam v Syndicate Bank,* AIR 1999 Mad 74.
352. *Ragho Govind v Balwant,* (1833) ILR 7 Bom 101.
353. *Sahu Jali v Bahal Singh,* AIR 1945 All 433.

benefit of this section.[354] But in a case in which a life interest in part of the property was reserved to the donor, the donee was held to be a universal donee.[355] So also, where the part retained by a donor is insignificant and is for his own maintenance, the donee is nevertheless a universal donee.[356]

(3) Muslims

Section 129 may be referred.

129. Saving of donations *mortis causa* and Muhammadan Law.— Nothing in this Chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan Law [357][***].

Synopsis

(1) Constitutionality of the Section ..... 1107 (2) Mahomedan Gifts 1108

(1) Constitutionality of the Section

In *Bibi Maniran v Mohammad Ishaque,*[358] a Division Bench of the Patna High Court rejected the argument that section 129 violated Article 14 of the Constitution; the court held that the classification between Mohammadans and others was reasonable, having regard to the well-known fundamental differences between the religion and customs of Muhammadans on one hand, and the religion and customs of others. The court relied on a decision of the Supreme Court in *Moti Das v S P Sahi.*[359] In *Rawther M v M Charavil*[360] a single judge of the Kerala High Court has held that section 129 was ultra vires Article 14 of the Constitution, if it was held applicable to all Mahomedan gifts and should, therefore, be construed as limited to Mahomedan gifts of a charitable or a religious nature. This decision, if correct, would mean that this chapter would apply to non-religious or non-charitable Mahomedan gifts. It is submitted that the Patna decision is correct.

In a Kerala case decided after the above ruling, the donor (a Muslim lady) recited in the gift deed that the donor had, along with the title deeds, completely and absolutely surrendered possession of all her rights and interests in properties without receiving any consideration and by way of gift, to be enjoyed by the donees. It was not shown that the admission made in the deed was erroneous. It was held that the donor had parted with possession of the property. The gift must be held to be completed by the donor's act, as nothing remained to be done thereafter by the donor.[361]

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354. *Shyam Behari Mal v Maha Prasad,* (1930) 28 All LJ 99 : 123 IC 324 : AIR 1930 All 180; *Anrudh Kumar v Lachmi Chand,* (1928) ILR 50 All 818 : 115 IC 114 : AIR 1928 All 500; *Brij Raj v Ram Dayal,* (1931) 7 Luck 411 : 135 IC 369 : AIR 1932 Oudh 40.
355. *Shahzad Singh v Madan Gopal,* 140 IC 120 : AIR 1933 All 146; but see *Thiruvenkidaswami v Palani Ammal,* AIR 1961 Mad 291.
356. *Bapurao v Balakidas,* AIR 1944 Nag 225.
357. The words and figures "or, save as provided by section 123, any rule of Hindu or Buddhist law" omitted by Act 20 of 1929, sec. 61.
358. *Bibi Maniran v Mohammad Ishaque,* AIR 1963 Pat 229.
359. *Moti Das v S P Sahi,* [1959] 2 SCR 563 (Supp) : AIR 1959 SC 942.
360. *Rawther M v M Charavil,* AIR 1972 Ker 27.
361. *K P Abdulrahiman v Kunhi Mohammed,* AIR 1975 Ker 150.

(2) Mahomedan Gifts

Nothing in this chapter applies to Mahomedan gifts.[362] Thus whether the writing requires registration or not depends on the facts and circumstances of each case,[363] and an unregistered gift deed may in certain circumstances would not be recognised.[364] An assignment of land by a Mahomedan bridegroom in favour of his bride at the time of the marriage in lieu of *meher* does not require writing.[365]

"*Hiba*" or gift under Mahomedan law is a transfer of property made immediately and without any exchange by one person to another, and accepted by or on behalf of the latter. By virtue of section 129 of TP Act, the chapter does not affect any rule of Mahomedan law and, therefore, "*hiba*" of subject matter of whatever value need not be registered as required by section 123. It can be oral but it should be adequately proved.[366] On the other hand, *hiba-bil-iwaz* in India, being a gift for an exchange, is in the nature of a sale and if the subject matter is immovable property, then, it can only be by a registered instrument as provided under section 54 of TP Act. Oral gift in discharge of money owed to the donee, being one for consideration, amounts to a "sale". It is not pure and simple "*hiba*", but a *hiba-bil-iwaz*; and if property of value of ₹ 100 or more is involved, it can only be by a registered document.[367]

The Supreme Court in *Hafeeza Bi v Sheikh Farid*,[368] clarified and set at rest the ambiguity on application of chapter VII, to Muslims. It said that section 129 preserves the rule of Muslim law and excludes the applicability of section 123 of the TPAct to a gift of an immovable property by a Muslim. It is not the requirement that in all cases where the gift is contemporaneous to the making of the gift then such gift deed must be registered under section 17 of the Registration Act. Each case would depend on its own facts.

The three essentials of gifts under Muslim law are: declaration of the gift by the donor; acceptance of the gift by the donee, and delivery of possession. Where a gift of immovable property is made by a Muslim, and these essential requirements of declaration, acceptance and delivery of possession of the property were fulfilled, and the gift deed was only recital of factum of prior gift, the gift is complete and valid and does not require registration.[369] The rules of Muslim law do not make writing essential to the validity of gift; and oral gift fulfilling all the three essentials make the gift complete and irrevocable. However, the donor may record the transaction of gift in writing. The apex court further clarified that merely because the gift is reduced to writing by a Muslim instead of it having been made orally, such writing does not become a formal document or/instrument of gift. When a gift could be made by a Muslim orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Muslim law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting a valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered is

362. *Musa Miya v Kadar Bux*, (1928) ILR 52 Bom 316, p 321 : 55 IA 171 : 109 IC 31 : AIR 1928 PC 108.
363. *Rasheeda Khatton v Ashiq Ali*, (2014) 10 SCC 459.
364. *Mayana Saheb Khan v Mayana Gulab Jan*, AIR 2011 (NOC) 97 (AP).
365. *Jaitunbi Fatrubhai v Fatrubhai Kasambhai*, (1947) ILR Bom 372 : 49 Bom LR 669 : AIR 1948 Bom 114. See, however, Kerala cases under the note "Constitutionality of the section."
366. *A M K Mariam Bibi v M A Abdul Rahim*, AIR 2000 (NOC) 21 (Mad).
367. *Imbichimodden Kutty v Pathumunni Umma*, AIR 1989 Ker 148.
368. *Hafeeza Bi v Sheikh Farid*, AIR 2011 SC 1695 : (2011) 5 SCC 654.
369. *Asgar Ali v Tahir, Ali* AIR 2013 MP 151.

inappropriate and not in conformity with the rules of gift in Mohammedan law. In the instant case, the gift was made by a donor by a written deed in favour of his son in respect of his properties. The gift as recited in the deed was based on love and affection for the son as after the death of the donor's wife, he has been looking after and helping him. The acceptance of the gift by son was evidenced as he signed the deed. The son was in physical possession of residential house with the donor. All the three essentials of a valid gift under the Mohammedan law were satisfied. The gift deed was a form of declaration by the donor and not an instrument of gift as contemplated under section 17 of the Registration Act and therefore it was complete and irrevocable. The apex court overruled the Andhra Pradesh High Court ruling that held against the validity of the gift for want of registration.

Where the dower was not fixed in cash so as to bring into existence a dower debt, but was to be by giving of land, the transfer of the land was held to be pure and simple oral gift (*hiba*) under the Mahomedan law.[370]

In *Maqbool Alam v Khodaija,*[371] the appellant examined himself as witness, and said that the gift was made on 10 February1943, in the presence of his parents. His mother was alive, but she was not examined as a witness. The date of the gift was not mentioned in the plaint or any other document, and was disclosed for the first time in the witness box without it being made clear as to how the appellant remembered it in absence of any record. The Supreme Court held that the appellant failed to prove the alleged oral gift. The Andhra Pradesh High Court holding that it was unknown to law, that a Mahomedan can make an oral gift within the confines of his house and without the presence of anybody else, negated the plea of oral gift where the donor admitted that no one was present when he made the alleged oral gift.[372] In the case of a gift of immovable property amongst Muslims, delivery of possession following the execution of a gift deed amounts to a valid gift.[373]

In *Imtiaz Rasul v Ataur Rasul,*[374] *A*, a Sunni Muslim and absolute owner of the plot of land gifted it to *B*, his younger brother under his influence through a registered gift deed. although he executed the gift deed and got it registered but did not hand over, possession of the same. Thereafter, *B* approached *A* and demanded possession of the property on the basis of the aforesaid gift deed to which *A* declined. Consequently, *B* started harassing *A* who later instituted the suit praying for declaration that notwithstanding execution of registered gift deed dated right, title and interest of the property remained with him. The issue before the court was whether a gift made by a muslim in favour of another muslim by executing a registered deed in compliance of sections 122 & 123 is sufficient and overrides the requirement under muslim law. The court held that section 129 saves the provision of the muslim law and even in the event of an execution of registered instrument by a muslim making a gift in favour of another muslim in that event unless the three ingredients ie, declaration of gift by the donor, an acceptance of the gift, express or implied, by or on behalf of the donee, and delivery of possession of the subject of the gift by the donor to the donee) are satisfied, a registered instrument within the meaning of section 123 would not get precedence. Here, the third condition was not fulfilled as the donor had not delivered the property in dispute to the donee after the execution of the registered gift deed hence there did not exist a valid gift deed between the two parties.

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370. *Imambi v Khaja Hussain,* AIR 1988 Kant 51, p 56, following *Jaitunbi,* AIR 1949 Bom 114.
371. *Shaik Pathimma Bi v Sri Venkata Chalapathy Finance Corporation,* AIR 1978 AP 401 : (1978) Andh WR 63 : AIR 1966 SC 1194.
372. *Ratan Lal Bora v Mohd Nabiud Din,* AIR 1984 AP 344, p 347.
373. *Kunheema Umma v P Ayissi Umina,* AIR 1981 Ker 176.
374. *Imtiaz Rasul v Ataur Rasul,* 2015 (3) GLT 530.

In *Ismail Hajee Essa Trust v Muslim Educational Society (Registered),*[375] a Trust conveyed the property to a society *B* under an oral gift. All the members of the trust were Muslims and contended that the trustees being Muslims are competent to execute a valid gift of the same under an oral disposition. The court held that a public trust cannot transfer a property by oral gift to such a Society merely because its members are governed by Muslim Law. The Trust and the Society are independent juristic legal entities who are bound by section 123 of the Transfer of Property Act, 1882 in the matter of gift. A transfer of immovable property by gift can only be affected by a registered instrument signed by the donor and attested by two witnesses. It necessarily follows that neither the Society nor its office bearers derived any title to the property under the oral gift as claimed by them.

The provisions of section 128 (universal donee) are, according to the Andhra Pradesh High Court, applicable to Muslims also, in the absence of any rule of Muslim law regarding the liability of a universal donee. A gift can be attacked on the ground of fraud on creditors under the general law (section 53), but, in the case of a universal donee, the liability is governed by the section itself. That the donor earns salary does not mean the donee is not a universal donee. Salary cannot be transferred in law.[376]

A dower debt being a debt payable by a husband to his wife, a gift in lieu of dower debt cannot be held to be valid, in as much as repayment of dower debt being consideration, no property can be transferred by way of a gift in lieu thereof.[377]

375. R F A No 329 of 2008, decided on 21 February 2017, High Court of Kerala.
376. *Shaik Pathhnama Bi v Sri Venkata Chalapathy Finance Corporation,* AIR 1978 AP 401 : (1978) Andh WR 63.
377. *Saimunissa v S K Mohiuddin,* AIR 1991 Pat 183, p 186; *Usman Khan v Amir Mian,* AIR 1949 Pat 237.

CHAPTER 8

Of Transfers of Actionable Claims

Sections 130–137, Transfer of Property Act, 1882

130. Transfer of actionable claim.—(1) The transfer of an actionable claim [1][whether with or without consideration] shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, [2][***] shall be complete and effectual upon the execution of such instruments, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceeding and without making him a party thereto.

Exception.— Nothing in this section applies to the transfer of a marine or fire policy of insurance [3][or affects the provisions of section 38 of the Insurance Act, 1938 (4 of 1938)].

ILLUSTRATIONS

(i) *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, not having received notice of the transfer, as prescribed in section 131, pays *B*. The payment is valid, and *C* cannot sue *A* for debt.

(ii) *A* effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies, the Bank is entitled to receive the amount of the policy and sue on it without the concurrence of *A*'s executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

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1. Ins. by Act 20 of 1929, sec. 62.
2. The words and figures "and notwithstanding anything contained in section 123" ins. by Act 38 of 1925, sec. 2 and omitted by Act 20 of 1929, sec. 62.
3. Added by Act 4 of 1938, sec. 121 (w.e.f. 1-7-1939).

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(1) Actionable Claims

The definition, which is contained in section 3, provides that "actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or any beneficial interest in movable property not in possession, either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent. It is an ascertained sum due from one person to another, as contrasted from unliquidated damages and claims for compensation which require ascertainment/assessment by a court or tribunal before it becomes payable and due.[4] Debts secured by a mortgage of immovable property or by a pledge or movable property are excluded from the definition. These are now transfers not of claims to property, but of the property itself. All claims under contract are excluded, except claims to the payment of a liquidated sum of money, or debt, or price. That a right to sue for damages is not an actionable claim is also stressed by the amendment made in section 6(e) to the effect that a mere right to sue cannot be transferred.[5] On the other hand, the definition has been extended so as to include such equitable choses in action as debts or beneficial interests in movable property, whether existent, accruing, conditional or contingent. It includes a decree for specific performance in case of an agreement to sell.[6]

Actionable claims, therefore, include claims recognised by the courts as affording grounds for relief either—

(1) as to unsecured debts; or

(2) as to beneficial interests in movable property not in possession, actual or constructive—whether present or future, conditional or contingent.[7]

(2) Civil Court

A suit by a co-sharer to recover his share of the profits from a *lambardar* in the province of Agra and Oudh is cognisable by a revenue court, and not by a civil court—Agra Tenancy

4. *Economic Transport Organization, Delhi v Charan Spinning Mills P Ltd,* AIR 2010 SC (Supp) 720 : LNIND 2010 SC 183 : 2010 (2) SCALE 427 : [2010] 3 MLJ 1347.
5. *Abu Mahomed v S C Chunder,* (1909) ILR 36 Cal 345 : 1 IC 827.
6. *Amol v Deorao,* AIR 2011 (NOC) 215 (Bom) : 2011 (2) All MR 22.
7. *McDowell and Co Ltd v Visakhapatnam,* AIR 2000 AP 374, para 15.

Act, 1926, section 230 and schedule IV. Such a claim by a co-sharer is, therefore, not within the definition of actionable claim.[8]

(3) Debt

A debt is a property. It is a chose in action and is heritable and assignable, and it is treated as property in India under the TP Act which calls it an "actionable claim."[9]

A debt is an obligation to pay a liquidated or certain sum of money.[10] A debt may be a present or a future debt. If it is a present debt, it is existent, or now due and owing. If it is a future debt, it is existent but accruing, or payment is in the future. The distinction between present and future debts is made in the case of *Subramanian v Arunachalam*,[11] where the phrase "now due, owing or payable" was held to exclude debts accruing after the date of the deed. Both present and future debts are existing debts, and can be attached, and are actionable claims. In order to be an accruing debt, there must be a present debt, although it may be payable in the future. It has accordingly been held that sums paid into the bank to the credit of the judgment-debtor after the service of the garnishee summons on the bank, was not an accruing debt from the bank to the judgment-debtor, and was not bound in the hands of the garnishee bank by the service of the garnishee summons.[12] Conditional or contingent debts cannot be attached, but under the present definition, they too are actionable claims. Instances of contingent debts include the price payable by a purchaser of immovable property before the execution of the conveyance;[13] or a maintenance allowance payable at a future date;[14] or future rents;[15] or annuities payable under a deed of *waqf*;[16] or an amount due under a policy of insurance;[17] or a letter of credit.[18]

An assignment of future rent can be effected only by a written instrument under section 130, and it must also be registered. A letter of the solicitor of the assignee to the tenant is not such an assignment.[19] A judgment debt or decree is not an actionable claim, for no action is necessary to realise it. It has already been the subject of an action, and is secured by the decree.[20] Arrears of rent constitute a debt or actionable claim,[21] but a claim to mesne profits is

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8. *Lallu Singh v Chandra Sen,* (1934) ILR 56 All 264 : 1934 All LJ 1 : 147 IC 937 : AIR 1934 All 155.
9. *Delhi Cloth and General Mills Co Ltd v Hamnam Singh,* AIR 1955 SC 590 : [1955] 2 SCR 402.
10. *Webster v Webster,* (1862) 31 Beav 393; *Johnson v Diamond,* (1856) 11 Exch 73; *Sabju Sahib v Noordin,* (1899) ILR 22 Mad 139.
11. *Subramanian v Arunachalam,* (1902) ILR 25 Mad 603 : 29 IA 138; *Venkata Gurunadha v Kesava Ramiah,* (1926) 50 Mad LJ 54 : 92 IC 973 : AIR 1926 Mad 417.
12. *Heppenstall v Jackson,* (1939) 1 KB 585 : [1939] 2 All ER 10.
13. *Ahmaduddin v Majlis,* (1881) ILR 3 All 12.
14. *Haridas v Baroda Kishore,* (1900) ILR 27 Cal 38; *Asad Ali v Haidar Ali,* (1911) ILR 38 Cal 13 : 6 IC 826; *Palikandy v Krishnan,* (1917) ILR 40 Mad 302 : 34 IC 381.
15. *Poothekka Nachiar v Annamalai Chetty,* (1926) Mad WN 774 : 98 IC 263 : AIR 1926 Mad 1173; *Chidambaram Pillal v Doraisami Chetti,* 31 IC 473.
16. *Bibi Alimunissa v Abdul Aziz,* 165 IC 298. (The *Wakf* had been executed before 1929, when clause (dd) was added to section 6).
17. *Varjivandas v Maganlal,* (1937) 39 Bom LR 493 : AIR 1937 Bom 382 : 170 IC 850.
18. *Joseph Pyke & Sons (Liverpool) Ltd v Kedarnath,* AIR 1959 Cal 328.
19. *Hanuman Estate (Private) Ltd v Dhanuka Industries (Private) Ltd,* (1975) 79 Cal WN 83, p 94. Rent in arrears can be transferred by written instrument—*Rameshwar v Ruknath,* AIR 1923 Pat 165.
20. *Afzal v Ramkumar Bhudra,* (1886) ILR 12 Cal 610; *Dagdu v Vanji,* (1900) ILR 24 Bom 502; *Govindarajulu v Ranga Rao,* (1921) 40 Mad LJ 124 : 62 IC 255 : AIR 1921 Mad 113.
21. *Sheogobind Singh v Gouri Prasad,* (1925) ILR 4 Pat 43 : 83 IC 81 : AIR 1925 Pat 310; *Rameshwar Narain Singh v Riknath Koeri,* 67 IC 451 : AIR 1923 Pat 165; *Madhabilata Devi v Butto Kristo Raj,* AIR 1944 Pat 129; *Daya Debi v Chapala Debi,* (1959) 63 Cal WN 976 : AIR 1960 Cal 378; *Babu Bhai v Bhagwanda,s* AIR 1967 MP 143.

not a claim to any debt, but is a mere right to sue which cannot be assigned,[22] for mesne profits are unliquidated damages.[23]

In the case of a claim to compensation for a canal constructed by the government on a part of the mining site before transfer of the mining lease, the transfer of the mining lease does not, per se, result in assignment of the right to claim compensation. It is a mere right to sue which cannot be assigned. In any case, it cannot be enforced as an actionable claim, in the absence of an instrument executed in the manner provided in section 130.[24] In the instant case, the agreement was entered into between the industrial corporation and the allottee as, a sequel to the request made by the allottee to give him an industrial plot for the purpose of setting up an industry. The assurance given by the allottee, that he shall start construction of the building for setting up the industry within a period of six months and complete the construction thereof within two years from the date of issue of the allotment letter, was verified and found acceptable by the corporation, and only then had the corporation chosen to enter into the agreement with the allottee. If the allottee evacuates from the scene after inducting someone else into the plot without the consent of the corporation, it is not legally permissible for the inductee to compel the corporation to recognise him as the allottee.[25]

A right to sue for damages cannot be transferred and where an advocate assigned his right to petitioner to sue the defendant and claim compensation for defamation, it was held that right to sue for damages concerning defamation cannot be transferred by one person in favour of another and a pauper application filed at the instance of this other person would not be maintainable.[26] A letter of subrogation, not being an assignment of a mere right to sue is valid and enforceable.[27] In the case of an agreement to sell, assignment of a decree for specific performance is transfer of an actionable claim and no consideration is required to be shown for assignment of decree for specific performance.[28]

Distinction between a debt or actionable claim and a mere right to sue, which cannot be transferred, is discussed in the note "Mere right to sue distinguished from actionable claim" under section 6(e).

(4) Debt Secured by a Mortgage

Although a mortgage debt is not an actionable claim, yet, in the case of *Imperial Bank of India v Bengal National Bank,*[29] the Privy Council held that an unregistered assignment of a mortgage debt might be treated as an assignment of the debt dissociated from the security. The debt divorced from the security was not an actionable claim; but their Lordships said that it was a species of property for the transfer of which, no specific provision is made in the TP Act, so that the assignee has to sue in the name of the assignor.

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22. *Jai Narayan v Kishun Dutta,* (1924) ILR 3 Pat 575 : 78 IC 105 : AIR 1924 Pat 551.
23. *Seetamma v Venkataramanayya,* (1915) ILR 38 Mad 308 : 21 IC 387; *Durga Chunder v Koilas Chunder,* (1897) 2 Cal WN 43; *Shyam Chand Koondoo v The Land Mortgage Bank of India,* (1882) ILR 9 Cal 695; *Chendrasekharalingam v Naghabhushanam,* (1927) 53 Mad LJ 342 : 104 IC 409 : AIR 1927 Mad 817.
24. *State of Madhya Pradesh v Balimansha Byramji,* (1976) MP LJ 535.
25. *Indu Kakkar v Haryana State IDC Ltd,* AIR 1999 SC 296.
26. *Sundar v Ramdass,* AIR 2013 Mad 13 : LNIND 2012 MAD 4552 : 2013 (1) Mad LJ 56 : 2013 (1) Mad LW 170.
27. *Economic Transport Organization, Delhi v Charan Spinning Mills P Ltd,* AIR 2010 SC (Supp) 720 : LNIND 2010 SC 183 : 2010 (2) SCALE 427 : [2010] 3 MLJ 1347.
28. *Amol v Deorao,* AIR 2011 (NOC) 215 (Bom).
29. *Imperial Bank of India v Bengal National Bank,* 58 IA 323 : 134 IC 651 : AIR 1931 PC 245.

(5) Transfer of Security

Transfer of a collateral security does not transfer the loan. In a Karnataka case, a money lending firm advanced a loan to the debtor, for the purchase of a vehicle. The bank financed the firm in respect of the loan so advanced by the firm. Subsequently, the firm also took a collateral security from the debtor in the form of promissory note, and assigned the note to the bank. It was held that the bank could not sue the debtor merely on the basis of collateral security, unless the loan was also assigned to the bank under section 130.[30]

There cannot be an assignment of the promissory note, though there can be an assignment of debt.[31]

(6) Beneficial Interest in Movable Property

The property must not be in possession, actual or constructive, for such possession is ownership. Thus, a right to recover elephants trapped on the owner's land is a right of ownership in the elephants, and not an actionable claim.[32] In *Jaffer Meher Ali v Budge-Budge Jute Mills Co*,[33] the right to claim the benefit of a contract, or the right on certain conditions to call for delivery of goods mentioned in the contract, was held to constitute a beneficial interest in movable property, conditional or contingent, within the meaning of the definition of actionable claim, and as such, assignable. The assignability of such a contract was said by Sale J to be subject to two conditions:

(1) that the benefit sought to be assigned was not coupled with any liability; and (2) that the contract was not induced by any personal considerations. A partner's right to sue for an account of a dissolved partnership is an actionable claim, being a beneficial interest in movable property not in possession.[34] The right to recover the insurance money on the death of the assured person, or on the expiry of the endowment period, is an actionable claim.[35] A right to recover back the purchase money on the sale being set aside is an actionable claim.[36] So also is the right to recover money left in the hands of a vendee;[37] or a right to the proceeds of a business;[38] or a decretal debt,[39] or the interest of the purchaser of the lottery in the prize money,[40] or a right to participate in the draw to be held in a lottery,[41] or dividends of a share in a company.[42]

A right to a sum of money is property. Merely because the claims pending before the arbitrator are liable to be reduced in the award to be passed by him, or that the court would

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30. *Chandra Shekar Gowda v Canara Bank,* AIR 1983 Kant 233, p 235.
31. *Mulji Mehta & Sons v C Mohan Krishna,* AIR 1997 AP 153.
32. *Ramakrishna v Kurukal,* (1888) ILR 11 Mad 445.
33. *Jaffer Meher Ali v Budge-Budge Jute Mills Co,* (1906) ILR 33 Cal 702, on app (1907) ILR 34 Cal 289, followed in *Hunsraj v Nathoo,* (1907) 9 Bom LR 838; *Laxmidhar Behera v Bansidhar Khatei,* AIR 1989 Ori 182, p 184; *Mulji Deoji v UOI,* AIR 1957 Nag 31; but see *Ibrahim v UOI,* (1964) ILR Guj 928 : 5 Guj LR 879 : AIR 1966 Guj 6.
34. *Thawerdas v Seth Vishindas,* 79 IC 384 : AIR 1925 Sau 72; Re *Bainbridge, Ex parte Fletcher,* (1878) 8 Ch D 218; *Mulchand v Shamdas,* 194 IC 380 : AIR 1941 Sau 73; and see *Bharat Prasad v Paras Singh,* AIR 1964 All 15.
35. *Somashekarrao v K S Mishra,* AIR 1944 Nag 185; *Varjivandas v Maganlal,* (1937) 39 Bom LR 493 : 170 IC 850 : AIR 1937 Bom 382.
36. *Chinnapareddi v Venkataramanappa,* AIR 1942 Mad 209.
37. *Agrenath v Ram Ratan,* (1938) All LJ 854 : 177 IC 700 : AIR 1938 All 544.
38. *Alkash Ali v Nath Bank,* AIR 1951 Assam 56.
39. *Ambika Prasad Singh v Ram Charitar Singh,* AIR 1951 Pat 419; *Ahmad Hossain v Bibi Naeman,* AIR 1963 Pat 30.
40. *Mohideen Sahib v Ameena Bi,* AIR 2007 Mad 13.
41. *Anraj v Govt of Tamil Nadu,* AIR 1986 SC 63 : (1986) 1 SCC 414.
42. *Daya Bai v Ambalal,* AIR 1981 SC 156.

not allow enhancement of the awarded amount for which it is pending in the court, it would make no difference.[43]

There was a gift of actionable claim valued at rupees three lakhs, out of donor's right, title and interest as a whole in the firm. It was held that the transaction amounted to a gratuitous transfer of an actionable claim to which section 137 (in preference to section 130) applied, and there was a valid gift thereof to the minor donees.[44]

(7) Transfer of Actionable Claims

This section of the TP Act, as observed by J Rankin in a Calcutta case,[45] contains a very special scheme which has some of the features of both the English common law, and of equity.

Thus, in equity, debts were assignable and also contingent interests and future property when the assignment was for valuable consideration.

Choses in action have been classed according to the procedure adopted for reducing them into possession. Legal choses in action were those enforceable by action at law, such as promissory notes, bills of exchange or policies of insurance.[46] Equitable choses in action, sometimes called choses in equity, were enforced by action in equity, e.g. a beneficial interest in a partnership,[47] or an interest in a trust fund.[48]

The remedy of the assignee was imperfect. At law, he had to sue in the name of the assignor on giving him an indemnity against costs. In equity he could sue in his own name, but there had to be consideration for the assignment, and the assignee could not sue the debtor in equity, but had to sue in law in the name of the assignor, unless the assignor had refused to allow the assignee to sue in his name.[49] Moreover, the assignee could not give a valid discharge, unless expressly empowered to do so by the assignment.

The section of the TP Act has some of the features of the statutory and some of the equitable modes of assignment. It resembles equitable assignment in that it applies to assignments, by way of charge as well as to absolute assignments, and takes effect as between the assignor and the assignee from the date of the assignment. On the other hand, it resembles a statutory assignment in that it must be in writing, and that it enables the assignee to sue in his own name, and to give a valid discharge.

In *Loknarayan Sethia v State Bank of Jaipur,*[50] the Supreme Court was called upon to decide whether an irrevocable power of attorney in favour of a creditor to execute a decree on behalf of the debtor-decree-holder constituted an equitable assignment. The court held that it did, as it was an engagement to pay out of a specific fund, viz the decretal amount. This decision was followed by the Supreme Court in *Bharat Nidhi Ltd v Takhatmal,*[51] where it held that an irrevocable power of attorney authorising the creditor-bank to receive moneys

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43. *Laxmidhar Behera v Bansidhar Khatei,* AIR 1989 Ori 182; See *Shivnarayan Laxminarayan v State of Maharashtra,* AIR 1980 SC 439; *State of Madhya Pradesh v Ranojirao Shinde,* AIR 1968 SC 1053.
44. *Controller of Estate Duty v Godavari Bai,* AIR 1986 SC 631 : (1986) 2 SCC 264.
45. *Sadasook Ramprotap v Hoare Miller & Co,* (1923) 27 Cal WN 733 : 80 IC 632 : AIR 1923 Cal 719; *Ranjit Roy v D A David,* (1934) ILR 62 Cal 1 : 38 Cal WN 1190 : AIR 1935 Cal 218 : 155 IC 193.
46. *Chowne v Bayliss,* (1862) 31 Beav 351; *Corporation Bank, Bangalore v Lalitha H Hola,* AIR 1994 Kant 133.
47. Re *Bainbridge, Ex parte Fletcher,* (1878) 8 Ch D 218.
48. *Pigott v Stewart,* (1875) WN (Eng) 69.
49. *Hammond v Messenger,* (1838) 9 Sim 327, p 332.
50. *Loknarayan Sethia v State Bank of Jaipur,* [1969] 1 SCR 122 : AIR 1969 SC 73 : [1968] 2 SCJ 851.
51. *Bharat Nidhi Ltd v Takhatmal,* [1969] 1 SCR 595 : AIR 1969 SC 313 : [1969] SCJ 367.

due or that may become due to the borrower, coupled with a bill endorsed in favour of the bank for collection, constituted an equitable assignment.

Assignment of non-performing assets between banks and financial institutions are covered by the RBI guidelines, which is a complete code and therefore the provisions of the Transfer of Property Act, 1882 are not applicable.[52]

(8) Assignment of Debts

As an actionable claim includes future debts, there can be a valid assignment of a future debt,[53] e.g. of salary to become due,[54] or of future book debts,[55] or of future rents.[56] An outstanding in the account of the borrower is a debt due to the bank and consequently its assets which can validly be assigned by the bank. Such assignment does not amount to trading in debts.[57] In an earlier case,[58] the same court held that a part of a debt could not be assigned, and now that the legislature has abolished partial subrogation, this would seem to be correct. The Calcutta High Court followed the earlier Madras case that a part of a debt could not be assigned.[59]

The question was considered by the Patna High Court,[60] which said that in India, the definition of an actionable claim, i.e., a claim to a debt which could not be enforced by action, e.g. when it was barred by limitation, was not property, and the same limitation must apply to a part of a debt which could not be sued upon under O 2, rule 2 of the Code of Civil Procedure. Therefore, although the TP Act did not make any distinction between whole debt and part of a debt and both might be transferred, the transferee might find that what had been transferred to him was not an actionable claim. It may be noted that it was a case of a separate and distinct debt, and the above observations of the learned judges were in the nature of obiter dicta. The Lahore High Court has, however, dissented from the Patna case, and held that a part assignment of a debt is valid in law and an action can be maintained thereon by the transferee, provided he makes the transferor and any other transferee who may be concerned parties to the suit, and that O 2, rule 2 of the Code of Civil Procedure has no bearing on the question.[61] It may be mentioned that although a decree is not an actionable claim, it has been held that there cannot be transfer of part of the decree.[62]

(9) Assignment of Contracts

The benefit of a contract can be assigned but not the burden, for the promisor cannot shift the burden of his obligation without a novation. If the contract has been broken, nothing is left, but a right to sue for damages, which cannot be assigned—section 6(e)—although a difference due on cross contracts in which delivery was not to be given or taken,

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52. *Gorakhpur Steels and Metals Pvt Ltd v Presiding Officer, DRT,* AIR 2017 All 224 : 2017 (9) ADJ 168 : 2017 (125) ALR 115.
53. Ibid.
54. *Jones v Humpherys,* (1902) 1 KB 10.
55. *Tailby v Official Receiver,* (1883) 13 App Cas 523; approved by the Supreme Court in *Bharat Nidhi Ltd v Takhatmal,* AIR 1969 SC 313.
56. *Knill v Prowse,* (1884) 33 WR 163.
57. *ICICI Bank Ltd v Official Liquidator of APS Star Industries Ltd,* AIR 2011 SC 1521 : (2010) 10 SCC 1.
58. *Doraiswami Mudaliar v Doraiswami Aiyangar,* (1925) 48 Mad LJ 432 : 87 IC 382 : AIR 1925 Mad 753.
59. *Ghisulal v Gambhirmal,* (1934) ILR 62 Cal 510 : AIR 1938 Cal 377 : 39 Cal WN 606 : 164 IC 111.
60. *Durga Singh v Kesho Lal,* (1939) ILR 18 Pat 839 : 185 IC 514 : AIR 1940 Pat 170.
61. *Ram Kishen v Girdhari Lal,* AIR 1941 Lah 337 : 97 IC 735.
62. *Narandas v Tejmal,* (1932) ILR 58 Bom 226; *Kusum Kamini v Sailes Chandra,* (1934) 38 Cal WN 1053.

has been held to be a debt or actionable claim.[63] However, if the contract has been executed, the promisor having discharged the burden, may assign the benefit. If the contract is still executory, the assignment involves a delegation of performance to the assignee, and hence it is said that contracts involving special personal qualifications are not assignable.[64] The Calcutta High Court in *Jaffer Meher Ali v Budge-Budge Jute Mills Co,*[65] and the Bombay High Court in *Hunsraj v Nathoo,*[66] held that the interest of a buyer of goods in a contract for forward delivery can be assigned as an actionable claim. In the former case, J Sale said:

> The rule as regards the assignability of contracts in this country is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term *benefit*, the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby. This rule is, however, subject to two qualifications: first, that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil, and next that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it.

The right to call for payment of goods delivered would be a mere right to suit, and, therefore, under section 6(e), not transferable.

The benefit of a contract giving an option to purchase land may be assignable,[67] or it may be personal to the party to whom the option is given, and, therefore, not capable of assignment.[68] The benefit of a contract giving a power of submission to arbitration is personal to the parties, and cannot be assigned. It was so held in a Sind case following an earlier case.[69] In a later English case, however, it was held, distinguishing the earlier case, that if the benefit of the main contract is assignable, the benefit of the clause giving power of submission to arbitration can also be assigned.[70] In the instant case, no instrument got executed to say that the case of the petitioner was covered by section 130 of the TP Act, and to indicate that property in the cargo, passed in the favour of petitioner. Since it was apparent that neither the title in the cargo, nor in the claim had been transferred by the endorsement made on behalf of the Union of India, the petitioner could not take shelter under section 130 of the TP Act, for the position of the petitioner was just of an agent who could not sue in his own name. Therefore, the petition for referring the dispute to an arbitrator was not maintainable.[71] An agreement for the sale or purchase of immovable property is a contract, the benefit of which can be assigned, unless the performance depends upon something personal or special.[72] Similarly, the right to demand the reconveyance of property is assignable.[73]

In order that an assignment should be effective, all the interest of the assignor under the contract must be transferred and conveyed to the assignee. The only question which the

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63. *Nagappa v Badridas,* (1930) 32 Bom LR 894 : 127 IC 410 : AIR 1930 Bom 409.
64. *Beckham v Drake,* (1849) 2 HL Cas 622 : 81 RR 329; *Tolhurst v Associated Portland Cement Manufacturers,* (1902) 2 KB 660 (CA) : (1903) AC 414 : [1900-03] All ER Rep 386; *Toomey v Rama Sahai,* (1890) 17 Cal 115, p 121; *Namasivaya Gurukkul v Kadir Ammal,* (1894) 17 Mad 168.
65. Calcutta High Court in *Jaffer Meher Ali v Budge-Budge Jute Mills Co,* (1906) ILR 33 Cal 702, p 707 : on app (1907) ILR 34 Cal 289.
66. *Hunsraj v Nathoo,* (1907) 9 Bom LR 838.
67. *Sakalaguna Nayudu v Chinna Munuswami,* (1928) ILR 51 Mad 533 : 55 IA 243 : 109 IC 765 : AIR 1928 PC 174.
68. *Gobardhan v Raghubir Singh,* (1930) 28 All LJ 799 : 124 IC 405 : AIR 1930 All 101.
69. *Desa v Girdharilal,* 139 IC 605 : AIR 1932 Sau 128, following *Cottage Club Estates v Woodside Estates Co,* (1928) 2 KB 468 : [1927] All ER Rep 397.
70. *Shailer v Woolf,* [1946] 2 All ER 542.
71. *HFC Ltd v Great Eastern Shipping Co Ltd,* (1998) 74 DLT 82.
72. *Bhabhootmal v Moolchand,* (1943) ILR Nag 643 : 209 IC 25 : AIR 1943 Nag 266.
73. *Andalammal v Alamelu Ammal,* AIR 1962 Mad 378.

court has to consider with respect to the assignment is whether the debtor would get a complete and proper discharge if he paid the assignee.[74]

(10) Mode of Assignment

No particular form of words is necessary in order to effect an assignment, if the intention is clear from the language used.[75]

Section 130 does not require that any particular words be used or any particular form be adopted, or that the terms of transfer must be discernible from a single instrument. There should be an intention to transfer the debt represented by the receipt, and the intention must be evidenced in writing.[76]

An assignment can be absolute or by way of security; but a deposit merely creating a pledge cannot amount to an assignment.[77] The delivery of a bond to *A*, with a letter requesting the debtor to pay *A*, constitutes an assignment of the bond to *A*.[78] In *Hunsraj v Nathoo*,[79] an endorsement on the back of a contract for the purchase of goods by the purchaser that he had sold all his rights and interest in the contract to a person named, was held to be a transfer of an actionable claim. A declaration by a retiring partner that he has no interest does not operate as a transfer to the remaining partners.[80] But where there has been an oral assignment of an actionable claim, a subsequent letter recording the transfer is a sufficient instrument in writing for the purposes of the section.[81]

A deed of assignment is treated only for assignment of the rights as creditor by conveying the rights in the immovable properties or security interests, and therefore the requirement under law providing for the documents to be registered would not be applicable.[82] An Assignment of debt and Non-Performing Assets by one bank to another bank without assigning assignor's obligations towards its borrowers and debtors is not violative of the Act.[83]

A power of attorney executed by a company authorising the bank to demand and receive the rent from its tenant, was held not to create any equitable assignment in favour of the bank.[84] A promissory note which is not negotiable may be transferred by a separate deed,[85] and a direction endorsed on such a promissory note operates as an assignment.[86] If the

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74. *Jethalal Nagji v Bombay Municipal Corpn,* (1954) ILR Bom 424 : 55 Bom LR 901 : AIR 1954 Bom 167.
75. *Rama Iyer v Venkatachallam Patter,* (1907) ILR 30 Mad 75; *Nanak Chand Kishori Lal v Ram Sarup Gujar Mal,* 78 IC 163 : AIR 1924 Lah 684; *Brahmayya & Co v Thangavelu,* AIR 1956 Mad 570; *Mohanlal v Loan Co of Assam,* AIR 1960 Assam 191.
76. *Simon Thomas v State Bank of Travancore,* (1976) KLT 554.
77. *Official Assignee v Hukumchand,* (1941) ILR Mad 378 : (1940) 2 Mad LJ 891 : 195 IC 422 : AIR 1941 Mad 147.
78. *Konjeti Veeraswamy v Varada,* (1913) 13 Mad LJ 77 : 16 IC 708
79. *Hunsraj v Nathoo,* (1907) 9 Bom LR 838.
80. *Dharm Chand v Mauji Sabu,* (1912) 16 Cal LJ 436 : 16 IC 440.
81. *Jivraj v Lalchand & Co,* (1932) 34 Bom LR 837 : 139 IC 582 : AIR 1932 Bom 446; and see *Muthuveeran Chetty v Govindan Chetty,* (1961) ILR Mad 908 : (1961) 2 Mad LJ 470 : AIR 1961 Mad 518.
82. *Kotak Mahindra Bank v Balaram Cements Ltd,* 2010 SCC OnLine Guj 13830 : (2011) 104 AIC (Sum 20) 12 : III (2011) BC 263 : 2011 (3) KLJ 809.
83. *ICICI Bank Ltd v Official Liquidator of APS Star Industries Ltd,* (2010) 10 SCC 1 : LNIND 2010 SC 945 : AIR 2011 SC 1521 : 2010 (10) SCALE 378.
84. *Corpn Bank, Bangalore v Lalitha H Hola,* AIR 1994 Kant 133; see *Seth Loonkam v Ivan E John,* AIR 1969 SC 73; and *Bharat Nidhi Ltd v Takhatmal,* AIR 1969 SC 313, where power of attorney contained ingredients of equitable assignment.
85. *Sugappa v Govindappa,* (1902) 12 Mad LJ 351.
86. *Rama Iyen v Venkatachellam Patter,* (1907) ILR 30 Mad 75.

promissory note is negotiable, some early cases supposed that the note could not be assigned as an actionable claim.[87] But later cases have held that even if the promissory note is negotiable, it may be assigned by an instrument in writing, although such an assignment renders the assignee under section 132 subject to the equities to which his assignor was subject.[88] A promissory note cannot be assigned, but there can be an assignment of a debt.[89] A document whereby the owner of a government promissory note authorises a person to recover the note or its value from the person with whom it is deposited, operates as an assignment.[90] Whenever transfer of actionable claim is intended, the hypothecation deed relating to actionable claim and followed by a document vesting a right to receive the money and to give full discharge to the debtor is normally adopted:—

(1) If the actionable claim takes the form of a negotiable instrument like a promissory note, mere hypothecation will give the hypothecatee an equitable right of charge or right to proceed against it as security. Of course, the hypothecation itself will not enable recovery of the money due under the promissory note, until a decree is obtained.

(2) However, if there is an endorsement transferring the right under the promissory note, the actionable claim itself is transferred, and the transferee would be in a position to recover the money due under the promissory note without obtaining a decree on the debt itself.

(3) Where actionable claim is merely an intangible asset, the transfer is effected (a) only by the execution of a hypothecation bond with a right to recover the same; or (b) by a regular transfer of the debt itself by a document.[91]

In a case already cited,[92] J Ramesam said that the instrument of transfer should, in general, be in favour of the assignee. The learned judge used the words "in general", for when the obligee of a bond delivered it to *A* without any endorsement, but gave a letter to the debtor requesting him to pay *A*, this was held to constitute an assignment.[93] Again in a Bombay case,[94] J Chandavarkar held that a *havala* or letter authorising a person to recover a sum of money due to the writer was an assignment. The provisions of this section have been held to override the rules of Mahomedan Law relating to the acceptance of a gift of an actionable claim; such a gift was held to be complete even without acceptance.[95]

ILLUSTRATION

A, a contractor, was owed ₹ 2,156 by the Public Works Department. He intended to assign ₹ 1,600 of this money to a creditor, *B*, and accordingly wrote two letters—(1) to the creditor assigning ₹ 1,600 out of the debt to him; and (2) to the executive engineer giving him notice of the assignment. Letter (1) was lost and secondary evidence of its contents was

87. *Pattal Ambadi Marhar v Krishna,* (1888) ILR 11 Mad 290; *Abhoy Chetti v Ramchandra Rao,* (1894) ILR 17 Mad 461; *Arunachala Reddi v Reddy Subba,* (1907) 17 Mad LJ 393.
88. *Muhammad Kumarali v Ranga Rao,* (1901) ILR 24 Mad 654 (endorsement invalid, being by one of two payees, treated as an assignment to the other payee); *Muthar Sahib v Kadir Sahib* (1905) ILR 28 Mad 544; *Roman Chetty v Nagarathna Naicker,* (1912) 11 MLT 246 : 15 IC 380; *Akhoy Kumar v Haridas Bysack,* (1914) 18 Cal WN 494 : 22 IC 500; *Venkatarama Ayyar v Krishnaswami Chettiar,* 138 IC 262 : AIR 1933 Mad 133.
89. *Mulji Mehta & Sons v C Mohan Krishna,* AIR 1997 Pat 153.
90. *Kattick Ramunni v Udayamangalath,* 14 IC 279.
91. *State Bank of India, Madras v Venkateswara Stores,* AIR 1987 Mad 221.
92. *Doraiswami Mudaliar v Doraiswami Aiyangar,* (1925) 48 Mad LJ 432 : 87 IC 382 : AIR 1925 Mad 753.
93. *Konjeti Veeraswamy v Varada,* 16 IC 708.
94. *Nandubai v Gau,* (1903) ILR 27 Bom 150.
95. *Iqbal Mahomad Khan v Controller of Estate Duty,* (1965) 1 ITJ 751.

not admissible as it was not stamped. It was then contended that the notice, letter (2) operated as an assignment. This contention was repelled as the letter was not addressed to the assignee, did not contain words of transfer, did not require payment out of a specific fund, and referred only to part of the debt.[96]

The assignment of debts by the bank company to another banking company or non-banking company is not a transfer of property. As section 130 applies to a case where actionable claim, an assignment of debt/NPA with right to recover debt by state Bank of India to Banking Company is a valid transaction and such transaction is neither prohibited under the Transfer of Property Act nor is volatile of public policy.[97] The transfer of bare licences to use brand and accounting software free of charge for a limited period does not amount the conferral of a property right in either case so as to constitute transfer of a capital asset.[98]

(11) Pay Order

Section 130 seems to require a transfer in writing addressed to the assignee, but the English rule under which, assignments, both equitable and legal, can be made by a direction to the debtor, has no doubt, influenced Indian decisions. It is, therefore, necessary to distinguish an assignment from a mandate or a pay order. A pay order is a revocable mandate. It gives the payee no interest in the fund. An assignment creates an interest in the fund, and is not revocable.[99] A pay order generally presupposes moneys of the drawer in the hands of the party to whom the order is addressed, held on terms of applying such moneys as directed by the order of the person entitled to them.[100] Again, a pay order is revocable, while an assignment is not, and a pay order ceases to be operative after the death of the creditor, while an assignment does not.

The Indian cases are not very consistent. Thus, while the delivery of a bond with a letter to the debtor directing him to pay was held to be an assignment,[101] yet the delivery of a banker's deposit receipt with a letter to the bank directing payment was held to be only a pay order.[102] However, in *Thakur Das v Malik Chand*,[103] a letter by a dairy man to the purchasers of his milk supply, directing them to pay the price of milk supplied to his creditor, was held to be an assignment; while in a Calcutta case,[104] a vendor's endorsement on a bill for goods sold requesting the purchaser to pay the amount to a third person, who would collect the amount on behalf of the vendor, was correctly held to be a pay order. That decision was distinguished in a later Calcutta case,[105] where the direction was unconditional and irrevocable. This was because there was no transfer, but a receipt of the money as agent of the creditor. In a Patna case, a letter of authority written by a debtor of a society authorising his

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96. *Daraiswami Mudaliar v Daraiswami Aiyangar,* (1925) 48 Mad LJ 432 : 87 IC 382 : AIR 1925 Mad 753. See *Madan Manohar v Narayan Sadashio,* (1958) 60 Bom LR 1012.
97. *Kotak Mahindra Bank Ltd v Chopra Fabricator and Manufacturers P Ltd,* 2010 SCC OnLine All 2616: AIR 2011 All 19 : LNIND 2010 ALL 47.
98. *Vodafone International Holdings BV v UOI,* (2012) 6 SCC 613 : 2012 (1) SCALE 53 : 2012 (1) UJ 334 : JT 2012 (1) SC 410.
99. *Bharat Nidhi Ltd v Takhatmal,* [1969] 1 SCR 595 : AIR 1969 SC 313 : [1969] 1 SCJ 367.
100. *Buck v Robson,* (1878) 3 QBD 686, p 691.
101. *Konjeti Veeraswamy v Varada,* (1913) 13 Mad LJ 77 : 16 IC 708.
102. *Sethna v Hemingway,* (1914) ILR 38 Bom 618 : 28 IC 114; cf Re *Griffin,* (1899) 1 Ch 408 and Re *Westerton, Public Trustee v Gray,* (1919) 2 Ch 104
103. *Thakur Das v Malik Chand,* (1933) ILR 14 Lah 325 : AIR 1933 Lah 102; *Jat Mal v Hakam Mal Tani,* 128 IC 494 : AIR 1930 Lah 820; *Khaman Lal v Sant Lal,* (1897) PR 43.
104. *Kissen Gopal v Bavin,* (1926) 42 Cal LJ 43 : 89 IC 735 : AIR 1926 Cal 447.
105. *Prakash Chandra v Kays Construction Co,* (1962) 66 Cal WN 483 : AIR 1962 Cal 604, followed in *Daga Films v Lotus Productions,* AIR 1988 Cal 280, p 282.

employer to deduct from the amount of his salary, sums due to the society, was held as not constituting an assignment of an equitable charge.[106] A mere authority or power of attorney to recover debts does not constitute an assignment, as such attorney is the agent of the creditor.[107] In another case, where the subscribers of a company purchasing chits from the company, deposit money with a bank for payment to the company of the instalments of the chits as and when they fall due, it has been held that the money deposited by subscribers with the bank operates as a valid assignment in favour of the company.[108] Similarly, an agreement to advance funds for indenting stamps under which the stamps were deposited with the creditor as security, and under which it was agreed that its proceeds were to be handed over to him towards repayment, was held to amount to an equitable assignment.[109]

(12) Novation

In a Bombay case,[110] one *M* owed a sum of ₹ 27,500 to G & Co As against that amount, G & Co held, as pledges, 212 bales of cotton belonging to *M*. At the same time, *M* was also a debtor of one *J* for a certain sum of money. As between *M*, *G* & Co and *J*, a tripartite agreement was arrived at, whereby *J* took over the liability of *M* to pay G & Co, and G & Co agreed that they would hold 212 bales to the account of *J* instead of the account of *M*. G & Co thereafter wrote the following letter to J—"212 bales of *M* are credited to your account as per his and your instructions and ₹ 27,500 have been debited to your account and credited to the account of *M*." Under the above circumstances, the court held that the transaction amounted to a novation, and section 130 had no application.

(13) Whether with or Without Consideration

The words "whether with or without consideration" have been inserted by Act 20 of 1929 to include cases of gifts of choses in action. As to an assignment for consideration, it has been held that a conditional assignment by way of security is valid.[111]

The question of payment of consideration is, in fact, one between the assignor and assignee, and the debtor cannot take advantage of non-payment of the consideration for the assignment.[112]

(14) Instrument in Writing

The section embodies an important alteration of the law, for a transfer of an actionable claim cannot be made otherwise than by writing.[113] The Supreme Court has, however, observed in *Bharat Nidhi Ltd v Takhatmal*[114] that a document can amount to an equitable assignment independently of section 130. These observations suggest that a transfer of actionable claims may be recognised even if not in compliance with section 130. An entry in a settlement of account between the assignor and assignee is sufficient,[115] but an oral transfer

106. *BNR Employees Urban Bank v Seager,* 201 IC 342 : (1942) ILR AP 307.
107. *Takhatmal v Bharat Nidhi Ltd,* AIR 1963 MP 132; *Bank of the East, (1927) Ltd v State of Assam,* AIR 1958 Assam 22; *Gauhati Bank v Rajendra Nath,* AIR 1959 Assam 167.
108. *TN Subsidiary Co v T N & Q Bank,* AIR 1940 Mad 258.
109. *Venkata Rao v China Venkatapathy,* AIR 1965 AP 410.
110. *Jivraj v Lalchand & Co,* (1932) 34 Bom LR 837, p 838 : 139 IC 582 : AIR 1932 Bom 446.
111. *Muthukrishnaier v Veeraraghava,* (1915) ILR 38 Mad 297 : 21 IC 316; *Venkatachalam v Subramania,* (1912) Mad WN 461 : 14 IC 144; *Simon Thomas v State Bank of Travancore,* (1976) KLT 554.
112. *Narain Food Products Ltd v Tikam Chand,* AIR 1973 All 573.
113. *Velayuthan v Pillaiyar Chetti,* (1911) 9 Mad LT 102 : 9 IC 287.
114. *Bharat Nidhi Ltd v Takhatmal,* [1969] 1 SCR 595 : AIR 1969 SC 313 : [1969] 1 SCJ 367.
115. *Seetharama Iyer v Narayanasami Pillai,* 47 IC 749.

is invalid.[116] But under the old section before the Act of 1900, a parol assignment was valid.[117] As the assignment must be in writing, an equitable mortgage or charge is not created by the deposit of a policy of insurance.[118]

ILLUSTRATION

The deceased had insured his life, and in 1904, deposited the policy with *A* to secure present and future debts. In 1909, the deceased executed a written deed of assignment of the policy to *B*, and then committed suicide the day after the notice of the assignment was received by the insurance company. *B* being an assignee in writing, was entitled to payment. The deposit of the policy with *A*, not being accompanied with a written transfer, did not create a charge on the policy. Lord Moulton said—In the present case the respondent bases his claim on a deposit of the policy and not under a written transfer and claims that this creates a charge on the policy. The section specifically enacts that such a proceeding shall not have any such effect, such a charge can only be created by a written document. It follows that the respondent acquired no right whatsoever to the policy or its proceeds by reason of the deposit.[119]

Again, while an oral gift can be made of a cash balance, there can be no valid oral gift of rents in arrears and current dues, for the latter are actionable claims.[120]

ILLUSTRATION

A debt was due by *A* to *B* for work done. *B* gave his creditor *C* a power of attorney and deposited with him vouchers for the work in order to enable him to get payment. Before *C* could draw the money, the debt was attached by another creditor. Held that *C* had no lien or charge on the money, for there was no written assignment of the debt.[121]

In Punjab, where the TP Act is not in force, an assignment of an actionable claim may be made orally.[122]

(15) Upon Execution of Such Instrument

The assignment is effectual from the date of the assignment. This is a departure from the English section by which the assignment only operates from the date of notice, though an equitable assignment is complete as between the assignor and the assignee, even when no notice is given to the debtor.[123] Under the old section, the assignment operated against the debtor from the date of express notice given to him, unless he was a party to or otherwise aware of the transfer of the debtor who were a party to the transfer, the case would be one of novation, and there would be no doubt as to his liability.[124] However, the words "otherwise aware of such transfer" had the effect of admitting constructive notice, and the section was interpreted to mean that the assignment was not void, but that its operation was suspended as against the debtor until he had notice of it, and it was sufficient if the debtor was made

116. *Raman Chetty v Nagarathana Naicker,* (1912) 11 Mad LT 246 : 15 IC 380.
117. *Autu Singh v Ajudhia Sahu,* (1887) ILR 9 All 249, p 251; *Ganga Prasad v Chandrawati,* (1885) ILR 7 All 256.
118. *Mulraj Khatau v Vishwanath,* 40 IA 24 : (1913) ILR 37 Bom 198 : 17 IC 827; *Official Assignee v Thompson,* 30 IC 602.
119. *Mulraj Khatau v Vishwanath,* (1913) ILR 37 Bom 198.
120. *Rameshwar Narain Singh v Riknath Koeri,* 67 IC 451 : AIR 1923 Pat 165
121. *Sidambaram Nadar v D R Maganlal Brothers,* (1929) ILR 7 Rang 365 : AIR 1929 Rang 318.
122. *Teja Singh v Kalyan Das,* (1925) ILR 6 Lah 487 : 91 IC 778 : AIR 1925 Lah 575; *Lacha Ram v Hem Raj,* 134 IC 121 : AIR 1932 Lah 30.
123. *Gorringe v Irwell,* (1886) 34 Ch D 128 (CA).
124. *Ganga Prasad v Chandrawati,* (1885) ILR 7 All 256; *Autu Singh v Ajudhia Sahu,* (1887) ILR 9 All 249.

aware of it by the writ served upon him in the assignee's suit.[125] These cases are now obsolete, for by the present section, the assignment takes effect from its date, and the rights of the debtor are safeguarded by the proviso.

(16) Proviso

The proviso is intended for the protection of a debtor who, without knowledge of the assignment, pays his creditor after the assignment. Such a payment is a valid discharge as against the assignee, if the debtor has not been a party to the assignment or has not received express notice of it. When the debtor has been a party, there has been a novation, and he has accepted the assignee as his creditor instead of the assignor. A debtor, the debt due from whom has been assigned over to a third person, cannot, after the notice of the assignment of the debt pay a portion of the debt, even under the order of the court in a case to which the assignee was not a party, so as to protect him from paying it over again to the assignee.[126] Express notice must be a notice in writing as required by section 131. Constructive notice is no longer sufficient.

The undernoted Madras case,[127] is an instance of the application of the proviso. The creditors had hypothecated a debt due to them by a railway company to the plaintiffs. They gave the plaintiffs a power of attorney to collect the debt, and the plaintiffs gave notice of the assignment to the company. The company, for no apparent reason, refused to recognise them and paid the creditors, and they had to make a second payment to the plaintiffs.

The principle of the proviso was applied in a Patna case.[128] A judgment debtor who had no notice of the assignment of the decree paid the decretal amount into court under O 21, rule 1(l)(a) of the Code of Civil Procedure. The decree was held to be discharged, although no notice of the payment had been given to the decree-holder under sub-rule (2), and the assignee was not entitled to execute the decree. The assignee cannot recover from the debtor a debt which he has paid without notice of the assignment, but he has his remedy against the creditor who is accountable to him for what he has recovered after his assignment.[129] However, in *UOI v Sri Sarada Mills*,[130] it has been held that where a consignee subrogated its rights to an insurer in consideration of receiving the claimed amount, it could still sue the railways for the loss of the goods. In this case, the insurance company had allowed the assignor to sue the railways.

(17) Priority

Under the English law, priority in the case of successive assignments of choses in action, each one without notice of the earlier one, is determined by the date of notice to the debtor. However, in India, no such notice to the debtor is necessary to perfect the assignee's title. Under section 130, the title vests in the assignee on the execution of the transfer deed and no further action on his part, e.g. sending of notice, is necessary to complete his title. In such cases, priority had ordinarily to be determined with reference to the date on which title vested in the transferee, i.e., the date of execution of the transfer

125. *Lala Jagdeo v Brij Behari,* (1886) ILR 12 Cal 505; *Subbammal v Venkata,* (1887) ILR 10 Mad 289; *Kalka v Chandan,* (1888) ILR 10 All 20; *Ragho v Narayan,* (1897) ILR 21 Bom 60.
126. *Burma Shell Co v Official Receiver,* (1943) ILR Mad 587 : (1942) 2 Mad LJ 661 : 207 IC 317 : AIR 1943 Mad 244.
127. *Gopalakrishna v Gopalakrishna,* (1910) ILR 33 Mad 123 : 4 IC 420.
128. *Tata Iron & Steel Co Ltd v Baidyanath,* (1923) ILR 2 Pat 754 : 76 IC 55 : AIR 1924 Pat 118.
129. *Fortescue v Barnett,* (1834) 3 My & K 36; Re *Patrick, Bills v Tatham,* (1891) 1 Ch 82, p 87.
130. *UOI v Sri Sarada Mills,* AIR 1973 SC 281 : (1972) 2 SCC 877.

deed. The proviso to section 130 is only for the benefit of the debtor, and it has nothing to do with the title of the transferee, or with priority of claims.[131]

In a Supreme Court case, certain trust property consisted of income from dividends on shares in companies and managing agency commission. The beneficiaries were also trustees under the trust deed. The beneficiaries effected two assignments of the trust property to two different creditors. The first assignee gave notice of assignment to the trustees/beneficiaries. He was held to have priority in receiving the trust income over the other assignee. In such a case, it could not be objected that the first assignee was negligent by failing to notify the companies whose shares were the trust property. In the facts of the case, the second assignee, to claim benefit as a bona fide transferee, ought to have made inquiry from the trustees, and not from companies who would have neither recognised a trust, nor an assignment. Also, there was no further obligation on the part of the first assignee to obtain a power of attorney, so as to make arrangements for directly receiving the dividend from the companies. The companies may, or may not, recognise such authority.[132]

(18) Right to Suit

The section follows the English statutory rule by which the assignee has the right to sue in his own name and give a valid discharge, but while the English rule is limited to absolute assignments, the section embraces all assignments. In fact, after the assignment, the assignee is the only person who is entitled to recover the debt.[133] The second illustration shows that after the death of the assignor, his executor is not a necessary party to the suit. In *Sham Kumari v Rameswar Singh*,[134] when a mortgagor assigned a debt to a mortgagee and the latter made no attempt to recover it, he was debited with the amount in the mortgage account.

Where the goods entrusted to the transport carrier by the consignor, an unregistered firm, were, on delivery by the carrier to the consignor, found damaged and the insurance company with which the goods were insured, made payment of the damages to the consignor, the assignment by the consignor of its right to indemnification from the carrier to the insurance company would be valid under section 130, and would not be hit by section 6(e).[135]

(19) Marine or Fire Policies

Policies of marine or fire insurance are excepted from this section, as they cannot be assigned apart from the property insured. (section 135.)

(20) Stocks and Shares

Debentures, negotiable instruments, and mercantile documents of title are excepted from this section by section 137.

The assignment of dividend is subject to section 53, Companies Act, 1956.[136]

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131. *Subramania v Subba*, (1935) ILR 59 Mad 141.
132. *Dahyabhai Chimanlal v Ambalal Hiralal*, AIR 1981 SC 1556.
133. *Muthukrishnier v Veeraraghava Iyer*, (1915) ILR 38 Mad 297 : 21 IC 716; *Arunachellam Chettiar v Madaswami*, (1920) 27 Mad LT 269 : 56 IC 146; Re *Narayanan Chettiar*, AIR 1958 Mad 34. And see *Walter & Sullivan v J Murphy Ltd*, (1955) 2 AB 584 : [1955] 1 All ER 843.
134. *Sham Kumari v Rameswar Singh*, (1904) ILR 32 Cal 27 : 31 IA 176.
135. *United India Fire & General Insurance Co Ltd v Transport Carriers*, AIR 1986 Pat 32.
136. *Daya Bai v Ambalal*, AIR 1981 SC 156.

(21) Fixed Deposits

A fixed deposit is not a deposit of specie, but is a debt or actionable claim, and a transfer of it can only be made by an instrument in writing under this section.[137]

A fixed deposit receipt is not a negotiable instrument. It represents a debt, and can be assigned under section 130.[138]

(22) Public Policy

Some actionable claims are not assignable on grounds of public policy. Such are salaries of public officers and military, civil and political pensions. (section 6(f) and (g) of TP Act.)

(23) Transfer by the Operation of Law

Actionable claims may also be transferred by operation of law. On the death of the person entitled, his actionable claims pass as a rule onto his legal representative. The legal representative is entitled to enforce performance of a contract with the deceased, unless his personal qualities were a material ingredient in the contract.[139] So also, on insolvency, the benefit of a contract with the insolvent,[140] or the right of an insolvent partner to sue for an account of a dissolved partnership,[141] vests in the official assignee; the right to sue for an account of a dissolved partnership being not a mere right to sue under section 6(e), but an actionable claim. Again, on the death of a joint tenant or co-partner, the interest in the actionable claim passes to the other joint holder. A reversioner succeeding to the estate of a Hindu widow on her remarriage can enforce an actionable claim held by the widow.[142]

(24) Dedication

Just as section 123 does not apply to a gift to an idol, so the dedication of an actionable claim, such as a bond, to an idol is not a transfer to which section 130 applies, and it may be made orally.[143]

(25) Redemption of Mortgage Without Notice of Sub-mortgage

A sub-mortgage being in the nature of an assignment of the mortgage, the principle underlying the proviso to sub-section (1) of section 130 of the TP Act, which is only a codification of the pre-existing law, has been applied to the case of a redemption of a mortgage by the mortgagor without the conjunction of the sub-mortgagee. The express notice contemplated by the proviso is not insisted upon, as the section is not in terms applicable; but if the redemption be without notice of the sub-mortgage, then it is valid and effective as against the sub-mortgage. Mere registration of the sub-mortgage is not notice thereof to the mortgagor, since by the redemption, he does not acquire the property transferred under the sub-mortgage or any part thereof.[144]

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137. *Maiyan Dalip Rajeshwari v Mohan Bikram,* AIR 1945 All 409.
138. *Central Board of Industries v Shamlal,* (1979) 81 Cun LR 22 (Delhi).
139. *Mohendra Nath v Kali Proshad,* (1903) ILR 30 Cal 265.
140. *Jaffer Meher Ali v Budge Budge Jute Mills Co Ltd,* (1907) ILR 34 Cal 289.
141. *Thawendas Jethanand v Seth Vishindas,* 79 IC 384 : AIR 1925 Sau 72.
142. *Hari Mahaton v Jugul Mahaton,* AIR 1954 Pat 32.
143. *Bhopatrao v Shri Ramchandra,* 96 IC 1004 : AIR 1926 Nag 469.
144. *Thamattor Chelamanna v Thamattoor Kurumbikkal Pare Mannakkal Parmeswaran,* AIR 1971 Ker 37 : (1970) Ker LT 313; *Krishnan Assari v Parmeswaran Pillai Madhavan Pillai,* AIR 1989 Ker 163, p 166.

[145][**130A. Transfer of policy of marine insurance.**—[*Rep. by the Marine Insurance Act, 1963 (11 of 1963), sec. 92 (w.e.f. 1-8-1963)*].]

131. Notice to be in writing, signed.—Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Synopsis

(1) Effect of Notice 1127
(2) Form of Notice 1127
(3) Waiver of Notice 1128
(4) Conditional Notice 1128

(1) Effect of Notice

It has been held that notice is not necessary when the assignment is by a registered document;[146] or where a transferee of the lessor is claiming rent, because this is not a case of a transfer of an actionable claim.[147]

It has been said that the assignment is not valid against the debtor until the debtor has in fact had notice of the assignment;[148] but a more correct statement of the effect of notice is that notice is not necessary to perfect the title to the assignee of a debt, but until the debtor receives notice of the assignment in accordance with law, his dealings with the original creditor will be protected.[149] Where the banking company assigns by way of transfer, the right to recover debt with rights of its sale, the assignee bank simply steps into the shoes of the assignor bank and the fact that no notice of such assignment was given to the debtor would not adversely affect the transfer, more so when statutory notice under section 434 of the Companies Act, 1956 has already been given.[150]

(2) Form of Notice

The notice must be an express notice in writing. The section is to be construed strictly, and in order that the exception in the proviso to section 130 should be operative, there must be a strict compliance with the requirements of section 131.[151] A notice which did not give the address of the transferee was held to be invalid.[152] But a notice is sufficient if it brings to the notice of the debtor with reasonable certainty, the fact that the deed does assign the debt;[153] and a notice would not, therefore, be defective merely because it does not mention the date of the assignment, or contains an erroneous statement that notice of assignment has already been given.[154] The section does not require that the notice must be given forthwith.

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145. Earlier section 130A was inserted by Act 6 of 1944, sec. 2.
146. *Prem Chand v Onkar Dutt,* AIR 1972 All 415.
147. *Mewa Lal v Tara Rani,* AIR 1973 All 165.
148. *Tata Iron & Steel Co Ltd v Baidyanath,* (1923) ILR 2 Pat 754 : 76 IC 55 : AIR 1924 Pat 118.
149. *Gopalakrishna v Gopalakrishna,* (1910) ILR 33 Mad 123 : 4 IC 420; *Sadasook Ramprotap v Hoar Miller & Co,* (1923) 27 Cal WN 733 : 80 IC 632 : AIR 1973 Cal 719; Re *Aviet Stephens,* 175 IC 786 : AIR 1938 Rang 1; *Balthazar v Official Assignee,* AIR 1938 Rang 426. See note "Priority" under section 130.
150. *Kotak Mahindra Bank Ltd v Chopra Fabricator and Manufacturer Pvt Ltd,* AIR 2011 All 19 : (2011) II BC 566.
151. *Sadasook Ramprotap v Hoar Miller & Co,* (1923) 27 Cal WN 733 : 80 IC 632 AIR 1923 Cal 719; *Bank of the East (1927) Ltd v State of Assam,* AIR 1958 Assam 22.
152. *Hunsraj v Nathoo,* (1907) 9 Bom LR 838; *Basant Singh v Burma Railways Co Ltd,* (1916) 8 Bom LR 288 : 30 IC 278.
153. *Denny, Gasquet and Metcalfe v Conklin,* (1913) 3 KB 177, p 180.
154. *Van Lynn Developments Ltd v Pelias Construction Co,* (1969) 1 QB 607 : [1968] 3 All ER 824 (CA).

What is reasonable notice would be a question of fact. There is no time-limit within which an assignee of a promissory note should give notice to the promisor. Notice given within one year was held to be reasonable.[155] The notice of a transfer would be given by the transferor and if given by the transferee, it should be alleged or shown that the transferor had refused to sign the notice.[156]

(3) Waiver of Notice

In *Sadasook Ramprotap v Hoar Miller & Co,*[157] it was suggested that the debtor might waive the provisions of section 131. Justice Rankin said that if the assignor had offered to let the debtor have the transferee's address in writing, and the debtor had said that there was no need to bother as he would make no point of the omission, the debtor might be liable to the assignee. In such cases it is submitted, the debtor becomes either by parole or by conduct, a party to the assignment and is, therefore, liable.

(4) Conditional Notice

Notice must be unconditional; otherwise it would lead to an intolerable increase in the burden of the debtor. In a Madras case,[158] *A* assigned to his creditor *B,* a debt due to him by a railway company, and gave *B* the power of attorney to collect the debt from the railway company. On the date of the power of attorney, *A* wrote to the company to inform them of the transaction and directed them to pay *B,* if he *(A)* had not in the meantime otherwise paid off his debt to *B.* The railway company refused to recognise *B* and paid *A*; but they were held not to be discharged by such payment. The court seemed to hold that a notice may be conditional, but added that if it were a good notice, it was validated by subsequent notices given by the plaintiff—a somewhat inconclusive and unsatisfactory decision.

132. Liability of transferee of actionable claim.—The transferee of an actionable claim shall take it subject to all the liabilities and equities and to which the transferor was subject in respect thereof at the date of the transfer.

ILLUSTRATIONS

(i) *A* transfers to *C* a debt due to him by *B. A* being then indebted to *B. C* sues *B* for the debt due by *B* to *A.* In such suit *B* is entitled to set off the debt due by *A* to him; although *C* was unaware of it at the date of such transfer.

(ii) *A* executed a bond in favour of *B* under circumstances entitling the former to have it delivered up and cancelled. *B* assigns the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A.*

Synopsis

(1) Liabilities and Equities 1128
(2) Court Sales 1129
(3) Notice Immaterial 1129
(4) Mortgage Debt 1129

(1) Liabilities and Equities

The word "liabilities" indicates only the plain rule that the assignee can get no better title than the assignor. If nothing is due to the assignor, the assignee gets nothing.

155. *Alapati Venkata v Vemuri Manikyaraw,* AIR 1948 Mad 171 : (1947) 2 Mad LJ 196.
156. *Kanraj v Vijai Singh,* AIR 1951 Raj 74.
157. *Sadasook Ramprotap v Hoar Miller & Co,* AIR 1923 Cal 719.
158. *Gopalakrishna v Gopalakrishna,* (1910) ILR 33 Mad 123 : 4 IC 420.

A right of set off is an equity. A judgment debtor has a right to set off a cross decree under O 21, rule 18 of the Code of Civil Procedure, and he also has this right against an assignee of the decree-holder.[159] So a debtor when sued by the assignee of his creditor, is entitled to set off a debt due to him by the assignor on a transaction, independent of the debt assigned.[160]

(2) Court Sales

The principle of the section has been applied to court sales.[161]

ILLUSTRATION

A sold his house to *B* but remained in possession as *B*'s tenant. *B* owed *A* ₹ 2,818 for part of the price. This debt was attached and sold by a creditor of *A*. The purchaser at the court sale was *C*, who sued to recover the amount from *B*, but *B* was allowed to set off the rent due by *A* at the time of the court sale.[162]

(3) Notice Immaterial

As already stated, it is immaterial that the assignee had no notice of the equity or liability to which the assignor was subject at the date of the assignment. This is expressly stated in the second illustration, and it is incumbent on the purchaser to make inquiries as to any equities and liabilities affecting his purchase.[163] Nevertheless, in a Calcutta case[164] decided under section 49 of the Code of Civil Procedure 1908, with reference to the assignment of decrees, it was assumed that the assignee should have notice. This was incorrect, and in the latter case of *Monmohan v Dwarka Nath*,[165] the court said: The assignee of a decree stands in no better position than his assignor, as regards equities existing between the original parties to the judgment, and takes it subject to all the equities and defences subsisting at the time of the assignment, which the judgment debtor could have asserted against in the hands of the judgment creditor, notwithstanding the assignee may have had no notice thereof.

(4) Mortgage Debt

As a mortgage debt is excluded from the definition of an actionable claim, the assignee takes subject to the liabilities of the mortgagee transferor, but not to the equities to which he was subject. The assignee takes subject to the state of account between the mortgagor and the mortgagee at the date of the transfer,[166] but the mortgagor cannot as against the assignee, claim a right of equitable set off.[167]

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159. *Kristo Ramani v Kedarnath,* (1889) ILR 16 Cal 619; *Sinnu v Santhoji,* (1903) ILR 26 Mad 428.
160. *Arunachellam v Subramania,* (1907) ILR 30 Mad 235; *Subramaniam Pattar v Kiradadasan,* (1912) Mad WN 1235 : 16 IC 686; *Ram Bhaj Dutta v Ram Dhas,* (1922) 3 Lah 414 : 69 IC 720 : AIR 1923 Lah 261.
161. *Ram Bhaj Datta v Ram Dhas,* (1922) ILR 3 Lah 414 : 69 IC 720 AIR 1923 Lah 261; *Ramchandra v Shankar,* AIR 1944 Nag 98.
162. *Ram Bhaj Datta v Ram Dhas,* (1922) ILR 3 Lah 414 : 69 IC 720 : AIR 1923 Lah 261.
163. *Mangles v Dixon,* (1852) 3 HLC 702.
164. *Kristo Ramani v Kedarnath,* (1889) ILR 16 Cal 619.
165. *Monmohan v Dwarka Nath,* (1910) 12 Cal LJ 312, p 321 : 7 IC 35.
166. *Dixon v Winch,* (1900) 1 Ch 736; *Chinnayya Rawutan v Chidambaram Chetti,* (1880) ILR 2 Mad 212.
167. *Subramania Ayyar v Subramania Pattar,* (1917) ILR 40 Mad 683 : 34 IC 859.

133. Warranty of solvency of debtor.—Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount of value of such consideration.

Synopsis

(1) Amendments ..... 1130 (2) Warranty of Solvency 1130

(1) Amendments

This was originally section 134. It was numbered as section 133 by the amending Act 2 of 1900. There has been no change in the section.

(2) Warranty of Solvency

A warranty of solvency of the debtor is not implied. If there is a warranty, then, unless it is expressed to be of a continued solvency, it is limited to solvency at the time of the assignment. The liability under such an assignment is further limited to the consideration for the assignment, which is all that is necessary to indemnify the assignee. No warranty of title is expressed in the TP Act, but probably, the principle of section 14 of the Indian Sale of Goods Act, 1930 would be applied.

134. Mortgaged debt.—Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Synopsis

(1) Amendment ..... 1130 (2) Assignment by Way of Mortgage..... 1130

(1) Amendment

This was originally section 138. It was renumbered as section 134 by Act 2 of 1900, which also made some verbal alterations and added the words "or other person entitled to recover the same". Since then there has been no change.

(2) Assignment by Way of Mortgage

A debt may be assigned by way of security.[168] The distinction which exists in the English law between an absolute transfer of a chose in action, and a transfer by way of charge, does

168. *Gopalakrishna v Gopalakrishna,* (1910) ILR 33 Mad 123 : 4 IC 420; *Ramasami Pillai v Muthu Chetti,* (1911) ILR 34 Mad 53 : 5 IC 834; *Muthukrishnier v Veeraraghava,* (1915) ILR 38 Mad 297 : 21 IC 316.

not exist under the TP Act.[169] A right to rent to fall due in future is an actionable claim which may be the subject of a mortgage.[170]

It has been said in a Calcutta case:[171]

> The position created by the precise language of section 134 seems to be somewhat anomalous, because where there is a transfer under section 130, all the rights and remedies of the transferor vest in the transferee. The expression "all rights" must of course include the right of ownership, and yet section 134 says that the residue, if any, belongs to the transferor which is only another way of saying that if there is anything left over, after the debt between the transferor and the transferee is satisfied, the transferor is the owner of the balance, whatever it may be. The anomaly consists in this that there is a contradiction between the provisions of section 130 and those of section 134. One would have expected that instead of saying "any residue belongs to the transferor" the section would have said "residue if any, shall be re-transferred by the original transferee to the original transferor". It is submitted that there is really no conflict between the two sections. Under section 131, "all rights and remedies" of the transferor vest in the transferee *vis-a-vis* the debtor, and the transferor cannot, after assignment even by way of security, sue the debtor, for that remedy is vested by the assignment in the transferee.[172] Section 134 deals with the rights inter se of the transferor and transferee, when the debt is transferred by way of security, after the debt is recovered. The section prescribes the mode of realisation of a mortgaged debt. The assignee recovers the debt and pays the surplus, if any, to the assignor. The transaction may be described by the parties as a charge or lien, and yet it may be in substance an assignment, for when a creditor purports to create a lien or charge on a debt due to him in favour of another person, the words have no meaning except as giving the latter right to recover the debt from the debtor.[173]

As already stated, a mortgage in the English form, which transfers the property with a proviso for reconveyance, is an absolute assignment under the English statute; though an assignment by way of charge only, is a conditional assignment and not within the English statute.[174] In *Mulraj Khatau v Vishwanath,*[175] the Privy Council rejected the contention that the requirement of an assignment in writing under section 130 referred only to a transfer of absolute rights, and not to the creation of a charge.

An assignment by way of mortgage or charge of a book debt of a company is void as against the liquidator or any creditor of the company, unless the provisions of section 109(d) of the Companies Act, 1913, now re-enacted as section 125 of the Companies Act, 1956, are complied with.[176]

An assignment by way of charge on future property is a valid assignment in equity, which will attach to the property when it comes into existence.[177] The section does not permit a transferor to recover the debt. If the transferee and the debtor collude, the transferor can file a suit for redemption, and can get the debt reassigned to him.[178]

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169. *Santuram v Trust of India Assurance Co,* AIR 1945 Bom 11.
170. *Chidambaram Pillai v Doraisami Chetty,* 31 IC 473; *Poothekka Nachiar v Annamalai Chetty,* (1926) Mad WN 774 : 98 IC 263 : AIR 1926 Mad 1173.
171. *Ranjit Roy v D A David,* (1935) ILR 62 Cal 1 : 38 Cal WN 1190 : 155 IC 193 : AIR 1935 Cal 218.
172. *Santuram v Trust of India Assurance Co,* AIR 1945 Bom 11.
173. *Ardesir Bejonji v Syed Sirdar Ali Khan,* (1909) ILR 33 Bom 610 : 4 IC 804; *Ramasami Pillai v Muthu Chetti,* (1911) ILR 34 Mad 53 : 5 IC 834.
174. *Durham Bros v Robertson,* (1898) 1 QB 765.
175. *Mulraj Khatau v Vishwanath,* (1913) ILR 37 Bom 198 : 40 IA 24 : 17 IC 627.
176. *Ranjit Roy v D A David,* (1935) ILR 62 Cal 1 : 38 Cal WN 1190 : 155 IC 193 : AIR 1935 Oudh 218.
177. *Lagdir Nanji v Surendra Mohun,* 177 IC 920 : AIR 1938 Cal 606.
178. *Santuram v Trust of India Assurance Co,* AIR 1945 Bom 11.

[179][135. **Assignment of rights under policy of insurance against fire.**— Every assignee by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.]

Synopsis

(1) Amendment ..... 1132 (2) Policies of Marine and Fire Insurance 1132

(1) Amendment

This section was inserted by Act 2 of 1900. It was transferred with slight alteration from the Policies of Insurance (Marine and Fire) Assignment Act, 1886, which is now entirely repealed.

(2) Policies of Marine and Fire Insurance

These policies constitute an exception to the general rule, for they cannot be assigned without a transfer of the property insured. So, when the ownership of goods passed to the plaintiffs on delivery into their trailors, they could not recover on a policy which was not agreed to be transferred to the plaintiffs by the contract of sale, though it was subsequently transferred to them.[180] However, a marine policy may be assigned after a loss.[181]

In a Supreme Court case, a consignment entrusted to a railway company for carriage was damaged by fire. The consignee obtained damages from the insurance company, after writing a letter of subrogation. A suit was subsequently filed for damages against the railway company by the consignee. The suit was held to be maintainable. The letter of subrogation was held not to divest the consignee of its cause of action against the railway administration for loss and damages. The letter of subrogation in this case contained intrinsic evidence that the consignee would give the insurance company facilities for enforcing the rights.[182]

According to the High Court of Guwahati, where partnership assets are insured and the firm is subsequently dissolved, one partner (getting all its assets) cannot sue for recovery of damages, unless the policy is assigned in his favour by the insurer, i.e., by the firm, by formal endorsement.[183]

[184][135A. **Assignment of rights under policy of marine insurance.**—[*Rep. by the Marine Insurance Act, 1963 (11 of 1963), sec. 92, (w.e.f. 1.8.1963)*].]

This section which was inserted by the Transfer of Property (Amendment) Act VI of 1944, has been repealed by section 92 of the Marine Insurance Act XI of 1933, and

179. Subs. by Act 6 of 1944, sec. 3, for section 135.
180. *North of England Oil-Cake Co v Archangel Insurance Co,* (1875) LR 10 QB 249.
181. *Lloyd v Fleming,* (1872) LR 7 QB 299.
182. *UOI v Sri Sarada Mills Ltd,* (1972) 2 SCC 877 : AIR 1973 SC 281 (majority view).
183. *Panmal v Oriental Fire & General Insurance Co,* AIR 1979 Gau 70.
184. Earlier section 135A was inserted by Act 6 of 1944, sec. 4.

re-enacted by section 92 of the Marine Insurance Act XI of 1933, and re-enacted in sections 52(2), 79 and 91 of that Act.

136. Incapacity of officers connected with Courts of Justice.—No judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall, enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid.

(1) Object

The intention of the former section was said to be that officers attached to a court should not be placed in a position in which they may be tempted to use the influence or the information which they may have acquired by virtue of their possible connection with the transaction of business in the court, to the prejudice of persons who might have to resort to it for the adjudication of actionable claims.[185] The section was, therefore, not applied to a high court pleader purchasing at a sale held in a subordinate court in which he did not habitually practise. However, the principle underlying the section is of wider import affecting the administration of justice in all courts. In *Kerakoose v Serle,*[186] the Privy Council said:

> It is of great importance in all countries, and more particularly in a country like India, that no officer of a Court of Justice should be even exposed to the suspicion that in the discharge of his official duties his conduct may be influenced by any personal consideration. The section is therefore analogous to O 21, rule 73, of the Civil Procedure Code, 1908, which provides that no officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

The words "or other person" did not occur in the corresponding provision of the Code of Civil Procedure 1882, and under that Code, a pleader was said not to be an officer of the court and not debarred from purchasing property sold in execution, though the courts disapproved of such purchases.[187] However, section 136 does not apply to such purchases, or to the purchase of a decree, for a decree is not an actionable claim.[188] The word "buy" in this section does not refer to purchases at court sales, for section 136 is subject to section 2(d), and it has been held that a purchase by a pleader of a policy of life insurance at a court sale is not invalid.[189] The prohibition applies irrespective of whether a suit has been filed on an actionable claim, and a purchase after a suit offends against public policy more than the purchase of such a claim before a suit.[190] Nor is the prohibition restricted to actionable claims in respect of which the pleader has a professional duty to perform; and when a pleader purchased a house under

185. *Rathanasami v Subramanya,* (1888) ILR 11 Mad 56.
186. *Kerakoose v Serle,* (1846) 3 Mad IA 329, p 346.
187. *Nundeepat Mahta v Urquhart,* (1870) 13 WR 209; *Syed Wajed v Hafez Ahmed,* (1872) 17 WR 480; *Subbarayudu v Kotayya,* (1892) ILR 15 Mad 389; *Aghore Nath v Ram Churn,* (1896) ILR 23 Cal 805; *Alagirisami v Ramanathan,* (1887) ILR 10 Mad 111.
188. *Hirday Narain Singh v Jugal Prasad Singh,* 62 IC 255 : AIR 1921 Mad 113.
189. *National Insurance Co v Haridas Basu,* (1927) 46 Cal LR 225 : 104 IC 729 : AIR 1927 Cal 691.
190. *Muni Reddi v Venkata Row,* (1914) ILR 37 Mad 238 : 17 IC 544.

a *kabala* which assigned to him the rents which were in arrears, this section was a bar to his enforcing his claim.[191] Again, an assignment by a Mahomedan widow to a pleader of her claim for unpaid dower is invalid.[192] However, a pleader may make an assignment of arrears of rent, for a sale of an actionable claim is not forbidden, and a mere sale is not trafficking.[193]

Where a person prohibited from dealing in an actionable claim under section 136, obtained an assignment of a bond through a bona fide mistake and instituted a suit on the basis of the same, it was held that the provisions of O 1, rule 10 of the Code of Civil Procedure would apply, and the assignor can be substituted in the place of the assignee as plaintiff and allowed to continue the suit.[194]

137. Saving of negotiable instruments, etc.—Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation.—The expression, "mercantile document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Synopsis

(1) Negotiable Instruments and the Law. 1134 (2) Shares 1136

(1) Negotiable Instruments and the Law

The assignment of a negotiable instrument is effected under the Negotiable Instruments Act by endorsement and delivery, or if payable to bearer, by delivery only.

Section 137 of the TP Act, and section 2(4) of the Sale of Goods Act, 1930 attribute negotiability to all such mercantile documents as are used in the ordinary course of business as proof of the possession or control of the goods, or authorising or purporting to authorise by endorsement or delivery, the possession of the documents to transfer or receive the goods thereby represented.[195]

A bill of lading is transferable by endorsement;[196] but a mate's receipt is not a document of title, and cannot be transferred by endorsement.[197] A debenture was given as

191. *Sheogobind Singh v Gouri Prasad,* (1925) ILR 4 Pat 43 : 83 IC 81 : AIR 1925 Pat 310; *Hiralal Singha v Tripura Charan Ray,* (1913) ILR 40 Cal 650 : 19 IC 129.
192. *Amir Hasan Khan v Muhammad Nazir Hussain,* (1933) ILR 54 All 499 : 1932 All LJ 275 : 136 IC 833 : AIR 1932 All 345.
193. *Hirday Narain Singh v Jugal Prasad Singh,* 97 IC 373 : AIR 1927 Pat 2.
194. *Sitla Bux Singh v Mahabir Prasad,* AIR 1936 Oudh 275; approvingly referred in *Bal Niketan Nursing School v Kesari Prasad,* AIR 1987 SC 1970.
195. *Deccan Queen Motor Service v Indian Overseas Bank,* AIR 1985 Ker 129, p 131 ("Goods Consignment Notes").
196. *Lickbarrow v Mason,* (1794) 5 Term Rep 683; *Burgos v Nascimento,* (1908) WN 237.
197. *Natchcppa v Irrawaddy Flotilla Co,* (1914) ILR 41 Cal 670 : 22 IC 311 (PC).

an illustration of the old section 137, but as it is a secured debt, it is not an actionable claim under the definition in TP Act. In *Imperial Bank of India v Bengal National Bank,*[198] CJ Rankin said:

> The meaning of this section seems to be that debentures and certain other things may be transferred otherwise than in the manner provided by section 130 and that the effect of the transfer is not controlled by the subsequent sections. I do not think it has reference to debentures considered as transfers, but only as the subject-matter of a transfer.

Bearer debentures are now, by the general custom of merchants, regarded as negotiable instruments.[199] A railway receipt entitles the endorsee to delivery as a document of title of goods;[200] and so does a delivery order.[201] It has, therefore, been held that in the case of an ordinary receipt, an endorsement and the delivery of the document are sufficient to complete a transfer. No separate document is necessary.[202] A pledge of a railway receipt has the effect of a pledging the goods.[203] Shares can only be transferred as provided by the Companies Act.[204] Shares are not, however, actionable claims, and are excluded from the operation of this chapter.[205] When a negotiable instrument is negotiated, the holder in due course, does not take subject to the liabilities and equities affecting his transferor, but may acquire a better title. But the transfer of such instruments may be effected by an instrument in writing under section 130, and the transfer will then be subject to section 132.[206] This is because while section 137 gives an extended privilege to mercantile documents, it is in no way restrictive.[207] The contract indicated by a railway receipt can be transferred without a writing. An endorsement in blank, coupled with the delivery of the receipt, is sufficient.[208]

The section is no bar to the transfer of a negotiable instrument otherwise than by way of endorsement. If a promissory note is executed in favour of a joint Hindu family, the whole family can sue to recover the debt evidenced by the note; and if a partition is effected, each member may sue (not on the note, but on debt) to recover his share.[209] The

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198. *Imperial Bank of India v Bengal National Bank,* (1931) ILR 58 Cal 136, p 152 : 131 IC 689 : AIR 1931 Cal 223.
199. *Bechuanaland Exploration Co v London Trading Co,* (1898) 2 QB 658.
200. *Ramdas v S Amerchand & Co,* (1916) ILR 40 Bom 630 : 43 IA 164 : 35 IC 954; *Secretary of State v Rishi Ram,* (1928) ILR 50 All 227 : 108 IC 457 : AIR 1928 All 145; and see *Mulji Deoji v UOI,* AIR 1957 Nag 31.
201. *Anglo Indian Jute Mills Co v Omademall,* (1911) ILR 38 Cal 127 : 10 IC 859; *Abdul Shakur v Motiram,* (1948) ILR Nag 843.
202. *GG in C v Jayanarayan,* AIR 1948 Pat 36.
203. *Mercantile Bank of India v Official Assignee of Madras,* (1933) ILR 56 Mad 177 : 64 Mad LJ 320 : 143 IC 641 : AIR 1933 Mad 207.
204. *Torkington v Magee,* (1902) 2 KB 427, p 430 : [1900-03] All ER Rep 991.
205. *Kunhuni v Krishna Pattar,* (1943) ILR Mad 115 : (1942) 2 Mad LJ 120 : 205 IC 210 : AIR 1943 Mad 74; *Arjun Prasad v Central Bank of India,* (1955) ILR 34 Pat 8 : AIR 1956 Pat 32.
206. *Akhoy Kumar v Haridas Bysack,* (1914) 18 Cal WN 494 : 22 IC 500; *Muthar Sahib v Kadir Sahib,* (1905) ILR 28 Mad 544; *Muhammad Kumarali v Ranga Rao,* (1901) ILR 24 Mad 654; *Palawan v Kanu* 66 IC 501; *Raman Chetty v Nagarathana Naicker,* (1912) 11 Mad LT 246 : 15 IC 380; *Champalal v Padam Chand,* AIR 1971 MP 133.
207. *Venkatarama Ayyar v Krishnaswami Chettiar,* 138 IC 262 : AIR 1933 Mad 133; *Ghanashyamdas v Sahu,* (1936) ILR 16 Pat 74 : 167 IC 51 : AIR 1937 Pat 100; see *Srinivasulu v Kondappa,* AIR 1960 AP 166; *Gadadhar v Damo Behera,* (1966) ILR Cut 576 : AIR 1966 Ori 230; *Moddi R Kottiah v M Seshamma,* AIR 1971 AP 315.
208. *Governor-General in Council v Jaynarain,* AIR 1948 Pat 30.
209. *Gopalu Pillai v Kothandarama Ayyar,* (1934) ILR 57 Mad 1082 : 67 Mad LJ 843 : 153 IC 916 : AIR 1934 Mad 529.

beneficial owner cannot sue on the note alleging that the payee is his *benamidar*, though he may sue for the debt evidenced by the note.[210] In some cases, a promissory note has been held to be transferred without an endorsement, by operation of law. Thus, the party entitled to possession after the release of the property from the superintendence of the Court of Wards, is entitled to sue on promissory notes executed by tenants to the Court of Wards.[211] So also, when a promissory note was purchased at a court auction.[212] However, in a case where a negotiable instrument was allotted to a party by a partition award and decree, the Bombay High Court held that there was no transfer by operation of law.[213]

Section 136 does not apply to instruments under this section, otherwise it would be questionable if a legal practitioner could take a cheque in payment of his fees.

Section 137 must, by virtue of section 4, be read as part of the Indian Contract Act, 1872.[214]

(2) Shares

Assignment of shares may be by sale, mortgage, or pledge. In the case of mortgage, the right to enjoy is given, while in a pledge, there is no such right.[215] Even if blank transfer forms are used, it cannot be said that the transaction is necessarily a pledge. In the case of a pledge, the right of enjoyment of property is not given to the pledgee, while in the case of a mortgage, such a right vests in the mortgagee. Where blank transfer forms are executed and the shares are delivered, and the transferee is specifically given the right to obtain a formal transfer of shares in his favour, and to exercise the rights of a shareholder, the transferee is a mortgagee, and not a pledgee. Further, even in a mortgage, there can be given a right to sell the shares privately for the realisation of the debt.[216]

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210. *Harkishore Barua v Gura Mia,* (1931) ILR 58 Cal 732 : 131 IC 570 : AIR 1931 Cal 387; *Peary Pasi v Gauri Lal,* (1934) ILR 13 Pat 655 : 151 IC 694 : AIR 1934 Pat 382.
211. *Sowcar Lodd Govinda Doss v Lepati Muneppa Naidu,* (1908) ILR 31 Mad 534.
212. *Kutalingam Pillai v Pakiyam Fernandez,* (1910) 21 Mad LJ 422 : 8 IC 17.
213. *Virappa v Mahadavappa,* (1934) 36 Bom LR 807 : 153 IC 352 : AIR 1934 Bom 356.
214. *Ramdas v S Amerchand & Co,* (1916) ILR 40 Bom 630 : 43 IA 104 : 35 IC 954.
215. *Shatzadi Begum v Girdharilal,* AIR 1976 AP 273.
216. Ibid.

THE SCHEDULE

(*a*) STATUTES

Year and chapter	Subject	Extent of repeal
27 Hen VIII, c 10	Uses	The whole.
13 Eliz, c 5	Fraudulent conveyances	The whole.
27 Eliz, c 4	Fraudulent conveyances	The whole.
4 Wm and Mary, c 16	Clandestine mortgages	The whole.

(*b*) ACT OF THE GOVERNOR GENERAL IN COUNCIL

Number and year	Subject	Extent of repeal
IX of 1842	Lease and release	The whole.
XXXI of 1854	Modes of conveying land	Section 17.
XI of 1885	*Mesne profits* and improvements	Section 1; in the title, the words "to *mesne profits* and", and in the preamble "to limit the liability for *mesne profits* and".
XXVII of 1866	Indian Trustee Act	Section 31.
IV of 1872	Punjab Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875	Central Provinces Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVII of 1876	Oudh Laws Act	So far as it relates to Bengal Regulations XVII of 1806
I of 1877	Specific Relief	In section 35 and 36, the words "in writing".

(*c*) REGULATIONS

Number and year	Subject	Extent of repeal
Bengal Regulation I of 1798	Conditional Sale	The whole Regulation.
Bengal Regulation XVII of 1806	Redemption	The whole Regulation.
Bengal Regulation V of 1827	Acknowledgment of debts; interest; mortgages in possession	Section 15.

Appendices

APPENDIX I

The Registration and other Related Laws (Amendment) Act, 2001

(Act No. 48 of 2001)

[*24th September, 2001*]

An Act further to amend the Registration Act, 1908, the Transfer of Property Act, 1882 and the Indian Stamp Act, 1899

BE it enacted by Parliament in the Fifty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. **Short title.**—This Act may be called the Registration and Other Related Laws (Amendment) Act, 2001.

CHAPTER II

AMENDMENT OF THE REGISTRATION ACT, 1908

2. **Insertion of new Section 16A.**—In the Registration Act, 1908 (16 of 1908) (hereafter in this Chapter referred to as the Registration Act), after s 16, the following section shall be inserted namely:—

> "**16A, keeping of books in computer floppies, diskettes, etc.**—(1) Notwithstanding anything contained in s 16, the books provided under sub-section (1) of that section may also be kept in computer floppies or diskettes or in any other electronic form in the manner and subject to the safeguards as may be prescribed by the Inspector-General with the sanction of the State Government.
>
> (2) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy or extracts from the books kept under sub-section (1) given by the registering officer under his hand and seal shall be deemed to be a copy given under s 57 for the purposes of sub-section (5) of that section."

3. **Amendment of Section 17.**—In s 17 of the Registration Act.—

(a) after sub-section (1), the following sub-section shall be inserted, namely:—

> "(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of s 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001

and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said s 53A.";

(b) In sub-section (2), in cl (v), for the opening words "any document", the words, brackets, figure and letter "any document other than the documents specified in sub-section (1A)" shall be substituted.

4. Amendment of Section 30.—In s 30 of the Registration Act, sub-section (2) shall be omitted.

5. Insertion of new Section 32A.—After s 32 of the Registration Act, the following section shall be inserted, namely:—

"**32A. Compulsory affixing of photograph etc.**—Every person presenting any document at the proper registration office under s 32 shall affix his passport size photograph and fingerprints to the document:

Provided that where such documents relates to the transfer of ownership of immovable property, the passport size photograph and fingerprints of each buyer and seller of such property mentioned in the document shall also be affixed to the document."

6. Amendment of Section 49.—In s 49 of the Registration Act, in the proviso, the words, figures and letter "or as evidence of part performance of a contract for the purposes of s 53A of the Transfer of Property Act, 1882 (4 of 1882)," shall be omitted.

7. Amendment of Section 52.—In s 52 of the Registration Act, in sub-section (1), in cl (a), after the words "and place of presentation," the words, figures and letter "the photographs and fingerprints affixed under s 32A" shall be inserted.

8. Omission of Section 67.—Section 67 of the Registration Act shall be omitted.

9. Amendment of Section 69.—In s 69 of the Registration Act, in sub-section (1), after cl (a), the following clause shall be inserted, namely:—

"(aa) providing the manner in which and the safeguards subject to which the books may be kept in computer floppies or diskettes or in any other electronic form under sub-section (1) of s 16A;"

CHAPETER III

AMENDMENT OF THE TRANSFER OF PROPERTY ACT, 1882

10. Amendment of Section 53A of Act 4 of 1882.—In s 53A of the Transfer of Property Act, 1892, the words "the contract, though required to be registered, has not been registered, or", shall be omitted.

CHAPTER IV

AMENDMENT OF THE INDIAN STAMP ACT, 1899

11. Amendment of Schedule I of Act 2 of 1899.—In Schedule I to the Indian Stamp Act, 1899.—

(a) under column heading "Description Instrument" in article No. 23, in Exemption, the portion beginning with the words "Assignment of Copyright" and ending with the word and figure "Section 5" shall be numbered as cl (a) thereof, and after cl (a) as so numbered, the following clause shall be inserted, namely:—

"(b) for the purpose of this article, the portion of duty paid in respect of a document falling under article No. 23A shall be excluded while computing the

duty payable in respect of a corresponding document relating to the completion of the transaction in any Union Territory under this article.";

(b) after article No. 23 and the entries relating thereto, the following article No. and the entries shall be inserted, namely:—

Description of Instument	*Proper Stamp duty*
"**23A. Conveyance in the nature of part performance.**—Contracts of the transfer of immovable property in the nature of part performance in any Union Territory under s 53A of the Transfer of Property Act, 1882 (4 of 1882).	Ninety per cent. of the duty as a conveyance (No. 23).".

12. **Saving.**—Notwithstanding anything contained in ss 6 and 10, any—

(a) right of a transfer or any person claiming under him debarred under s 53A of the Transfer of Property Act, 1882, (4 of 1882) immediately before the commencement of this Act shall remain so debarred as if s 10 had not come into force in respect of such right; and

(b) unregistered document relating to the right referred to in cl (a) may be received as evidence of part performance of a contract for the purpose of s 53A of the Transfer of Property Act, 1882, (4 of 1882) as if s 6 had not come into force in respect of such document.

APPENDIX II

The Transfer of Property (Amendment) Act, 2002

(Act No. 3 of 2003)

[*31st December, 2002*]

An Act further to amend the Transfer of Property Act, 1882.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:—

1. **Short title.**—This Act may be called the Transfer to Property (Amendment) Act, 2002.

2. **Substitution of new section for section 106.**—For s 106 of the Transfer of Property Act, 1882 (4 of 1882.) (hereinafter referred to as the principal Act), the following section shall be substituted, namely:—

> "**106. Duration of certain leases in absence of written contract or local usage.**—(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.
>
> (2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.
>
> (3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.
>
> (4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

3. **Transitory provisions.**—The provisions of s 106 of the principal Act, as amended by s 2, shall apply to—

(a) all notices in pursuance of which any suit or proceeding is pending at the commencement of this Act; and

(b) all notices which have been issued before the commencement of this Act but where no suit or proceeding has been filed before such commencement.

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